

Intercountry Adoption in Malaysia and Morocco: A New Frontier

Nadhilah A. Kadir¹, Azizah Mohd²

¹ Faculty of Law, Universiti Kebangsaan Malaysia, Malaysia. E-mail: nadhilah@ukm.edu.my

² Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia. E-mail: azizahmohd@iiu.edu.my

Abstract: Intercountry adoption offers a family-based care option for children in need of care and protection. It allows them to find loving and permanent homes outside their birth country, providing them with stability, support, and a sense of belonging essential for their well-being. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 (Hague Convention 1993) serves as the primary international legal instrument governing intercountry adoption. Despite its importance, intercountry adoption remains relatively uncommon in Malaysia, as the country lacks specific statutory provisions and is not a signatory to the Hague Convention 1993. The purpose of this study is to examine the current state of intercountry adoption in Malaysia and Morocco and explore the viability of intercountry adoption as a child protection measure. The study involves interviews with relevant departments and an examination of Malaysia's current adoption laws. Additionally, the study analyses the international legal framework, including the Hague Convention 1993 and the United Nations Convention on the Rights of the Child 1989 (UNCRC) to provide a comprehensive understanding of the context surrounding intercountry adoption. Furthermore, this paper offers a comparative analysis of Morocco's intercountry *kafalah* system, which recognises *kafalah* as an alternative to legal adoption based on Islamic law. The findings of this study will offer valuable insights and recommendations for enhancing Malaysia's approach to intercountry adoption. By considering best practices and international standards, this research seeks to ensure the well-being and protection of children in need of care and protection, promoting their access to a stable and nurturing family environment.

Keywords: Intercountry Adoption; Child Protection; Alternative Care; Family-Based Care

1. Introduction

Adoption serves as a vital means to protect children who lack familial support. In many countries, offering alternative family care is a common practice for children in need of care and protection, including orphans and those who have experienced abuse, neglect, or abandonment. Through adoption, these children are afforded the opportunity to experience security and affection within a nurturing family environment, ensuring their well-being and safety. Hence, when birth parents are unable or unwilling to fulfill their parental responsibilities, substitute care becomes necessary. This term refers to a crucial child protection service that aims to replace the natural parental care partially or fully when it is unavailable or inadequate.¹ These alternative care options,² such as

¹ Hunt, R.M., "Child Welfare," in *The Encyclopedia Americana* (International Edition) vol. 6 (Danbury, Conn: Grolier Incorporated, 1982), 463-464.

adoption, foster care, *kafalah* placement, and residential care, are integral parts of the child protection systems in many countries. Deriving from the root word “to feed”, *kafalah* refers to a form of sponsorship or legal fostering, which involves providing care and support to a child without terminating the legal relationship between the biological parents and the child.³ It is important to note that not all these options provide the advantage of long-term family care. For children in need of care and protection, a placement that prioritizes permanent family care is considered superior to temporary or institutional care.⁴ In this context, adoption, including intercountry adoption, emerges as a potential avenue to provide a permanent and loving home for children without families. It is important to recognize that intercountry adoption differs from domestic adoption, as it involves adopting a child across international borders.

International law recognises intercountry adoption as a viable alternative care option for children in need of care and protection.⁵ The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 (Hague Convention 1993) serves as the primary international legal framework for regulating intercountry adoption. Its primary objective is to facilitate intercountry adoption practices between contracting countries while preventing any potential criminal activities associated with it. As a direct response to the practice of intercountry adoption, the Hague Convention 1993 represents a significant advancement in international law in this regard. Furthermore, the United Nations Convention on the Rights of the Child 1989 (UNCRC) includes provisions that recognize intercountry adoption as a valid alternative care option for children deprived of family environment.

Recognizing the need to protect and support children as a vulnerable group, governments have enacted various laws, regulations and conventions aimed at safeguarding their rights but usually is not supported with a strong shared commitment

² United Nations, “Convention on the Rights of the Child,” G.A. res. 44/25, (U.N. Doc. A/44/49), 1989, accessed May 25, 2023, <http://www2.ohchr.org/english/law/pdf/crc.pdf> [UNCRC], art. 20(3).

³ Ahmad Imad-ad-Dean, “The Islamic View of Adoption and Caring for Homeless Children,” 1999, accessed June 2, 2023, <http://www.minaret.org/adoption.htm>. See also, Abu Noman Mohammad Atahar Ali and Zafrin Andaleeb, “Concept and Practice of Laws Relating to Adoption in Different Religion and Modern Societies: Special Reference to the Law of Islam,” *Journal of Islamic Law and Judiciary* 3&4, (2008): 30.

⁴ See e.g. Laura Matney Shapiro, “Inferring a Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and Selected Scientific Literature,” *Washington and Lee Journal of Civil Rights and Social Justice* 15, no. 1 (2008): 191-225 (describing that a child is entitled to a right of permanent family care while emphasizing the negative effects of institutional and temporary care); Sara Dillon, “Making Legal Regimes For Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption,” *Boston University International Law Journal* 21, (2003): 179-258 (arguing that a child should not be institutionalized due to its negative effects).

⁵ See generally Hague Conference on Private International Law (HCCH), “33. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Concluded 29 May 1993),” accessed May 25, 2023, <https://assets.hcch.net/upload/conventions/txt33en.pdf> [Hague Convention 1993]; Hans Van Loon, “Introductory Note on the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption,” *Uniform Law Review* os-21, no 1 (1993): 76–81, <https://doi.org/10.1093/ulr/os-21.1.76>; G. Parra-Aranguren, “Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption,” 1994, accessed May 25, 2023, <http://www.hcch.net/upload/expl33e.pdf>; Peter H. PFund, “Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise” *Family Law Quarterly* 28, no. 1 (1994): 53-88; Richard R. Carlson, “The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption” *Tulsa Law Journal* 30, no. 2 (1994): 243-304. See also UNCRC, art. 21(b) (recognizing intercountry adoption as an alternative means of child care).

requiring effective implementation of the law.⁶ It follows that in Malaysia, there is no specific legislation or legal provision for intercountry adoption, and Malaysia is not a party to the Hague Convention 1993. It seems that Malaysia does not directly engage in intercountry adoption as a part of its alternative care options for children in need of care and protection. Alternatively, children in need of care and protection are placed in the care of a fit and proper person,⁷ foster parents⁸ or in a place of safety⁹ through a court order under the Child Act 2001.¹⁰ The places of safety, such as Children's Homes managed by the Social Welfare Department (SWD), provide institutional settings for these children.¹¹ There is also no formal legislation for foster care and it is primarily based on the practices of the SWD.¹² Foster parents may pursue legal adoption of a foster child who has been abandoned by the birth parents after a period of two years.¹³ Adoption in West Malaysia is regulated by the Adoption Act of 1952¹⁴ (AA) and the Registration of Adoptions Act of 1952¹⁵ (RAA). The AA applies to non-Muslims, while the RAA applies to both Muslims and non-Muslims. It is important to note that the legal implications of adoption differ depending on the applicable statute. Adoption under the AA severs the legal relationship between the child and their biological parents, granting the adopted child the same rights as a natural child.¹⁶ On the other hand, the RAA preserves the existing legal relationship between the child and their biological parents.

The existing legal framework in Malaysia does not appear to adequately address intercountry adoptions. Instead, institutional care has predominantly been relied upon as the primary alternative for children in need of care and protection.¹⁷ In this respect, efforts have been made to prevent institutional care through deinstitutionalization programs and community-based services. There is, however, often a higher demand for adopting healthy infants or younger children within the country. As a result, older and specific needs children in institutional care may face challenges in finding adoptive families within their home country. Delaying the placement of older children or those with specific needs can potentially prolong their time in institutional care, which may not provide the stability and support they need for healthy development. In this

⁶ Rudy, Rudi Natamiharja, Jalil Alejandro Magaldi Sernac, and Ahmad Syofyan. "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia," *Hasanuddin Law Review* 8, no. 3 (2022): 305-306. DOI: <http://dx.doi.org/10.20956/halrev.v8i3.4229>

⁷ Child Act 2001, s. 30 (1)(c).

⁸ Child Act 2001, s. 30(1)(e).

⁹ Child Act 2001, s. 30(1)(d).

¹⁰ Act 611.

¹¹ See Child Act 2001, s. 54.

¹² See generally Azizah Mohd, *Protection and Adoption of Abandoned Children in Malaysia. A Comparative Overview with Islamic Law*. (Selangor: International Law Book Services, 2008) (describing the role of the Social Welfare Department in protecting abandoned children including adoption and foster care service); Nadhilah A.Kadir, "Foster Care: Concept and Provisions of the Law in Malaysia" (Master Thesis, International Islamic University Malaysia, 2011) (describing the practice of foster care in Malaysia).

¹³ Child Act 2001, s. 30(1)(4).

¹⁴ Act 257.

¹⁵ Act 253.

¹⁶ See Adoption Act 1952, s. 9.

¹⁷ UNICEF East Asia and Pacific Regional Office (EAPRO), "Alternative Care for Children without Primary Caregivers in Tsunami-Affected Countries Indonesia, Malaysia, Myanmar and Thailand," 2006, accessed May 25, 2023, <https://bettercarenetwork.org/sites/default/files/attachments/Alternative%20Care%20for%20Children%20in%20Tsunami-Affected%20Countries%20.pdf>

context, intercountry adoption can provide an opportunity for these children to find permanent families and homes abroad, where there may be a higher likelihood of finding adoptive parents willing to embrace them. Thus, this research is undertaken to analyse intercountry adoption as a child protection measure and whether it can be a step forward to improve a child's placement based on permanent family care for children who are not taken into domestic adoption or long-term foster care in Malaysia. In order to examine the intercountry adoption process in Malaysia, interviews with relevant departments have been conducted and Malaysia's current adoption laws, as well as the international legal framework encompassing the Hague Convention 1993 and the UNCRC have been analysed. Additionally, a legal comparison between intercountry adoption in Malaysia and intercountry *kafalah* in Morocco has been undertaken to enhance the existing legislation and practices.

2. Method

This paper adopts qualitative research method to analyse the legal framework for intercountry adoption in Malaysia, which is based on two approaches. Firstly, it is based primarily on library research. Secondly, part of the research is based on fieldwork research. In fieldwork research, data are collected through interviews with officers from the National Registration Department (NRD) and the SWD who directly involve with the adoption process in Malaysia.

3. International Legal Framework for Intercountry Adoption

Intercountry adoption is recognised as one of a range of alternative care options available for children in need of care and protection at the international level. There are two main international legal instruments that have been introduced to facilitate the practice of intercountry adoption, namely, the Hague Convention 1993 and the UNCRC. In addition, the implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1¹⁸ (Good Practice Guide) further clarifies the provisions of the Hague Convention 1993. The relevant international legal instrument applicable to Morocco is the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (Hague Convention 1996).¹⁹

3.1 The Hague Convention 1993

The primary international law document directly addressing the practice of intercountry adoption is the Hague Convention 1993. At present, there are 105 contracting states to

¹⁸ Hague Conference on Private International Law (HCCH), "The Implementation and Operation of The 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No. 1," 2008, accessed May 13, 2023, <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf> [Guide to Good Practice].

¹⁹ Hague Conference on Private international Law (HCCH), "34. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996)," accessed May 24, 2023, <http://www.hcch.net/upload/conventions/txt34en.pdf> [Hague Convention 1996].

the Hague Convention 1993.²⁰ Malaysia, however, has not ratified it. It is probably because intercountry adoption is not a formal alternative care option for children without families in Malaysia.²¹ In defining intercountry adoption, the Hague Convention 1993 provides that:

The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.²²

Therefore, if the child and the prospective adoptive parents live in different Contracting States, the 1993 Hague Convention will apply. Considering this, the Hague Convention 1993 does not apply in situations where the child habitually resides in one contracting state while the prospective adoptive parents habitually reside in a non-contracting state, or the other way around.²³

The Hague Convention of 1993's preamble recognises intercountry adoption as an alternative form of care that gives a child the advantage of a permanent home when a suitable family cannot be found for them in the birth country. The recognition confirms intercountry adoption as one of the available alternative means of child's care when the child cannot be cared for domestically particularly in the absence of a suitable adoptive or foster family. The preamble also emphasizes on the importance of birth family care as the first priority for the child's care which further highlights the subsidiary nature of intercountry adoption. Besides, the Hague Convention 1993 considers a family setting for a child's placement including intercountry adoption as the best option among all kinds of alternative care.²⁴ The Guide to Good Practice addresses the subsidiarity and non-discrimination principles in detail with regard to the implementation of the child's best interests. The subsidiarity principle basically refers to the understanding among signatories to the Hague Convention 1993 that a child should, whenever possible, be raised by his or her biological family or other close relatives, and that, in the event that this is not possible, due consideration should have been given to other national solutions, in particular, other types of permanent family care, before deciding on intercountry adoption.²⁵

The Guide to Good Practice also promotes a permanency planning in the shortest possible time for children's placement so that they are not unintentionally harmed by unduly delay of a permanent solution that may be achievable through intercountry adoption.²⁶ Therefore, the principle of subsidiarity is to be interpreted in the light of the

²⁰ Hague Conference on Private International Law (HCCH), "Status Table - 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption," accessed May 25, 2023, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>

²¹ See generally, UNICEF EAPRO, "*Alternative Care for Children*," 57.

²² Hague Convention 1993, art. 2(1).

²³ Parra-Aranguren, "Explanatory Report on the Convention," para. 77.

²⁴ *Ibid.*, para. 37.

²⁵ HCCH, "Guide to Good Practice," para. 47.

²⁶ *Ibid.* See also, Hague Conference on Private International Law (HCCH), "Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention

child's best interests²⁷ and subsidiarity itself is not the overriding principle of the Hague Convention 1993.²⁸ Thus, staying permanently in institutions or having to drift to many temporary foster homes in general is not to be regarded as preferred solutions over intercountry adoption.²⁹ This is because institutional care in this context is to be considered as "a last resort" and not intercountry adoption.³⁰ Thus, the Guide to Good Practice does not categorize intercountry adoption as either a last resort or the primary option for placing a child. Instead, it acknowledges intercountry adoption as one of the methods for providing permanent family care to children without families, along with other national solutions. It emphasizes that intercountry adoption should not be excluded or isolated as a sole approach.³¹ The non-discrimination principle is another factor considered to safeguard the best interests of the child in intercountry adoption. According to the Guide to Good Practice, the Hague Convention of 1993 grants the adopted child, whose adoption terminates the previous parent-child relationship, the same rights and protections as those resulting from a similar adoption completed in the receiving state under its national law. This principle ensures equal rights and safeguards for all adopted children involved in intercountry adoption. It aims to provide vulnerable and underprivileged children with opportunities to grow up in a family setting, just like any other child.³²

In fact, the preamble emphasizes the 'recognition of the right of the child to a family'³³ in which the child can develop his personality through an atmosphere of happiness, love and understanding. In this regard, intercountry adoption as a child protection measure may help contribute to achieving the Sustainable Development Goals 2030 especially Goal number 2, zero hunger. This goal significantly relates to survival of vulnerable children especially regarding their rights to food and life.³⁴ By providing children with secure and stable family environments through intercountry adoption, it increases their chances of accessing nutritious food and adequate healthcare preventing malnutrition and hunger. Furthermore, the preamble of the Hague Convention 1993 stresses the need to take measures in ensuring intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, as well as to prevent illicit activities like abduction, the sale or traffic in children. This is also reflected in the objectives of the Hague Convention 1993, which are to establish safeguards to ensure that intercountry adoptions occur in the child's best interests;³⁵ to establish system of co-operation among contracting states in order to prevent abduction, the

(17-25 June 2010)," March 2011, accessed Jun 4, 2023, http://www.hcch.net/upload/wop/adop2010_rpt_en.pdf, ["Conclusions and Recommendations and Report 2010"], Recommendation No. 14.

²⁷ Ibid., at para. 51.

²⁸ Ibid., at para. 52.

²⁹ Ibid., at para. 53.

³⁰ Ibid.

³¹ Trevor Buck, Alisdair A. Gillespie, Lynne Ross and Sarah Sargent, *International Child Law*, 2nd ed. (New York: Routledge, 2011), at 256.

³² HCCH, "Guide to Good Practice," paras. 56-57. See also, Hague Convention 1993, art. 26(2) (describing the adopted child under the Hague Convention 1993 enjoys rights equivalent as to those other adopted children).

³³ Parra-Aranguren, "Explanatory Report on the Convention," para. 37.

³⁴ See generally Nurul Hidayat Ab Rahman and Redwan Yasin. "Children Rights to 'Zero Hunger' and the Execution Challenges during the COVID-19 Crisis" *Hasanuddin Law Review* 8, no. 2 (2022): 139-159. 10.20956/halrev.v8i2.3684

³⁵ Hague Convention 1993, art. 1(a).

sale or trafficking of children³⁶ and to secure recognition of adoptions in contracting states made in accordance with the Hague Convention 1993.³⁷

Certified adoption which is made in compliance with the Hague Convention 1993 will be recognized by operation of law in all contracting states.³⁸ The phrase 'by operation of law' in the provision indicates that the recognition of adoption shall take place automatically, that is 'without the need for a procedure for recognition, enforcement or registration'.³⁹ Accordingly, if the adoption is already certified in the state of origin, it does not have to be certified once again in the receiving state. However, such recognition may be refused in a contracting state if the adoption is for instance, contrary to its public policy.⁴⁰ Besides, the Hague Convention 1993 only covers all adoptions that create a permanent parent-child relationship.⁴¹ If the state of origin where the adoption is granted does not terminate the pre-existing legal parent-child relationship, the receiving state may convert it into a full adoption.⁴² In addition, it was recommended that the concept of adoption should be wide enough to include all possibilities like *kafalah*, fostering and guardianship since Muslim countries like Egypt and Morocco do recognize such manners to take care of children instead of adoption.⁴³

The intercountry adoption process commences with prospective adoptive parents submitting an application to the central authority in their country of their habitual residence.⁴⁴ All the requirements as prescribed by the Hague Convention 1993 must be fulfilled by the child and prospective adoptive parents. The state of origin is responsible to establish the adoptability of the child.⁴⁵ Hence, the child's background should be looked into in situations of orphans and abandonment, and every effort should be made to find the families or relatives so that a reunion can be arranged without unnecessary delay.⁴⁶ It must also be determined that an intercountry adoption is in the best interests of the child after applying the principle of subsidiarity.⁴⁷

The subsidiarity principle seems to suggest that intercountry adoption should not be employed unless the birth parents can no longer look after the child and there is no other suitable family care in the birth country.⁴⁸ This does not necessarily mean that intercountry adoption should be relegated to a last resort.⁴⁹ Besides that, consent to the adoption must be relinquished properly. In this regard the persons, institutions and authorities whose consent is to be relinquished have been counselled appropriately and duly informed that doing so will end the child's contact with his or her birth family

³⁶ Hague Convention 1993, art. 1(b).

³⁷ Hague Convention 1993, art. 1(c).

³⁸ Hague Convention 1993, art. 23(1).

³⁹ Parra-Aranguren, "Explanatory Report on the Convention," para. 409.

⁴⁰ Hague Convention 1993, art. 24.

⁴¹ Hague Convention 1993, art. 2(2).

⁴² Hague Convention 1993, art. 27.

⁴³ Parra-Aranguren, "Explanatory Report on the Convention," para 90.

⁴⁴ Hague Convention 1993, art. 14.

⁴⁵ Hague Convention 1993, art. 4(a).

⁴⁶ HCCH, "Guide to Good Practice," para. 326.

⁴⁷ Hague Convention 1993, art. 4(b).

⁴⁸ See Van Loon, "Introductory Note," 79 (describing that other alternatives to intercountry adoption must be taken into account that is permanent care by a suitable local family).

⁴⁹ HCCH, "Guide to Good Practice," para. 326.

legally.⁵⁰ It must also be given freely through the required legal form and expressed or evidenced in written form.⁵¹ In this regard, such consent should not be affected by a defect, for instance, fraud, misrepresentation, duress, undue influence or mistake.⁵² Additionally, the consent has not been rescinded, and no financial incentive exists.⁵³ The birth mother must also consent to the adoption once the child is born.⁵⁴ The purpose of this is to assure the seriousness of the unmarried mothers' consent and to safeguard them from abuse.⁵⁵ It is further to ensure that precautions have been made to prevent them from making hasty decisions as a result of stress, anxiety, or pressure to withdraw their consent to the adoption.⁵⁶

Taking into account the child's age and maturity, the sending state must verify the child's consent, wishes, and opinions.⁵⁷ Apparently, the view or opinion of the older child in particular is mattered in deciding his or her placement. Not all of these safeguards need to be confirmed by the central authority. Instead, they can be verified by the competent authorities designated by the sending state. These authorities can be administrative, judicial, or even the central authority itself.⁵⁸ Importantly, these conditions are the minimum requirements outlined in the Hague Convention 1993 that must be met in every adoption case before granting an adoption. However, the sending state has the flexibility to impose additional or stricter standards if they wish to do so.⁵⁹

Regarding the receiving state, it is responsible for assessing the eligibility and suitability of prospective adoptive parents.⁶⁰ This assessment is typically conducted through a "home study" process, where social service workers visit the prospective parents' home, review their medical and psychological reports, and evaluate their pre-adoption training and preparation.⁶¹ Additionally, the prospective adoptive parents must receive appropriate counseling to help them prepare for the adoption.⁶² This counseling may involve training and education to ensure they are well-prepared for the responsibilities of adoption.⁶³ It is also essential to verify the child's authorization to enter and permanently reside in the receiving state.⁶⁴ Both the central authorities of the sending and receiving states need to take the necessary actions to obtain permission for the child to leave the sending state and travel to the receiving state.⁶⁵ To avoid the child

⁵⁰ Hague Convention 1993, art. 4(c).

⁵¹ Hague Convention 1993, art. 4(c)(2).

⁵² Parra-Aranguren, "Explanatory Report on the Convention," para. 141.

⁵³ Hague Convention 1993, art. 4(c)(3).

⁵⁴ Hague Convention 1993, art. 4(c)(4).

⁵⁵ Parra-Aranguren, "Explanatory Report on the Convention," para. 153.

⁵⁶ *Ibid.*

⁵⁷ Hague Convention 1993, art. 4(d).

⁵⁸ Parra-Aranguren, "Explanatory Report on the Convention," para. 111.

⁵⁹ *Ibid.*, para. 108. See also Van Loon, "Introductory Note," 79.

⁶⁰ Hague Convention 1993, art. 5(a).

⁶¹ HCCH, "Guide to Good Practice," para. 403.

⁶² Hague Convention 1993, art. 5(b).

⁶³ Hague Conference on Private International Law (HCCH), "Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (17-23 September 2005)," August 2006, accessed Jun 4, 2023, http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf ["Report and Conclusions 2005"], para. 89.

⁶⁴ Hague Convention 1993, arts. 4(5)(c).

⁶⁵ Hague Convention 1993, art. 18.

becoming stateless, it is recommended that the child's citizenship be automatically granted upon entering the receiving state.⁶⁶ This ensures that the child has a legal status and is not left without citizenship in any country.

In order to discharge the duties under the Hague Convention 1993, a central authority should be designated.⁶⁷ There are certain duties that have to be performed directly by central authorities while some other duties may be delegated.⁶⁸ In many states, there is already a governmental body functioning as the central authority for intercountry adoption. In other cases, an existing ministry's service or division may be designated as the central authority.⁶⁹ More than one central authority can also be appointed by the states with more than one system of law or states having independent territorial units.⁷⁰ However, it is important to have one dedicated central authority responsible for communication between the two contracting states.⁷¹ Apparently, the appointment of central authorities in both the sending and receiving states aims to centralize and streamline the management of all intercountry adoption matters, ensuring better communication and coordination between the two parties involved.

The Hague Convention 1993 sets out minimum safeguards and procedures that should be followed in all adoption cases. While the central authority plays a crucial role in overseeing and coordinating these processes, other competent authorities within the sending and receiving states may also be involved in verifying conditions, assessing prospective adoptive parents, and ensuring the child's authorization and citizenship status. The goal is to facilitate a smooth and well-regulated intercountry adoption process while safeguarding the rights and welfare of the children involved.

3.2 The United Nations Convention on the Rights of the Child

Malaysia is a signatory to the UNCRC. Like the Hague Convention 1993, the preamble to the UNCRC also recognizes the right of the child to a family. The UNCRC embraces several provisions on intercountry adoption though they do not deal with it directly. For instance, the UNCRC obliges the state parties to provide for a child deprived of his or her family environment either temporarily or permanently with special assistance and care and to ensure that national laws provide alternative care for such a child.⁷² The UNCRC also provides a wide range of alternative care including foster placement, *kafalah* of Islamic law, adoption as well as institutional care, taking into account the desirability of continuity in a child's upbringing and his or her ethnic, religious, cultural

⁶⁶ Hague Conference on Private International Law (HCCH), "Conclusions and Recommendations of the Second Meeting of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (17-23 September 2005)," October 2005, accessed Jun 4, 2023, http://www.hcch.net/upload/wop/concl33sc05_e.pdf ["Conclusions and Recommendations 2005"], Recommendation No. 17.

⁶⁷ Hague Convention 1993, art. 6(1).

⁶⁸ See Hague Convention 1993, arts. 8, 9.

⁶⁹ Parra-Aranguren, "Explanatory Report on the Convention," para. 195.

⁷⁰ See Hague Convention 1993, art. 36 (stating the provision is applicable to a State which has two or more systems of law with regard to adoption applicable in different territorial units).

⁷¹ Hague Convention 1993, art. 6(2).

⁷² UNCRC: arts. 20(1), (2).

and linguistic background.⁷³ Thus, this provision highlights the significance in considering for the child to grow up in an environment where he or she can experience the cultural heritage. Since intercountry adoption involves in disconnection of the child's cultural experience by transferring to another country, it is designed as a second-best option with an emphasis on the protection of a child's right to cultural stability.⁷⁴ The discretion is on the state parties to determine alternative care options for children without families. The states that do recognize adoption should take the best interests of the child as the paramount consideration.⁷⁵ The UNCRC also recognizes intercountry adoption as one of the options of alternative care for children who cannot be looked after in their birth countries particularly due to the unavailability of foster or adoptive family.⁷⁶

Though the states are given discretion to allow intercountry adoption, it seems that the UNCRC 'unquestionably discourages' it by appearing to favour in-country placements such as foster care and other 'suitable' forms of care, over intercountry adoption and for that reason institutional care is not relegated to a last preference.⁷⁷ Alternatively, the Hague Convention 1993 signifies 'a step in the direction of legitimizing intercountry adoption' as a preferable placement over any in-country placements apart from adoption.⁷⁸ Intercountry adoption aims to provide a permanent family for a child in which foster care and institutional care do not offer the same level of permanency. This means that children in these arrangements may not experience the stability and lifelong support that a permanent family can provide. In addition, the emphasis on in-country placements poses a risk to children as it may result in delays or even a complete denial of their opportunity to find a suitable adoptive family and it can create additional barriers to the placement of children in need of permanent family care.⁷⁹ Thus, it is important for states to carefully consider the best interests of each child and ensure that decisions regarding placement prioritize their well-being and long-term stability without disregarding intercountry adoption as an alternative care option.

3.3 The Hague Convention 1996

The Hague Convention 1996 recognizes *kafalah* as a child protection measure.⁸⁰ The Hague Convention 1993 focuses on intercountry adoption by excluding *kafalah* while the Hague Convention 1996 aims to address this gap.⁸¹ It states that if *kafalah* is being considered in another country, the relevant authorities should be consulted beforehand

⁷³ UNCRC: art. 20(3).

⁷⁴ Robin Shura, "Intercountry Adoption: A Theoretical Analysis," (PhD Thesis, Case Western Reserve University, January 2010), accessed June 4, 2023, https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=case1253849386&disposition=inline

⁷⁵ UNCRC, art. 21.

⁷⁶ UNCRC, art. 21 (b).

⁷⁷ Dillon, "Making Legal Regimes," 208.

⁷⁸ Elizabeth Bartholet, "International Adoption: Thoughts on the Human Rights Issues," *Buffalo Human Rights Law Review* 13, (2007): 154.

⁷⁹ Bartholet, "International Adoption: Thoughts," 193.

⁸⁰ Hague Convention 1996, art. 3(e).

⁸¹ William Duncan, "Children's Right, Cultural Diversity and Private International Law" in *Children's Rights and Traditional Values*, ed. Gillian Douglas and Leslie Sebba (Aldershot; Brookfield, USA: Ashgate/Dartmouth: 1998), 35.

and a report on the child's situation and the reasons for the proposed placement should be provided.⁸² The placement can only proceed with the consent of the involved countries, considering the child's best interests.⁸³ Morocco, among other Muslim countries, has ratified the Hague Convention 1996 and allows intercountry *kafalah*.⁸⁴ This international instrument aims to facilitate *kafalah* placements abroad and provide better protection for Muslim children who were previously excluded from the scope of the Hague Convention 1993.

4. Intercountry Adoption in Morocco

Islamic law does not recognize the notion of legal adoption. Legal adoption was, however, widely practised in pre-Islamic Arabia⁸⁵ known as *al-tabanni*, an act of adopting a child that is “to make one’s son.”⁸⁶ In *al-tabanni*, the adopted child would take the adoptive family’s name and assume the biological child’s rights and duties including inheritance and consanguinity. The adoption would also be valid even if the adopted child was an adult with known father and lineage. Basically, *al-tabanni* is perceived as the deliberate and intended act of making someone else’s birth child as one’s own.⁸⁷ After the advent of Islam, this form of adoption as recognized by the present day Western countries in which an adopted child has the same position as a biological child was no longer allowed.⁸⁸ The basis for such non-recognition is traced in the Qur’an and the case of Zayd bin Harithah, the adopted son of the Prophet Muhammad (s.a.w).⁸⁹ The Qur’an states:⁹⁰

“...nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way. Call them by (the names of) their fathers: that is juster in the sight of Allah. But if you know not their father’s (names, call them) your brothers in faith, or your Mawlās.”

⁸² Hague Convention 1996, art. 33(1).

⁸³ Hague Convention 1996, art. 33(2).

⁸⁴ Hague Conference on Private international Law (HCCH), “Status Table - 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children,” accessed May 24, 2023, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>

⁸⁵ See generally Amira al-Azhary Sonbol, “Adoption in Islamic Society: A Historical Survey” in *Children in the Muslim Middle East* ed. Elizabeth Warnock Fernea (Austin: University of Texas Press, 1995), 45-67.

⁸⁶ Yusuf Al-Qaradawi, *The Lawful and The Prohibited in Islam (al-halāl wa al-harām fī al-islām)* (New Delhi, India: Kitab Bhavan, 2007), 223. See generally Sonbol, “Adoption in Islamic Society”; Faisal Kutty, “Islamic Law and Adoptions” (June 20, 2014). Forthcoming in Robert L. Ballard et al., *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014), Valparaiso University Legal Studies Research Paper No. 14-5, <http://ssrn.com/abstract=2457066>; Ingrid Mattson, “Adoption and Fostering” in *Encyclopedia of Women and Islamic Cultures: Family, Law and Politics* ed. Suad Joseph and Afsaneh Najmabdi (Leiden: Koninklijke Brill NV, 2005).

⁸⁷ Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham, Rowman & Littlefield Publishers: 2002), EPUB file, 8-9.

⁸⁸ See generally Sonbol, “Adoption in Islamic Society.” See also, David Pearl and Werner Menski, *Muslim family law*, 3rd ed. (London: Sweet & Maxwell, 1998), 408 (describing that Islam does not recognize the formal adoption that creates the legal fiction, allowing a child to stand on an equal footing to a natural relative of the adoptive father).

⁸⁹ For further discussion of the legal bases on the prohibition of adoption in Islam see, Yahyá Aḥmad Zakariyā al Shāmī, *al-Tabannī fī al-Islām: wa-Atharahu ‘alá al-‘Alāqāt al-Khāṣṣah al-Dawliyah* (Dār al-Jāma’ah al-Jadīdah, 2009); Ashraf ‘Abd al-‘Alim al-Rifai’, *al-Tabannī ad Duwalī wa Mabda’ Iḥtirām Maṣlahah al-Ṭifl Dirāsah Muqārinah* (Dār al-Fikr al-Jamā’i, 2011).

⁹⁰ Qur’an 33:4-5.

This Qur'anic verse provides specific rules regarding the legal relationship of a child and his or her adopters in which neither the blood ties between the child and the birth parents are terminated nor is the identity of the birth parents concealed.⁹¹ In regard to the case of Zayd bin Haritha, he was freed as a slave and adopted by the Prophet (s.a.w). After that he was known as Zayd ibn (son of) Muhammad. However, after the revelation of the Qur'anic verse, Zayd was no longer known as Zayd ibn Muhammad, but was named again according to his father's name, Zayd bin Harithah.⁹²

Despite the fact that Islam does not practise adoption in the same sense as the West does, alternative forms of care and support for orphaned or vulnerable children, such as guardianship and *kafalah* are recognized and encouraged.⁹³ These forms of care aim to provide for the well-being of children while upholding the principles of Islamic teachings. *Kafalah* is described as 'wardship, tutelage, or the gift of care'.⁹⁴ In this Islamic form of adoption, the child's original family ties and lineage are not severed or concealed. The guardian (*kafil*) is responsible for providing the children with guardianship, accommodation and care within a family setting by preserving their biological parentage without the affiliation and inheritance rights.⁹⁵ In this regard, Islam emphasizes the importance of maintaining the ties to one's biological family and treating them with kindness and fairness.⁹⁶

Since Islamic law does not recognize the institution of legal adoption, *kafalah* system is established in Morocco to allow Muslims to foster or take care of a child professes any religion in their homes under that system.⁹⁷ Although such care does not have the same effects as to the legal adoption in Western countries, it allows children without families to be looked after in a family environment.⁹⁸ There are two types of *kafalah* in Morocco. First is notary certified *kafalah* which means the act of looking after children with known parentage whose birth parents relinquish their consent through a legal document. It is not widely practiced and was often used amongst the family member especially when there is no male child. Second is judicial *kafalah* which refers to taking care of abandoned children with known or unknown parentage who have been left permanently in the care of the state or orphanages.⁹⁹ Judicial *kafalah* is regulated by

⁹¹ Ali and Andaleeb, "Concept and Practice of Laws," 30.

⁹² Ibid. See also, al Shāmī, *al-Tabannī fī al-Islām* :29-30; al-Rifai', *al-Tabannī ad Duwalī*, 196.

⁹³ See "Sahih al-Bukhari, Book 78 - Good Manners and Form (Al-Adab), Hadith 6005," accessed June 2, 2023, <https://sunnah.com/bukhari:6005> (describing that "The Prophet (s.a.w.) said, 'I and the person who looks after an orphan and provides for him, will be in Paradise like this,' putting his index and middle fingers together").

⁹⁴ Bargach, *Orphans of Islam*, 9.

⁹⁵ Shabnam Ishaque, "Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity" *International Journal of Law, Policy and the Family* 22, no. 3 (2008): 401. 10.1093/lawfam/ebn009. See also Al-Qaradawi, *The Lawful and The Prohibited*, 223; Ali and Andaleeb, "Concept and Practice of Laws," 31.

⁹⁶ Qur'an 93: 9 (the Qur'an states that "treat not the orphan with harshness").

⁹⁷ Committee on the Rights of the Child, "Summary Record of the 319th Meeting: Morocco." (CRC/C/SR.319.03) September 1996, accessed Jun 4, 2023, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FSR.319&Lang=en, paras. 8, 12.

⁹⁸ See generally Assim M Usang and Julia Sloth-Nielsen, "Islamic *Kafalah* as an Alternative Care Option for Children Deprived of a Family Environment" *African Human Right Law Journal* 14, no 2 (2014): 322-345.

⁹⁹ Marianne Roux-Bouzidi, "The Kafala, an Adoption that is not an Adoption (1)," (translated from French by Elizabeth Grech), 3 September 2012, accessed Jun 2, 2023, <https://www.babelmed.net/en/article/71866-the-kafala-an-adoption-that-is-not-an-adoption-1>; Katherine E. Hoffman, "Morocco," in *Filiation and the Protection of Parentless Children* ed. Nadjma Yassari, Lena-Maria Möller and Marie-Claude Najm (The Hague: T.M.C. Asser Press: 2019), 247,

Dahir No. 1-02-172 of 13 June 2002 on the Promulgation of Law No. 15-01 concerning the care (*Kafalah*) of abandoned children (Law No.15-01).¹⁰⁰ Article 2 of the Law No.15-01 defines *kafalah* as the commitment of foster parents to be responsible for the protection, education and maintenance of an abandoned child similar as to what a father would do for his child without filiation and inheritance rights. Individuals or married couples who are interested in becoming *kafalah* guardians must proactively initiate the *kafalah* process by reaching out to or visiting local orphanages, hospital units caring for parentless children, or organizations affiliated with social workers responsible for matching available babies or children with potential guardians.¹⁰¹

Morocco is also among Muslim countries that allows intercountry *kafalah* and has ratified the Hague Convention 1996.¹⁰² The process can be challenging unless the receiving state formally recognizes it.¹⁰³ Despite the challenges, many foreigners have been able to foster Moroccan children through the *kafalah* process and become their legal guardians.¹⁰⁴ In Morocco, intercountry *kafalah* is regulated by Law No. 15-01, along with the laws of the receiving state. Prospective foster parents who want to adopt a child from Morocco need to obtain a *kafalah* order from the Moroccan court. This order serves as the legal authorization to proceed with the *kafalah* process in their own country.¹⁰⁵ Many foster parents have successfully completed their *kafalah* process in countries like the U.S., Spain, and Italy. According to the Law No. 15-01, abandoned children are those who are under the age of eighteen and have been physically abandoned by their parents, are orphans, or have parents who are unable to support them or fulfill their parental responsibilities.¹⁰⁶ Before these children can enter the *kafalah* system, the court must issue a declaration of abandonment.¹⁰⁷ Additionally, if the child is twelve years or older, their consent is required for the *kafalah* process.¹⁰⁸

10.1007/978-94-6265-311-5_9. See also, Bargach, *Orphans of Islam*, 9 (describing two types of *kafala* which are *kafala itifaqiya* as a consensual *kafala* where binding agreement is made between birth mother and a foster family and *kafala* of an abandoned child who is in the state's care where binding agreement is made between the state and a foster family).

¹⁰⁰ "Texte de la Loi 15-01, Loi n°15-01 relative à la prise en charge (Kafala) des enfants abandonnés" [Text of Law 15-01, Law No. 15-01 concerning the care (Kafala) of abandoned children], Kafala.fr, accessed May 14, 2023, <https://www.kafala.fr/loi-de-la-kafala-judiciaire-en-france/>

¹⁰¹ Hoffman, "Morocco," at 251.

¹⁰² Hague Conference on Private international Law (HCCH), "Status Table - 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children," accessed May 22, 2023, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>

¹⁰³ Jamilla Bargach, "A Study on Abandonment and the Practice of Kafala in Morocco for Amici Dei Bambini (www.aibi.it)," 2007, accessed January, 27, 2012, http://www.childout.org/data/doc/doc_e7f9dc3540c6be0a3b79ac8d90e02b07.pdf

¹⁰⁴ See Marianne Roux-Bouzidi, "The Kafala, an Adoption that is not an Adoption (2)" (translated from French by Elizabeth Grech), 03 September 2012, accessed Jun 4, 2023, <https://www.babelmed.net/en/article/71867-the-kafala-an-adoption-that-is-not-an-adoption-2>

¹⁰⁵ Travel.State.Gov, U.S. Department of State, "Intercountry Adoption: Morocco," accessed Jun 4, 2023, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Morocco.html>

¹⁰⁶ Law No.15-01, art. 1.

¹⁰⁷ Law No.15-01, art. 6 (describing that the court reviews the investigation by the public prosecutor. If the parents are unknown, the court issues a temporary judgment with the child's details to be posted for three months, giving the parents a chance to claim the child. If nobody claims the child, the court issues a final judgment declaring them abandoned).

¹⁰⁸ Law No.15-01, art. 12.

The Law No. 15-01 further requires prospective foster parents to fulfill several conditions before they can qualify to apply for *kafalah*. The conditions include an adult Muslim either a married couple or a woman with moral and social capability; financially stable to fulfil the child's needs; has no conviction of criminal offences individually or jointly; and free from contagious diseases or health conditions that might hamper them to perform their duties.¹⁰⁹ These conditions are in place to ensure the suitability of prospective foster parents and the well-being of the child. Individuals or couples can demonstrate their ability to provide a loving and supportive environment for the child they wish to adopt by meeting these requirements. When there are multiple requests for the *kafalah* of an abandoned child, priority is given to spouses who don't have children or who have the best conditions and can provide the child's best interest.¹¹⁰

Prospective foster parents can identify a child they wish to adopt from children's homes like Lalla Hasna, an institution that is authorised to prepare for the *kafalah* process.¹¹¹ The prospective foster parents then must submit an application for *kafalah* to the judge of minors in the child's place of residence with supporting documents indicating that they have fulfilled all the conditions mentioned above and a copy of the child's birth certificate.¹¹² A commission consisting of representatives from legal and several ministries will be established to conduct investigation in collecting relevant information regarding the *kafalah* application particularly whether the applicants have fulfilled all the prescribed requirements.¹¹³ The judge will grant *kafalah* order to the prospective foster parents if the investigation shows that they have successfully met all the conditions.¹¹⁴ The order, however, would not render the successful foster parents as the child's legal parents as the judge of minors remains responsible as the legal guardian of the child whose permission is needed in deciding significant matters such as travelling and inheritance.¹¹⁵ The Law No. 15-01 does not explicitly mention about the requirement of residence.¹¹⁶ It seems that that the foreign foster parents are not required to reside in Morocco before applying for *kafalah*.

The Law No. 15-01 also allows foreign foster parents to bring the child with them to their country provided that the authorization from the judge of minors is obtained legally and monitoring will be conducted by the Moroccan consulate where the child will reside with the foster family.¹¹⁷ The judge of minors must also ensure that there is a judicial agreement with the foster parent's country of residence, recognizing the

¹⁰⁹ Law No.15-01, art. 9. See also Hoffman, Morocco, 256 (describing that non-Moroccans who want to apply for *kafalah* need to provide additional documents such as a certificate of faith or conversion to Islam, and a home study or authorization for guardianship conducted in their country of residence, while Moroccan nationals residing in Morocco or abroad are assumed to be Muslim).

¹¹⁰ Law No.15-01, art. 10.

¹¹¹ Roux-Bouzidi, "The Kafala, an Adoption that is not an Adoption (2)."

¹¹² Law No.15-01, art. 15.

¹¹³ Law No.15-01, art. 16.

¹¹⁴ Law No.15-01, art. 17.

¹¹⁵ Bargach, "A Study on Abandonment,"; Law No.15-01, art. 23.

¹¹⁶ Julie Chaudier, "Kafala au Maroc : Déblocage en vue pour les parents espagnols" [Kafala in Morocco: Release in Sight for Spanish Parents], accessed Jun 4, 2023, <http://www.yabiladi.com/articles/details/15568/kafala-maroc-deblocage-pour-parents.html>

¹¹⁷ Law No.15-01, art. 24.

kafalah as an Islamic form of care before granting the authorization.¹¹⁸ Moroccan authorities may further require foster parents to prepare for the post-placement report as stated in the *kafalah* order which should be complied with in a timely manner.¹¹⁹ This significantly shows that Morocco allows intercountry *kafalah*. However, foreign foster parents with a *kafalah* order of a Moroccan child must be aware of the immigration rules that have to be observed under their national law before they bring the child back to their home country. By ensuring compliance with immigration rules, foster parents can prevent any potential barriers to the child's entry into the foreign country. This enables the child to reside there permanently with the foster parents, establishing a stable and secure environment for their upbringing.

One of the issues concerning intercountry *kafalah* in Morocco is the legal recognition of *kafalah* institution in foster parents' home country and whether conversion to full adoption is allowed after the child's entry into the country. For instance, the U.S allows adoption after the *kafalah* process is completed in Morocco so that the child's citizenship can be obtained when he or she resides in the U.S.¹²⁰ In some European countries like Belgium, Switzerland, Italy, England, and the Netherlands, the law of the guardians' residence determines the adoption process for children under *kafalah*.¹²¹ This means that if the *kafalah* was legally established in court and the child's parentage is unknown, the adoption of the child is allowed without delay. On the other hand, it might be impossible for *kafalah* guardians to adopt children in their care in certain states.

In *Harroudj v France*,¹²² a French national was denied permission to legally adopt an Algerian baby girl whom she had been caring for under the *kafalah*. The applicant invoked Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life. She argued that the denial of her request to adopt a child under *kafalah*, and the refusal to recognize a familial relationship with the child she considered her own daughter, constituted a disproportionate interference with her family life. The court found that a fair balance had been struck between the public interest and that of the applicant. The authorities had made efforts to promote the integration of children under *kafalah* while also respecting cultural diversity and preserving their connection to the laws of their country of origin.

In this case, the court pointed out that a new Article 370-3 was inserted in the French Civil Code by the law of 6 February 2001 to prohibit adoption of children in *kafalah* whose national law does not legally recognize it. Since the new provision was introduced, *kafalah* guardians in France can no longer apply to the court for an adoption order as states like Algeria and Morocco do not allow legal adoption. In addition, Article 21-12 of the Civil Code was amended by the law 26 November 2003 to

¹¹⁸ Kingdom of Morocco, Ministry of Justice and Freedom, "Procedures in Family Justice," October, 2012, 32, accessed January 25, 2014, http://adala.justice.gov.ma/production/Guides_Manuels/fr/PlaquetteANG.pdf.

¹¹⁹ U.S. Department of State, "Intercountry Adoption: Morocco."

¹²⁰ *Ibid.*

¹²¹ Hoffman, "Morocco," 261.

¹²² No 43631/09, 4 October 2012. See generally, Nikos Koumoutzis, "The Islamic Prohibition of Adoption as Limitation of the Right to Respect of Family Life (article 8 ECHR) – Revisiting ECtHR *Harroudj v France*, no. 43631/09, 4 October 2012," *CUADERNOS DE DERECHO TRANSNACIONAL* 13, no. 1 (2021): 939-965, 10.20318/cdt.2021.6004

allow a child who has been in the care of foster parents who are French nationals and have lived in France for five years to obtain the French citizenship. It seems that only after obtaining the French citizenship, the child can be adopted legally.

On September 2012, the Moroccan Ministry of Justice and Liberties issued a Circular No. 40 S/2 to prohibit foreign prospective foster parents who are not resident in Morocco from obtaining *kafalah* order from the court.¹²³ The Circular, however, does not affect the Moroccans who are residing abroad. The Circular stated that it is difficult for the court to perform some duties in maintaining the child's best interests when the foster parents are not residing in Morocco such as monitoring to ensure that the *kafalah* applicants are capable to raise the child in accordance with Islamic principles. The Minister of Justice has also stated that in the past 20 years, around 30,000 adopted children have been converted to Christianity and that this decree aims put a stop to this trend.¹²⁴ It follows that the Circular seems to effectively restrict intercountry *kafalah* to prospective foster parents who are residing in Morocco or Moroccan citizens living abroad only. Consequently, foreign foster parents who reside outside of Morocco may no longer be able to assume the *kafalah* of a Moroccan child.

In this regard, there is a great concern among orphanages and associations working for protection of abandoned children and orphans in Morocco on the methods of the Ministry of Justice and Liberties to rectify the situation since about 50% of adoptions in Morocco were by foreign foster parents residing outside Morocco.¹²⁵ For instance, in 2011, the Moroccan courts had granted *kafalah* order of 254 children to foreign foster parents who were mostly from Spain.¹²⁶ Taking into account the stigma against adoption and abandoned children in Morocco,¹²⁷ it would be more likely to expect that there are not many local foster families willing to take up *kafalah* of these children.¹²⁸ Alternatively, the judge still has the power to decide the *kafalah* applications on a case-by-case basis as the Circular is not the real law.¹²⁹

5. Intercountry Adoption in Malaysia

In Malaysia, the AA governs non-Muslims while the RAA governs both Muslims and non-Muslims. These statutes are not applicable in Sabah and Sarawak for adoption in both

¹²³ "Circulaire N° 40 S/2 Ministère de la Justice et des Libertés" [Circular No. 40 S/2 Ministry of Justice and Freedoms], Kafala.fr, accessed Jun 4, 2023, <https://www.kafala.fr/circulaire/>

¹²⁴ Aida Alami, "Moroccan Adoption Rules Leave Kids in Limbo," *Al-Jazeera*, July 26, 2013, <https://www.aljazeera.com/features/2013/7/26/moroccan-adoption-rules-leave-kids-in-limbo>. See also Hoffman, "Morocco," 260.

¹²⁵ Ibid.

¹²⁶ Chaudier, "Kafala au Maroc : Déblocage."

¹²⁷ See generally Bargach, *Orphans in Islam*.

¹²⁸ See, e.g., The View From Fez, "Kafala Protest Gains Strength," Posted 11 November 2012, <http://riadzany.blogspot.com/2012/11/kafala-protest-gains-strength.html> (noting that foreigners tend to adopt children with physical or mental disabilities, those who would not be accepted by the Moroccans); "A Call to Enable Muslim Americans to Adopt Abandoned Moroccan Children," *Morocco World News*, March 31, 2013, <https://www.morocoworldnews.com/2013/03/84768/a-call-to-facilitate-adoption-of-moroccan-abandoned-children-by-muslim-americans/> (stating that after the restriction of intercountry *kafalah*, the number of children in orphanages almost doubled since Moroccan citizens are not interested to foster these children).

¹²⁹ Alami, "Moroccan Adoption Rules."

states is governed by the Adoption Ordinances, respectively.¹³⁰ Unlike the RAA, the AA grants the adopted child with equal status as a birth child.¹³¹ In the case of *Hitchcock v W.B and F.E.B.*,¹³² Lord Goddard C.J said that:

An adoption order is an order of the most serious description. It removes the child once and for all from his natural parents and gives him to the adopted parents as though they were, and always had been, his natural parents.¹³³

On the other hand, adoption under the RAA does not sever the legal relationship between the child and the birth parents. The birth parents' legal rights remain as conferred by law since the RAA only confers the adoptive parents with custodial, care, maintenance and educational rights in respect of the child.¹³⁴ It follows that the adopted child under the AA can inherit from the adoptive parent's property. Alternatively, the adopted child under the RAA does not automatically receive an inheritance from their adoptive parents and the property can be distributed through gifts, *waqf* (charitable endowment), or bequests.¹³⁵ The AA also provides that an adoption of a Muslim child by non-Muslim prospective adoptive parents is not allowed.¹³⁶ Although it is not explicitly mentioned in the RAA, Muslims prospective adoptive parents are allowed to adopt a non-Muslim child.¹³⁷ At present, the practice of intercountry adoption in Malaysia is based on both adoption statutes. Though there is no express provision on intercountry adoption, foreign prospective adoptive parents may adopt a Malaysian child and Malaysian citizen may also adopt from abroad provided that they fulfill all the requirements prescribed by the AA or the RAA.¹³⁸

In practice, prospective adoptive parents may identify a child to adopt from the SWD, NGOs or by personal arrangement. It has been observed that the SWD may accept adoption applications from foreign individuals residing and working in Malaysia for not less than two years.¹³⁹ The SWD usually does not accept adoption applications from foreigners residing abroad. However, there have been a few complex cases requiring extensive coordination with the foreign countries to ensure compliance with immigration rules and procedures. These measures aim to prevent child trafficking and

¹³⁰ Adoption Ordinance Sabah 1960 (No.23 of 1960) and Adoption Ordinance Sarawak 1958 (Cap 91). For further discussion on adoption in Malaysia see Ahmad Ibrahim, *Family Law in Malaysia*, 3rd ed. (Kuala Lumpur: Malayan Law Journal, 1997); Mimi Kamariah, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1999).

¹³¹ Adoption Act 1952, s. 9. See also *Re TSY (An Infant)* [1988] 3 MLJ 43, at 44 (describing the general effect of an adoption order, Edgar Joseph Jr J. said that: "...it destroys the legal bond between the infant and its natural parents and puts him in precisely the same position as a natural child of his adoptive parents. The making of an adoption order may, therefore, be rightly described as the using of a statutory guillotine."

¹³² [1952] 2 QB 561.

¹³³ *Ibid.*, 568-569.

¹³⁴ *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137, 150.

¹³⁵ Azizah Mohd, "Protection of Rights of Adopted Children in Relation to Duties of Adoptive Parents under the Law in Malaysia," *Adoption Quarterly*, 14 no. 4 (2011): 239-240. 10.1080/10926755.2011.628261

¹³⁶ Adoption Act 1952, s. 31.

¹³⁷ See e.g., *Tan Kong Meng v Zainon bte Md Zain & Anor* [1995] 3 MLJ 408 (describing a case of *de facto* adoption of a Chinese, non-Muslim child by a Malay couple).

¹³⁸ Sopia Othman and Halimatunisma Ismail (National Registration Department of Malaysia Ministry of Home Affairs, Federal Territory of Putrajaya), in discussion with the author, November 7, 2014.

¹³⁹ Nurzan Mohd Wahie, *Pengangkatan: Nikmat atau Derita bagi Kanak-kanak* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992), 24-25.

protect the children, ensuring their legal entry and stay in the foreign countries.¹⁴⁰ There were also instances that initial applications made by foreigners to an NGO, OrphanCARE, were initially rejected. It was only through the appeal process and assistance from the NGO that they obtained approval from the Malaysian Home Ministry to proceed with the adoption.¹⁴¹ In addition, there have been instances of personal arrangements between birth parents and adoptive parents, such as a Malaysian child being legally adopted by a Singaporean citizen based on Singaporean law.¹⁴² According to the U.S. Department of State, there were no recorded cases of adoption from Malaysia involving American citizens in 2020 and 2021. However, there was one recorded case in 2019 and another in 2018.¹⁴³ These statistics only pertain to adoptions by U.S. citizens and do not encompass adoptions by citizens of other countries. Despite the lack of specific legislation and regulations on intercountry adoption in Malaysia, there have been instances of intercountry adoptions taking place. It is very hard to officially recognize intercountry adoption in Malaysia since the cultures between the adoptive parents and the child are also different.¹⁴⁴ It seems that obtaining approval from the Malaysian Home Ministry is necessary for such adoptions.

5.1. How a Foreign Citizen Can Adopt a Child in Malaysia

At present, to adopt a child who resides in Malaysia, foreign prospective adoptive parents need to meet certain requirements outlined by either the Registrar of Adoptions (RAA) or the Adoption Act (AA). The AA states that they must be at least 25 years old and at least 21 years older than the child they wish to adopt.¹⁴⁵ On the other hand, the RAA requires that they must be at least 25 years old and at least 18 years older than the child they intend to adopt.¹⁴⁶ Additionally, foreign prospective adoptive parents must ensure that the child's birth parents have given their consent to the adoption by obtaining a letter of consent or a statutory declaration from the birth parents.¹⁴⁷ As for children without families such as abandoned children or orphans who have been placed in the care of the SWD or the NGOs, the consent may be dispensed with by the court.¹⁴⁸

¹⁴⁰ Rosmaini Ahmad (Children Division of Malaysian Social Welfare Department, Federal Territory of Putrajaya), in discussion with the author, 25 May 2015.

¹⁴¹ Alyaa Azhar, "The Joys of Adoption," *Free Malaysia Today*, January 25, 2014, <http://www.freemalaysiatoday.com/category/nation/2014/01/25/the-joys-of-adoption/>

¹⁴² Sopia Othman and Halimatnisma Ismail (National Registration Department of Malaysia Ministry of Home Affairs, Federal Territory of Putrajaya), in discussion with the author, November 7, 2014.

¹⁴³ Travel.State.Gov, U.S. Department of State, "Intercountry Adoption: Malaysia," accessed Jun 4, 2023, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Malaysia.html>

¹⁴⁴ Rosmaini Ahmad (Children Division of Malaysian Social Welfare Department, Federal Territory of Putrajaya), in discussion with the author, 25 May 2015.

¹⁴⁵ Adoption Act 1952, s. 4(1) (a).

¹⁴⁶ Registration of Adoptions Act of 1952, s. 10(2) (a).

¹⁴⁷ Adoption Act 1952, s. 5(1); Registration of Adoptions Act of 1952, ss. 6(1) (b).

¹⁴⁸ Adoption Act 1952, ss. 5(1) (a)-(d); Registration of Adoptions Act of 1952, s. 6(1) (b).

The AA and the RAA require the prospective adoptive parents and the child to be ordinarily resident in West Malaysia.¹⁴⁹ In the context of intercountry adoption, foreign prospective adoptive parents in Malaysia must demonstrate their Malaysian identification, such as a permanent resident card or red identity card.¹⁵⁰ This seems necessary for them to be considered "ordinarily resident" in Malaysia. The term "ordinarily resident" is not explicitly defined in the legislation. However, in *T.P.C v A.B.U.*,¹⁵¹ the court pointed out that the meaning of "ordinarily resident" is 'coloured by the provisions of section 4(4) (a)' of the AA. This section requires the child to be under the care of the adoptive parents continuously for a period of three months before the adoption order can be granted. In this case, Edgar Joseph Jr. J also emphasised that the required residence period for the adoption is intended as a probationary period to allow the prospective adoptive parents and the child to develop a bond and establish a meaningful relationship with each other.¹⁵² Therefore, in order to fulfill the requirement of foster care period, the prospective adoptive parents must reside in Malaysia with the child for three months consecutively. The court noted that it becomes *functus officio* after the adoption order is granted and has no power to intervene if the adoptive family decides to leave the country. While the prospective adoptive parents are not obligated to demonstrate their intention to live in Malaysia permanently, they must reside in the country for a sufficient and continuous period to proceed with the adoption. It is essential for them to show that they are living and working in Malaysia and physically present in the country when the adoption order is issued.

This residence period may also refer to a probationary or foster care period as required by the RAA¹⁵³ and the Child Act 2021 regarding an abandoned child.¹⁵⁴ During this two-year probationary period, the prospective adoptive parents are expected to provide care and support to the child they wish to adopt. They are responsible for the child's upbringing, maintenance, and education, ensuring their well-being and meeting their needs. The purpose of this two-year residency requirement and probationary period is basically to assess the prospective adoptive parents' commitment and ability to provide a stable and nurturing environment for the child. It seems to allow the SWD to evaluate the compatibility and suitability of the prospective adoptive parents for the adoption. Thus, in adoption cases, the requirement of "ordinarily resident" does not strictly mean that the prospective adoptive parents must be Malaysian citizens. Instead, they must

¹⁴⁹ Adoption Act 1952, s. 4(3); Registration of Adoptions Act of 1952, s. 10(3).

¹⁵⁰ Sopia Othman and Halimatunisma Ismail (National Registration Department of Malaysia Ministry of Home Affairs, Federal Territory of Putrajaya), in discussion with the author, November 7, 2014.

¹⁵¹ [1983] 2 MLJ 79, 82-83. See also *Re Duncan Gillis & Anor v. Liew Mei Ling & Ors* [2010] 4 MLJ 179 (describing that the court observed that the applicants, Australian nationals with employment pass were residing in Malaysia just like other citizen or permanent resident of the country. The court further emphasized that "ordinarily resident" does not imply permanent residence, as the Parliament intentionally distinguished between the two terms by not using "permanently resident.")

¹⁵² [1983] 2 MLJ 79, 82.

¹⁵³ Registration of Adoptions Act 1952, s. 6(1). See e.g., *Tang Kong Meng v Zainon bte Md Zain & Anor* [1995] 3 MLJ 408 (describing that the child had been in the care and possession of the defendants for more than two years before the adoption application was made).

¹⁵⁴ Child Act 2001, s. 30 (4).

demonstrate that the condition of continuous care and possession of the child for a period stipulated by the AA and the RAA has been fulfilled.¹⁵⁵

Under the AA and the RAA in Malaysia, the adoption process involves several steps and requirements. Adoptions under the AA are made through court proceedings which the prospective adoptive parents have to appoint a legal firm. Prospective adoptive parents must notify the SWD in their state of residence about their intention to apply for an adoption order.¹⁵⁶ If the child is in the care of the SWD, an "offer letter" is issued to the prospective adoptive parents.¹⁵⁷ The court appoints guardian ad litem¹⁵⁸ to investigate the child's background and the circumstances of the prospective adoptive parents.¹⁵⁹ If the court grants the adoption, a copy of the adoption order will be sent to the foreign prospective adoptive parents and to the NRD.¹⁶⁰ The NRD will then issue a new birth certificate for the child the same as the original birth certificate without any mention of words such as "adopted", "adopter" or "adoptive".¹⁶¹ These processes and documentation ensure that the adoption is legally recognized, and the child's identity and rights are protected. It is to be noted, however, that the adoption order under the AA does not automatically confer the adopted child a right to citizenship especially if the child is a non-citizen.¹⁶² An abandoned child whose biological or legal parents were unknown may also be considered as a non-citizen.¹⁶³ Similarly, if a migrant worker gives birth to a child in Malaysia, the child will be considered as an irregular migrant unless the parents can provide relevant documents to the NRD such as passport, working permit, marriage certificate as a proof of their valid and legal existence.¹⁶⁴

For adoptions under the RAA, the NRD verifies whether foreign prospective adoptive parents have resided in Malaysia and cared for the child continuously for a period of 2 years. The NRD examines relevant documents such as visas or entry permits to establish the length of stay. Prospective adoptive parents are also required to attend interviews at the NRD, where they bring the child with them. In some cases, the NRD may consult

¹⁵⁵ See, Mohd, *Protection and Adoption*, 106 (noting that the requirement of ordinarily resident does not suggest that an adopter must be a Malaysian citizen but it also includes a temporary stay that fulfills the condition of custody and maintenance for three months prior to the date of the adoption order under the AA).

¹⁵⁶ Adoption Act 1952, s. 4(4) (b).

¹⁵⁷ U.S. Department of State, "Intercountry Adoption: Malaysia."

¹⁵⁸ Adoption Act 1952, s. 12.

¹⁵⁹ Adoption Act 1952, s. 13.

¹⁶⁰ Adoption Act 1952, s. 24.

¹⁶¹ Adoption Act 1952, s. 25A. See also, Shamsuddin Suhor, "Anak Angkat dan Pengangkatan," in *Undang-Undang Keluarga (Sivil)* ed. author and Noor Aziah Mohd Awal (Kuala Lumpur: Dewan Bahasa and Pustaka, 2007), 54-56 (describing the amendment of s. 25A of the AA has affected the child's identity which deprives him or her right to know the birth parents).

¹⁶² See *Foo Tan Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573 (describing that the court held that the child could not automatically become a citizen by operation of law because he was not born to a lawful parent. To be eligible for automatic citizenship, two conditions must be met: the person must be born in the country, and at least one parent must be a citizen or permanent resident).

¹⁶³ *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 (describing that the court dismissed the applicant's request to review the respondent's decision to deny citizenship for the child after adoption. The court cited and followed the precedent set in the case of *Foo Tan Aik*).

¹⁶⁴ Saidatul Nadia Abdul Aziz and Salawati Mat Basir, "Protection of Migrant Workers under the ICMW: Incompatibility with Malaysian Laws and Position in ASEAN," *Hasanuddin Law Review* 7, no. 3, (2021): 159-160. 10.20956/halrev.v7i3.3066

the SWD, particularly for abandoned babies or when consent from birth parents cannot be obtained. Once the NRD is satisfied with the requirements, they register the adoption and issue an adoption certificate. Adoption certificate can be used for schooling, applying an identity card and passport as well as for other official matters. The NRD will also inform the adoptive parents that the adopted child cannot inherit through blood relations but can only receive inheritance through gift or bequest. Similar to the adoption under the AA, the registration of adoption under the RAA does not confer the child an automatic citizenship.¹⁶⁵

Table 1. Comparison between adoptions under the AA and the RAA

Aspect	Adoptions Act 1952 (AA)	Registration of Adoptions Act 1952 (RAA)
Scope	Covers adoptions through court proceedings.	Covers adoptions through registration with the NRD.
Applicable to	Non-Muslims only [s.31].	Muslims and Non-Muslims.
Age	Prospective parents must be at least 25 years old and at least 21 years older than the child they intend to adopt [s.4 (1)(a)].	Prospective parents must be at least 25 years old and at least 18 years older than the child they intend to adopt [s.10 (2)(a)].
Residence Requirement	Prospective adoptive parents must fulfill a residence period of 3 months continuously in Malaysia [s.4 (3), (4)(a)].	Prospective adoptive parents must fulfill a residence period of 2 years continuously in Malaysia [s.10 (3), s.6 (1)].
Consent of Birth Parents	Consent of birth parents/statutory declaration is required and can be dispensed with by the court in certain cases [s.5]	Consent of birth parents/statutory declaration is required and can be dispensed with by the court in certain cases [s.6 (1)(b)].
Adoption Order	Granted by the court [s.3].	Registration of adoption with the NRD [s.6(1) (a)].
New Birth Certificate	Issued by the NRD following the adoption order [s.25A].	The NRD issued adoption certificate after the adoption is registered.
Effect of Adoption	Permanently terminates the legal parent-child relationship [s.9].	The legal parent-child relationship is preserved.
Inheritance Rights	Adopted child is attributed to the family and can inherit from the adoptive parent's property.	Adopted child cannot be attributed to the family and can only inherit through gift or bequest.

Source: Authors' own compilation.

¹⁶⁵ Sopiah Othman and Halimatonisma Ismail (National Registration Department of Malaysia Ministry of Home Affairs, Federal Territory of Putrajaya), in discussion with the author, November 7, 2014.

Once the required documents are obtained for the adoption process under the AA or the RAA, foreign adoptive parents can proceed to apply for the child's passport before returning to their home country.¹⁶⁶ If the adopted child is a non-citizen child, the adoptive parents may have to refer to the Ministry of Foreign Affairs in bringing out the child out of Malaysia.¹⁶⁷ It is important to note that not all countries automatically recognize foreign adoption orders, especially from non-Hague Convention countries like Malaysia. Therefore, adoptive parents must ensure that the adopted child can enter and reside permanently in their home country as mentioned in the Hague Convention 1993. Although the Hague Convention 1993 is not applicable to Malaysia, the step is important to avoid any potential issues or complications related to their nationality. This is particularly crucial for adoptions under the RAA since it does not establish legal parent-child relationship and the issue may arise as to whether the adoptive parent's home country recognized such adoption.

5.2. How a Malaysian Citizen Can Adopt a Child from a Foreign Country

It is uncommon for Malaysians to adopt children from foreign countries. While there are no official data available, such cases may exist on a personal basis. Malaysian prospective adoptive parents who wish to adopt a child from a foreign country must fulfill all the requirements of intercountry adoption set by that particular country. Once the adoption process is finalized in the child's birth country, the Malaysian adoptive parents must go through another adoption process in Malaysia. To have the adoption recognized in Malaysia, the adoptive parents and the child must meet the residence requirement stated in the AA or the RAA. This means that they need to look after the child continuously for a period of 3 months or 2 years in Malaysia, depending on the specific act. The NRD will issue a new birth certificate for the child if the court grants the adoption order under the AA. For the registration of adoption with the NRD, the department will verify the child's travel document such as entry permit or visa date and the date of application for adoption registration. This is to ensure the residence requirement has been fulfilled. The purpose of re-adoption in Malaysia is to establish the adoptive parents as the child's legal guardians. It is important to note that upon adoption, the child does not automatically acquire Malaysian citizenship. The adoptive parents must separately apply for the child's Malaysian citizenship.¹⁶⁸

6. A Comparative Lens: Intercountry Adoption in Malaysia and Morocco

Intercountry adoption practices in Malaysia and Morocco have some similarities and differences. In Malaysia, there is no specific intercountry adoption law, and the process is governed by existing domestic adoption statutes, namely the AA and the RAA. In

¹⁶⁶ U.S. Department of State, "Intercountry Adoption: Malaysia."

¹⁶⁷ See Azhar, "The Joys of Adoption."

¹⁶⁸ Sopiah Othman and Halimatonisma Ismail (National Registration Department of Malaysia Ministry of Home Affairs, Federal Territory of Putrajaya), in discussion with the author, November 7, 2014. See also, Jabatan Pendaftaran Negara, "Adoption," accessed May 20, 2023, <https://www.jpn.gov.my/en/faq/faq-adoption> (describing that the child must have fulfilled the required period of residence as stipulated by the statute and possess a valid travel document in order to be eligible for the adoption).

contrast, Morocco has a specific law known as Law No. 15-01 and has ratified the Hague Convention 1996 to regulate intercountry *kafalah*.

Table 2. Comparison between intercountry adoption in Malaysia and Morocco

Aspect	Malaysia	Morocco
Legal Framework	No specific legislation; based on the domestic adoption statutes (the AA or the RAA).	Specific law - Law No. 15-01; combination of domestic and intercountry <i>kafalah</i> .
Requirements of adoptive or foster parents	Age, residency, ability to provide care for a specified period	Adult Muslims, financial stability, free from criminal convictions or diseases.
Consent and relinquishment	Required consent from birth parents/legal guardians (e.g., letter of consent or statutory declaration).	Declaration of abandonment by the court (investigation by a commission).
Residency requirement	3 months (AA) or 2 years (RAA/Child Act 2021); usually 2-year period of residence in Malaysia for foreign adoptive parents.	Not explicitly mentioned, no specific duration. In 2012, the Ministry of Justice issued a circular requiring prosecutor to ask for proof of residency when handling <i>kafalah</i> applications.
Citizenship	No automatic citizenship, separate application or depends on adoptive parent's home country.	No automatic citizenship, usually depends on foster parents' home country.
Monitoring	Not explicitly mentioned; usually by the SWD during the residence and probationary period only.	Monitoring by consulates.

Sources: Authors' own compilation

Table 2 illustrates a comparative analysis of key aspects of intercountry adoption in Malaysia and Morocco. This comparative analysis offers insights into the regulatory frameworks, procedures, and considerations that underlie intercountry adoption practices in both countries. The requirements for prospective adoptive or foster parents are mentioned in each legislation. The adoption laws in Malaysia provide requirements such as age, residency, and ability to provide care for a specified period. Prospective foster parents in Morocco, on the other hand, must meet specific statutory requirements, namely, being adult Muslims, financially stable, and free from criminal convictions or contagious diseases. These conditions or criteria are not explicitly mentioned in the Malaysian adoption statutes since they are basically provided by the SWD.

In regard to relinquishment of consent, both Malaysia and Morocco require the consent of the biological parent or legal guardian. In Malaysia, there may be different consent requirements depending on the situation including the SWD or NGOs involvement where consent of birth parents or a legal guardian may be dispensed with especially in abandoned child cases. Morocco requires a declaration of abandonment by the court before foster parents may take the child into their care where a commission is established to investigate this matter. The judge of minors will be responsible for the abandoned children who may later be arranged for *kafalah* and placed in the care of the qualified foster parents.

The process for intercountry adoption in Malaysia is quite different from Morocco. In Malaysia, the prospective adoptive parents must establish their "ordinarily resident" status by residing and working in West Malaysia. During this period, the SWD and the NRD will assess their residency qualification. Throughout the adoption process, the prospective adoptive parents are required to remain in Malaysia with the child they wish to adopt. This is to meet the minimum fostering period of three consecutive months for non-Muslim children or two consecutive years for Muslim children, as prescribed by the AA and the RAA, respectively. In Morocco, it seems that there is no requirement of residence explicitly stated in the Law No. 15-01. Thus, the foreign foster parents do not have to reside in Morocco before applying for *kafalah*. However, the *kafalah* process still requires some waiting period before a child can be legally brought out of Morocco. This may also subject to the Circular No. 40 S/2 issued in 2012 which restricts foreign citizens living abroad from participating in the *kafalah* process.

Being non-Hague Convention countries, the adoption and *kafalah* processes in Malaysia and Morocco do not automatically grant citizenship to the adopted or foster child. The adoptive or foster parents must apply for the child's citizenship separately after the adoption or *kafalah* is finalised. They may also apply for the child's citizenship in their home country if the adoption is finalised there. This is crucial to ensure that the child can travel to, enter, and reside in the receiving country without any legal issues. Thus, it is important for adoptive and foster parents to be well-informed about the immigration rules and procedures in their home country to prevent the child from becoming stateless or facing difficulties in obtaining legal status. In this regard, Morocco could potentially benefit from the provisions of the Hague Convention 1996, which also aims to establish international standards and procedures for ensuring secure and stable arrangements for intercountry adoption.

Unlike Malaysia, the Law No. 15-01 in Morocco provides provisions for monitoring of the child by Moroccan consulate while he or she resides in the receiving country. The Moroccan authorities may also request the foster parents to submit post-placement reports regarding the development and progress of the foster child. In Malaysia, there is no such provision and usually the SWD is the only authority in the adoption process who will provide monitoring of the child during the residence and probationary period. The monitoring ceases after the adoption is finalised. It seems that there are no clear guidelines regarding the monitoring procedure in the context of intercountry adoption. However, based on case-by case basis, the SWD may decide with the authorities or consulates in the receiving country to provide this monitoring.

Since both Malaysia and Morocco have unique cultural and religious contexts, their reactions to intercountry adoption may vary. Both states, however, might prioritize preserving cultural heritage and religious values by seeking to ensure that the adopted and foster children are brought up within an environment that respects and nurtures their cultural identity. In addition, Malaysia's approach to intercountry adoption is less structured. In this regard, positive reaction to intercountry adoption might be shaped by its readiness to develop or modify the legal frameworks to address intercountry adoption more comprehensively. Ultimately, both states aim to strike a balance between providing loving homes for children and safeguarding against potential risks that might jeopardize their interests.

7. Conclusion

In the absence of specific legislation, it seems that intercountry adoption is not encouraged as a child protection measure in Malaysia. Apparently, the authorities in Malaysia prefer in-country placement of children including residential care. It is to be noted that unlike institutional setting, intercountry adoption provides permanent family care for children in need of care and protection. It is crucial to recognize that every child deserves a permanent and loving family, regardless of their age or specific needs. Foreigners who wish to adopt these children should be allowed and facilitated in their adoption process after being found as suitable and fit to be adoptive parents according to the Malaysian law. In this regard, Morocco has established legal provisions and regulations for intercountry *kafalah*, providing a clear framework for the process compared to Malaysia. Morocco has also established co-operation with other country like Spain regarding intercountry-*kafalah*. Thus, Malaysia may consider introducing statutory provisions for moving the child out of the country and monitoring to ensure legal clarity and protection for all parties involved especially when Malaysia has not ratified the Hague Convention 1993 and the Hague Convention 1996. Malaysia may also establish bilateral agreements or partnerships with other countries involving cooperation on adoption procedures, information sharing, and support services for adoptive families. These efforts can help ensure that intercountry adoption is a well-regulated and an effective means of providing permanent family care for children in need of care and protection who cannot be placed domestically. The ultimate goal should be to prioritize the best interests of the child and ensure that suitable families are found as soon as possible, taking into consideration the child's well-being and long-term prospects for a stable and nurturing environment.

Acknowledgments

Authors acknowledge the Ministry of Higher Education (MOHE) for funding under the Fundamental Research Grant Scheme (FRGS) (FRGS/1/2022/SSI12/UKM/02/2).

References

- A. Kadir, Nadhilah. "Foster Care: Concept and Provisions of the Law in Malaysia." Master thesis, International Islamic University Malaysia, 2011.
- Ab Rahman, Nurul Hidayat and Redwan Yasin. "Children Rights to 'Zero Hunger' and the Execution Challenges during the COVID-19 Crisis." *Hasanuddin Law Review* 8, no. 2 (2022): 139-159. 10.20956/halrev.v8i2.3684
- Abdul Aziz, Saidatul Nadia and Salawati Mat Basir. "Protection of Migrant Workers under the ICMW: Incompatibility with Malaysian Laws and Position in ASEAN." *Hasanuddin Law Review* 7, no. 3 (2021): 150-168. 10.20956/halrev.v7i3.3066
- Al Shāmī, Yahyá Aḥmad Zakarīyā. *al-Tabannī fī al-Islām: wa-Atharahu 'alá al-'Alāqāt al-Khāṣṣah al-Dawlīyah*. Dār al-Jāma'ah al-Jadīdah, 2009.
- Al-Azhary Sonbol, Amira. "Adoption in Islamic Society: A Historical Survey." In *Children in the Muslim Middle East* edited by Elizabeth Warnock Fernea, 45-67. Austin: University of Texas Press, 1995.
- Al-Qaradawi, Yusuf. *The Lawful and The Prohibited in Islam (al-halāl wa al-harām fī al-islām)*. New Delhi, India: Kitab Bhavan, 2007.
- Al-Rifai', Ashraf 'Abd al-'Alim. *al-Tabannī ad Duwalī wa Mabda' Iḥtirām Maṣlahah al-Ṭiflu Dirāsah Muqārinah*. Dār al-Fikr al-Jamā'i, 2011.
- Alami, Aida. "Moroccan Adoption Rules Leave Kids in Limbo." *Al-Jazeera*. July 26, 2013. <https://www.aljazeera.com/features/2013/7/26/moroccan-adoption-rules-leave-kids-in-limbo>
- Ali, Abu Noman Mohammad Atahar and Zafrin Andaleeb. "Concept and Practice of Laws Relating to Adoption in Different Religion and Modern Societies: Special Reference to the Law of Islam." *Journal of Islamic Law and Judiciary* 3&4, (2008): 27-40.
- Azhar, Alyaa. "The Joys of Adoption." *Free Malaysia Today*. January 25, 2014. <http://www.freemalaysiatoday.com/category/nation/2014/01/25/the-joys-of-adoption/>
- Bargach, Jamila. "A Study on Abandonment and the Practice of Kafala in Morocco for Amici Dei Bambini (www.aibi.it)." 2007. Accessed January, 27, 2012. http://www.childout.org/data/doc/doc_e7f9dc3540c6be0a3b79ac8d90e02b07.pdf
- Bargach, Jamila. *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham: Rowman & Littlefield Publishers, 2002. EPUB file.
- Bartholet, Elizabeth. "International Adoption: Thoughts on the Human Rights Issues." *Buffalo Human Rights Law Review* 13, (2007): 151-203. <https://digitalcommons.law.buffalo.edu/bhrlr/vol13/iss1/8>
- Buck, Trevor, Alisdair A. Gillespie, Lynne Ross and Sarah Sargent. *International Child Law*. 2nd ed. New York: Routledge, 2011.
- Carlson, Ricahard R. "The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption." *Tulsa Law Journal* 30, no. 2 (1994): 243-304.
- Chaudier, Julie. "Kafala au Maroc : Déblocage en vue pour les parents espagnols" [Kafala in Morocco: Release in Sight for Spanish Parents]. Accessed Jun 4, 2023. <http://www.yabiladi.com/articles/details/15568/kafala-maroc-deblocage-pour-parents.html>
- Committee on the Rights of the Child. "Summary Record of the 319th Meeting: Morocco." (CRC/C/SR.319.03). September 1996. Accessed Jun 4, 2023. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FSR.319&Lang=en, paras. 8, 12.

- Dillon, Sara. "Making Legal Regimes For Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption." *Boston University International Law Journal* 21, (2003): 179-258.
- Duncan, William. "Children's Right, Cultural Diversity and Private International Law." In *Children's Rights and Traditional Values*, edited by Gillian Douglas, and Leslie Sebba, 31-46. Aldershot; Brookfield, USA: Ashgate/Dartmouth, 1998.
- Hague Conference on Private International Law (HCCH), "Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010)." March 2011. Accessed Jun 4, 2023. http://www.hcch.net/upload/wop/adop2010_rpt_en.pdf
- Hague Conference on Private International Law (HCCH). "33. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Concluded 29 May 1993)." Accessed May 25, 2023. <https://assets.hcch.net/upload/conventions/txt33en.pdf>
- Hague Conference on Private international Law (HCCH). "34. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (Concluded 19 October 1996)." Accessed May 24, 2023, <http://www.hcch.net/upload/conventions/txt34en.pdf>
- Hague Conference on Private International Law (HCCH). "Conclusions and Recommendations of the Second Meeting of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (17-23 September 2005)." October 2005. Accessed Jun 4, 2023. http://www.hcch.net/upload/wop/concl33sc05_e.pdf
- Hague Conference on Private International Law (HCCH). "Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (17-23 September 2005)." August 2006. Accessed Jun 4, 2023. http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf
- Hague Conference on Private International Law (HCCH). "Status Table - 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption." Accessed May 25, 2023. <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>
- Hague Conference on Private international Law (HCCH). "Status Table - 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children." Accessed May 24, 2023, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- Hague Conference on Private international Law (HCCH). "Status Table - 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children." Accessed May 22, 2023, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- Hague Conference on Private International Law (HCCH). "The Implementation and Operation of The 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No. 1." 2008. Accessed May 13, 2023, <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf>
- Hoffman, Katherine E. "Morocco." In *Filiation and the Protection of Parentless Children* edited by Nadjma Yassari, Lena-Maria Möller and Marie-Claude Najm, 231-266. The Hague: T.M.C. Asser Press, 2019. https://doi.org/10.1007/978-94-6265-311-5_9

- Hunt, R.M. "Child Welfare." In *The Encyclopedia Americana* (International Edition) vol. 6, 463 - 464. Danbury, Conn: Grolier Incorporated, 1982.
- Ibrahim, Ahmad. *Family Law in Malaysia*. 3rd ed. Kuala Lumpur: Malayan Law Journal, 1997.
- Imad-ad-Dean, Ahmad. "The Islamic View of Adoption and Caring for Homeless Children." 1999. Accessed June 2, 2023. <http://www.minaret.org/adoption.htm>
- Ishaque, Shabnam. "Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity." *International Journal of Law, Policy and the Family* 22, no. 3 (2008): 393–420. 10.1093/lawfam/ebn009.
- Jabatan Pendaftaran Negara. "Adoption." Accessed May 20, 2023. <https://www.jpn.gov.my/en/faq/faq-adoption>
- Kafala.fr. "Circulaire N° 40 S/2 Ministère de la Justice et des Libertés" [Circular No. 40 S/2 Ministry of Justice and Freedoms]. Accessed Jun 4, 2023.
- Kafala.fr. "Texte de la Loi 15-01, Loi n°15-01 relative à la prise en charge (Kafala) des enfants abandonnés." [Text of Law 15-01, Law No. 15-01 concerning the care (Kafala) of abandoned children]. Accessed May 14, 2023. <https://www.kafala.fr/loi-de-la-kafala-judiciaire-en-france/>
- Kamariah, Mimi. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal, 1999.
- Kingdom of Morocco, Ministry of Justice and Freedom. "Procedures in Family Justice." October 2012. Accessed January 25, 2014. http://adala.justice.gov.ma/production/Guides_Manuels/fr/PlaquetteANG.pdf, at 32.
- Koumoutzis, Nikos. "The Islamic Prohibition of Adoption as Limitation of the Right to Respect of Family Life (article 8 ECHR) – Revisiting ECtHR Harroudj v France, no. 43631/09, 4 October 2012." *CUADERNOS DE DERECHO TRANSNACIONAL* 13, no. 1 (2021): 939-965. 10.20318/cdt.2021.6004
- Kutty, Faisal. "Islamic Law and Adoptions." (June 20, 2014). Forthcoming in Robert L. Ballard et al., *The Intercountry Adoption Debate: Dialogues Across Disciplines*. Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014. Valparaiso University Legal Studies Research Paper No. 14-5. <http://ssrn.com/abstract=2457066>.
- Mattson, Ingrid. "Adoption and Fostering." In *Encyclopedia of Women and Islamic Cultures: Family, Law and Politics*, edited by Suad Joseph and Afsaneh Najmabdi, 1-3. Leiden: Koninklijke Brill NV, 2005.
- Mohd Wahie, Nurzan. *Pengangkatan: Nikmat atau Derita bagi Kanak-kanak*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992.
- Mohd, Azizah. "Protection of Rights of Adopted Children in Relation to Duties of Adoptive Parents under the Law in Malaysia." *Adoption Quarterly* 14, no. 4 (2011): 229-245. 10.1080/10926755.2011.628261
- Mohd, Azizah. *Protection and Adoption of Abandoned Children in Malaysia. A Comparative Overview with Islamic Law*. Selangor: International Law Book Services, 2008.
- Parra-Aranguren, G. "Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption." 1994. Accessed May 25, 2023. <http://www.hcch.net/upload/expl33e.pdf>
- Pearl, David and Werner Menski. *Muslim Family Law*. 3rd ed. London: Sweet & Maxwell, 1998.
- Pfund, Peter H. "Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise." *Family Law Quarter* 28, no. 1 (1994): 53-88.
- Roux-Bouzidi, Marianne. "The Kafala, an Adoption that is not an Adoption (2)" (translated from French by Elizabeth Grech). 03 September 2012. Accessed Jun 4, 2023. <https://www.babelmed.net/en/article/71867-the-kafala-an-adoption-that-is-not-an-adoption-2>

- Roux-Bouzidi, Marianne. "The Kafala, an Adoption that is not an Adoption (1)" (translated from French by Elizabeth Grech). 3 September 2012. Accessed Jun 2, 2023, <https://www.babelmed.net/en/article/71866-the-kafala-an-adoption-that-is-not-an-adoption-1>;
- Rudy, Rudi Natamiharja, Jalil Alejandro Magaldi Sernac, and Ahmad Syofyan. "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia." *Hasanuddin Law Review* 8, no. 3 (2022): 299-309. DOI: <http://dx.doi.org/10.20956/halrev.v8i3.4229>
- Shapiro, Laura Matney. "Inferring a Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and Selected Scientific Literature." *Washington and Lee Journal of Civil Rights and Social Justice* 15, no. 1 (2008): 191-225.
- Shura, Robin Anne. "Intercountry Adoption: A Theoretical Analysis." PhD Thesis, Case Western Reserve University, January 2010. Accessed Jun 4, 2023. https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=case1253849386&disposition=inline
- Suhor, Shamsuddin. "Anak Angkat dan Pengangkatan." In *Undang-Undang Keluarga (Sivil)*, edited by author and Noor Aziah Mohd Awal. Kuala Lumpur: Dewan Bahasa and Pustaka, 2007.
- Sunnah.com. "Sahih al-Bukhari, Book 78 – Good Manners and Form (Al-Adab), Hadith 6005." Accessed June 2, 2023. <https://sunnah.com/bukhari:6005>
- The View From Fez. "Kafala Protest Gains Strength." Posted 11 November 2012. <http://riadzany.blogspot.com/2012/11/kafala-protest-gains-strength.html>
- Travel.State.Gov, U.S. Department of State. "Intercountry Adoption: Morocc.," Accessed Jun 4, 2023, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Morocco.html>
- Travel.State.Gov, U.S. Department of State. "Intercountry Adoption: Malaysia." Accessed Jun 4, 2023. <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Malaysia.html>
- UNICEF East Asia and Pacific Regional Office (EAPRO). "Alternative Care for Children without Primary Caregivers in Tsunami-Affected Countries Indonesia, Malaysia, Myanmar and Thailand." 2006. Accessed May 25, 2023. <https://bettercarenetwork.org/sites/default/files/attachments/Alternative%20Care%20for%20Children%20in%20Tsunami-Affected%20Countries%20.pdf>
- United Nations. "Convention on the Rights of the Child." G.A. res. 44/25 (U.N. Doc. A/44/49). 1989. Accessed May 25, 2023. <http://www2.ohchr.org/english/law/pdf/crc.pdf>
- Usang, Assim M and Julia Sloth-Nielson. "Islamic *Kafalah* as an Alternative Care Option for Children Deprived of a Family Environment." *African Human Right Law Journal* 14, no 2 (2014): 322-345.
- Van Loon, Hans. "Introductory Note on the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption." *Uniform Law Review* os-21, no 1 (1993): 76–81. 10.1093/ulr/os-21.1.76

Conflict of Interest Statement: The author(s) declares that the research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest.

Copyright: © HALREV. This is an open access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Hasanuddin Law Review (Hasanuddin Law Rev. – HALREV) is an open access and peer-reviewed journal published by Faculty of Law, Hasanuddin University, Indonesia.

