

Child Protection Through Intercountry Adoption in Malaysia: A Literature Review

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KEYWORDS:

Child protection
Intercountry adoption
Alternative care

CITATION:

Nadhilah A.Kadir & Azizah Mohd. (2022).
Child Protection Through Intercountry
Adoption in Malaysia: A Literature Review.
*Malaysian Journal of Social Sciences and
Humanities (MJSSH)*, 7(11), e001870.
<https://doi.org/10.47405/mjssh.v7i11.1870>

ABSTRACT

Intercountry adoption is recognised at the international level as a child protection measure, particularly during the Second World War. The introduction of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (Hague Convention 1993) has formally recognised intercountry adoption as one of the means of child care. However, in Malaysia, intercountry adoption is not formally practised and Malaysia is not a State party to the Hague Convention 1993. A review of intercountry adoption as a child protection measure in Malaysia from a legal perspective was conducted and four themes emerged, namely, (a) legal and policy framework; (b) legal issues; (c) sending and receiving states' perspectives; and (d) Malaysian perspective. Results indicate that there is a comprehensive literature on intercountry adoption from a legal perspective but small literature in the context of Malaysia since it is not formally recognised as a child protection measure. At present, intercountry adoption is permitted based on the requirement of residence in the adoption statutes.

Contribution/Originality: This study is one of very few studies which have investigated whether intercountry adoption can be an effective alternative means of child protection in providing permanent family care for children in need of care and protection and it also provides a new direction to child protection in Malaysia.

1. Introduction

Parental care is perceived as a natural setting for children to live, grow, and thrive. However, there are children without families who require substitute parental care. These children include orphans as well as abandoned, abused and neglected children. Since the birth parents are absent, disqualified, incapable or unwilling to look after these children, substitute or alternative care is vital in order to ensure that their well-being is upheld. Substitute care refers to a service that is designed for a replacement of natural

parental care, either partly or wholly (Hunt, 1982). According to article 20(3) of the [United Nations Convention on the Rights of the Child 1989 \(UNCRC\)](#), alternative care options may include adoption, foster placement, placement according to the principle of kafālah and placement at residential care. Kafālah in general refers to a placement of a child in a family setting without terminating the legal relationship between the biological parents and the child. It has been recognised in Muslim countries as a substitute for legal adoption since it is not permitted in Islam. Adoption, on the other hand, is further divided into two categories, namely, domestic and intercountry adoption.

Intercountry adoption is recognised by international law as a possible alternative care option for children without families or children deprived of a family environment. The main international legal instrument on intercountry adoption is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. Its Preamble significantly recognises the child's right to live in a family environment, in an atmosphere of happiness, love and understanding so that his or her personality can develop fully and harmoniously. In general, the Hague Convention 1993 was introduced to facilitate the practice of intercountry adoption between the Contracting States and to prevent any involvement of illicit activities in the process such as abduction, the sale or traffic in children. Intercountry adoption differs from domestic adoption in a way that a child is adopted across borders particularly when a suitable family is not available in the birth country. Thus, it is imperative to ensure that any arrangement for intercountry adoption is made in the best interests of the child. Although the UNCRC also provides several provisions for intercountry adoption, the Hague Convention 1993 seems to represent a significant development in international law relating to intercountry adoption. This is because it was designed to deal directly with the intercountry adoption practice by providing guidelines and safeguards. In addition, the Hague Convention 1993 seems to endorse intercountry adoption as a form of substitute permanent family care for children deprived of a family environment.

In Malaysia, however, there is no statutory provision concerning intercountry adoption. Besides that, Malaysia is not a state party to the Hague Convention 1993. Due to this fact, it seems that Malaysia does not directly practise intercountry adoption, especially as one of the alternative care options for children without families. Alternatively, children in need of care and protection are placed in the care of a fit and proper person, foster parents or in a place of safety through a court order under the Child Act 2001. Place of safety in general refers to institutional or residential care.

2. Literature Review

This article is a review of legal studies' contribution to the literature on the practice of intercountry adoption in studying its applicability in Malaysia. Intercountry adoption has been long in existence as a child protection measure. Seemingly, intercountry adoption remains an alternative means of providing children in need of care and protection with permanent family care, outside their birth countries. Notably, legal research continuously emphasises the development of international law and policy in establishing guidelines and safeguards in promoting good and ethical practices in the intercountry adoption sphere. The discussion on the literature on the practice of intercountry adoption in this article focuses on four main themes, namely the legal and policy framework, legal issues, sending and receiving states' perspectives as well as the Malaysian perspective.

2.1. Legal and Policy Framework

International law recognises intercountry adoption as one of a range of care options available for children without families. A substantial body of literature has examined the international legal instruments relating to the practice of intercountry adoption, especially the Hague Convention 1993. [Van Loon \(1993\)](#), [Parra-Aranguren \(1994\)](#), [Pfund \(1994\)](#), [Carlson \(1994\)](#) and [Duncan \(1995\)](#) analyse the provisions of the Hague Convention 1993 as a whole since it regulates the movement of a child from one country to another for adoption purpose. The legal instrument has primarily focused on the requirements and procedures for intercountry adoption in order to ensure that the interests of all including the child, the birth parents and the adoptive parents are protected. The authors note that the endorsement of intercountry adoption as a means to offer a permanent family for children without families after complying with all the prescribed minimum standards is the overarching significance of the Hague Convention 1993. The authors further point out that all the rules of the Hague Convention 1993 must be observed in order to prevent illicit activities associated with intercountry adoption such as the abduction, sale and trafficking of children from occurring. Nevertheless, there is still a lack of information in these works concerning certain issues such as the principle of best interests, child adoptability as well as race and ethnicity.

[Van Bueren \(1998\)](#) analyses international documents relating to children. The author generally compiles international legal instruments for a better understanding of international law regarding children. In regard to intercountry adoption, the discussion includes the provisions of the UNCRC and the Hague Convention 1993. Similarly, [Buck \(2005\)](#) writes on the need for international legal regulations on intercountry adoption, which includes the UNCRC and the Hague Convention 1993. The author provides a worthy explanation regarding the Hague Convention 1993 which aims to provide solutions in the intercountry adoption's 'difficult and complex area'. In addition to the analysis of the international legal instruments, the author provides a general overview of intercountry adoption in several countries including Romania, the Russian Federation, the People's Republic of China and the Republic of Korea. Furthermore, [Stark \(2005\)](#) examines the Hague Convention 1993 and the UNCRC along with the regional instruments on adoption, such as the European Convention, Inter-American Convention 1984 and African Charter 1990. The author notes that the regional instruments especially highlight the intercountry adoption issues in a particular region, though they are not as comprehensive and widely ratified as the Hague Convention 1993. These works have generally provided a good discussion on international legal instruments relating to intercountry adoption but lack in assessing the legal instruments in terms of their strengths and weaknesses.

[Sargent \(2009\)](#) examines the Hague Convention 1993 based on the principle of the best interests of the child in the context of intercountry adoption. She points out the relationship between the best interests of the child and the principle of subsidiarity as well as the principle of non-discrimination. She also provides a comparative law analysis of intercountry adoption in seven countries, namely the People's Republic of China, Guatemala, India, South Africa, South Korea, Sweden and the United States (U.S.) in their capacity either as the sending or receiving state, with the U.S. playing the dual role. Furthermore, the written work by [Buck et al. \(2011\)](#) provides a discussion regarding the practice of intercountry adoption based on the three main aims of the Hague Convention 1993. The explanation is also supported by *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (Guide to Good

Practice). The authors describe two key aspects of intercountry adoption, namely adoption based on profit motives and the role of institutional placement of a child. They also highlight contemporary issues in intercountry adoption including how such practice is portrayed and celebrity adoptions. These works, however, fail to address the consequences of failing to ratify the Hague Convention 1993.

The Hague Convention 1993 reflects the positive development in international law to formally recognise intercountry adoption as an alternative care option for homeless children. The legal researches also continue to focus on whether it can provide adequate protective measures for children adopted by foreigners. [Katz \(1995\)](#) reviews the problems with the Hague Convention 1993, which includes its failure in stipulating a concrete time frame for a child's placement and the variations in adoption requirements between the states. Besides, it may create bureaucratic difficulties as the states have to develop and implement rules for adoption. It also fails to ensure the efficiency of the system in addressing illicit activities, which would affect the interests of children. [Thompson \(2004\)](#) and [Briscoe \(2009\)](#) also criticise the Hague Convention 1993 for failing to provide uniform standards to prevent the abuses historically associated with intercountry adoption. They present an analysis of the weak parts of the Hague Convention 1993 that fall short in providing adequate protective measures for children. According to the authors, the Hague Convention 1993 is ambiguous with regard to definitions of certain key adoption terms and procedures, such as "adoption", "adoptable", "public policy" and "child's best interests". They also suggest amending the Hague Convention 1993 to remedy the vagueness and deficiencies so that every child involved in intercountry adoption can be adequately protected. Nevertheless, these writings fail to mention the omission of kafalah as a factor that contributes to the inadequacy of the Hague Convention 1993.

[McKinney \(2007\)](#) further examines the Hague Convention 1993 and the UNCRC in the light of their impacts on the debate of intercountry adoption, and the effectiveness of the implementation of the Hague Convention 1993 in some developing countries. The author points out that the sending states have to bear the burden of implementing the Hague Convention 1993 due to a lack of financial resources and political will. Besides, the strict implementation of adoption laws has affected children in need of care and protection because such laws have resulted in delays in their placements or no placement at all. In addition, the author comments that the Hague Convention 1993 implementation in Paraguay, Romania and the People's Republic of China, for instance, is more effective in preventing illicit activities than facilitating the placement of homeless children in adoptive families. This work, however, provides no further details about race and ethnicity issues as challenges in placing a child in adoptive homes abroad.

In analysing the evolution of international legal instruments regarding intercountry adoption, [Wechsler \(2010\)](#) highlights the need for intercountry adoption as an effective solution to the chronic problem of orphaned children around the world. The author also points out the problems with the current system of intercountry adoption. The problems include inefficiency, corruption, variations in adoption laws among nations and lack of enforcement of the current regulations. The author also mentions the progress and criticism of the Hague Convention 1993. The author stresses that the Hague Convention 1993 signifies an improvement in child protection through intercountry adoption but is still inadequate. The author proposes a solution to the problems as noted above by creating an international agency on intercountry adoption and an international Family

Court. This solution provides legal protection for parties involved in the intercountry adoption process especially for children, as they are vulnerable to becoming corruption victims as well as prospective adoptive parents and birth parents. Though the current intercountry adoption system is well examined along with the legal framework, there is still a lack of details of the effectiveness of international legal instruments, especially the Hague Convention 1993 to ameliorate the illicit activities associated with the practice of intercountry adoption.

[Rotabi and Gibbons \(2012\)](#) investigate whether the Hague Convention 1993 on intercountry adoption adequately protected orphaned, vulnerable children and their families. They present both the strengths and weaknesses of the Hague Convention 1993 based on a case study from the U.S. The authors highlight the problems in intercountry adoption such as difficulties in identifying a genuine adoptable child or orphan as well as the abuses of power and exploitation of vulnerable people. They also point out that there is no clear interpretation regarding the child's best interests principle. However, based on the recommendations in the Guide to Good Practice, they assert how each state may develop a new law on intercountry adoption taking into account their nation's unique context while complying with the basic requirements of the Hague Convention 1993. The authors further critique the inadequacy of the Hague Convention 1993 in protecting birth parents from misunderstanding and exploitation particularly in giving consent to an adoption. They have suggested for the sending or receiving state to establish regulations based on the Hague Convention 1993 and the domestic adoption models. The authors also demonstrate how significant the Hague Convention 1993 is as a starting point to prevent the abuses of power and exploitation of vulnerable people. However, this work does not mention the consequences of failing to ratify the Hague Convention 1993 by some states.

In addition, [Gonzalez \(2013\)](#) points out that the Hague Convention 1993 has not addressed its interaction with Islamic law. The author notes that legal adoption is not recognised in Islamic law and subsequently in most Muslim countries. It follows that there is a concern over the effectiveness of the Hague Convention 1993, especially in contracting states with large Muslim communities. The author focuses on the interaction of the Hague Convention 1993 with Islamic law and its possible ramifications. For instance, the author highlights that a child who is not formally adopted such as under the guardianship form of Islamic law would not meet the criteria of family environment and permanent parent-child relationship as prescribed by the Hague Convention 1993. Accordingly, they would not be entitled to enjoy the benefits of the Hague Convention 1993. Nevertheless, there is a lack of information in this work regarding possible solutions that can rectify the non-recognition of the Islamic law form of care under guardianship by the Hague Convention 1993.

Other than the Hague Convention 1993, [Duncan \(1998\)](#) also analyses 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 . The author notes that in the contemporary world, there is a growing occurrence of children who move or are removed to different countries away from their cultural and national heritage including due to intercountry adoption. Consideration is made on how to give proper respect to the original traditions and cultural values of the children when providing legal protection for them. The position of kafalah under Islamic law is also mentioned in light of the practice of intercountry adoption. The author also focuses on the omission of kafalah from the Hague Convention 1993. Alternatively, the Hague

Convention 1996 provides the inclusion of kafālah as a child protection measure although it does not have the same objectives as the Hague Convention 1993. In addition, the author believes over time, it may be necessary to consider extending the scope of the Hague Convention 1993 to kafālah and to all forms of long-term alternative care involving interstate movement of children. However, there are no details in this work about the difficulties of intercountry kafālah when it is excluded from the scope of the Hague Convention 1993.

2.2. Legal Issues

This section reviews the literature on legal and complicated issues in the intercountry adoption sphere. [Stark \(2005\)](#) and [Bartholet \(1996\)](#) point out that intercountry adoption raises legal issues with regard to the national laws on adoption, immigration and citizenship. [Stark \(2005\)](#) discusses the legal issues in intercountry adoption, such as the variations in national laws on the disclosure of the birth parents' identities as well as immigration and citizenship laws. On the other hand, [Bartholet \(1996\)](#) mentions that a foreign country that allows intercountry adoption will apply its law in determining the availability of children to be adopted. The author also states that most of the receiving states make little effort in adjusting their laws on adoption, immigration and citizenship to accommodate the realities of intercountry adoption. Accordingly, such laws create unnecessary hurdles in the foreign adoption process. She also suggests that there is a need for both sending and receiving states to agree on a legal framework for intercountry adoption in order to facilitate such placement. The author further addresses the controversy and other issues claimed by the critics of intercountry adoption such as the risk of abuse and exploitation as well as loss of roots.

[Bartholet \(2007a\)](#) further argues that the domestic law of sending and receiving states as well as international law, such as the UNCRC and the Hague Convention 1993 tend to generally work as a restriction rather than facilitation in the intercountry adoption process. The author notes that the state plays an important role in regulating intercountry adoption based on such legislation which usually portrays the best interests of the child as its guidance. The author also claims that the UNCRC allows countries to exclude intercountry adoption as an option with no restraint, which limits children in need to options such as foster care and institutional care only. According to the author even though intercountry adoption is allowed, it is only considered the last choice for a child's placement. She believes that policymakers should involve greatly in state regulation by giving more freedom for birth and prospective adoptive parents as private adults' parties to involve in deciding on what is best for them and the child. She also asserts that a new type of positive regulation in this area should be developed by policymakers in facilitating rather than restrict the practice of intercountry adoption. Similar to her previous works, she addresses issues at the heart of the opposition to intercountry adoption, such as wrong ideas about the role of the state, and how children are considered as belonging to their birth country as well as adoption abuse. Despite a good discussion regarding complicated issues in the intercountry adoption sphere, these works, however, lack information regarding solutions to effectively implement the Hague Convention 1993, especially in developing countries.

Intercountry adoption is often associated with abuses and illicit activities. [Herrmann \(2010\)](#), [Meier and Zhang \(2010\)](#), [Kapstein \(2003\)](#) and [Smolin \(2004; 2005\)](#), (investigate intercountry adoption on the issues of child trafficking and baby buying or selling. The discussion on the issues is made within the perspective of international law based on

several international legal documents, such as the UNCRC, the Hague Convention 1993 and the Prohibited Sale of a Child under the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (OP CRC). According to [Smolin \(2004; 2005\)](#), intercountry adoption is constituted as illicit child selling and child trafficking if there is an intermediary that induces consent to the adoption against the standards of the Hague Convention 1993. It can also be considered child trafficking if it involves remuneration in the transfer of a child. The author criticises the role of money in the intercountry adoption process which often contributes to abuses. Accordingly, the author concludes that although not all intercountry adoptions are unethical, the system as a whole is corrupt and fails legally since there is no efficient mechanism to prevent intercountry adoptions from deteriorating into illicit child selling or trafficking.

Similarly, [Smolin \(2006; 2007\)](#) criticise intercountry adoption as child laundering. A child is 'laundered' when he or she is taken illegally from the birth families through child buying or kidnapping for adoption as 'orphans' or 'adoptees'. The author claims that the current system of intercountry adoption incentives and legitimates baby buying and child stealing through financial incentives and legal processes. It follows that the laundering of purchased or stolen children through the adoption system becomes a money-making machine. The author also investigates child laundering in several countries, such as Cambodia and India. The author proposes reforms for intercountry adoption in reducing this incident. Intercountry adoption as child trafficking and baby selling is also associated with improper financial gain. [Wilken \(1995\)](#) studies the situation where adoptive parents have to pay large money to intermediaries or independent agents who procure children for adoption. Intermediaries may contact hospitals and orphanages or approach a desperate birth mother directly to relinquish their child for adoption in exchange for a small payment. Though these works have focused on abuses related to intercountry adoption, there are not enough particulars on how to ameliorate these problems.

In addition, intercountry adoption is often criticised for depriving the child of his or her cultural identity and national heritage since the child is moved from his or her birth country to the adoptive parents' country of residence for adoption. Though the critics of intercountry adoption have been focusing on the negative sides of intercountry adoption, there are no further details on other alternatives to intercountry adoption to ensure a child in need is placed in a permanent family setting. [Freundlich and Lieberthal \(2000\)](#), [Hollingsworth \(2008\)](#) and [McGinnis et al. \(2009\)](#) note the significance of cultural identity to the adopted child. The authors point out the issues of racial discrimination and ethnic identification as among the matters that have to be addressed by adoptive parents when they adopt a child through intercountry adoption. Though the issues of cultural identity and national heritage are often associated with the dissuasion of intercountry adoption as a form of child care, [Bartholet \(1996; 2010\)](#), [Dillon \(2003\)](#) and [Worthington \(2009\)](#) argue that the child's right to cultural identity does not trump the child's right to live in a family. This is because, without intercountry adoption, homeless children would be left to live in institutional care and even on the street where it would be hard for them to truly enjoy their culture in such a situation. They also emphasise on the negative effects of institutional care on the development of children who have been placed within the institutions for a long period. In retaining the ties between the child and his or her birth country, [Lee et al. \(2006\)](#) suggest that adoptive parents have to engage in cultural socialisation. For instance, they may participate in at least one cultural activity and address the issue of racism with their adopted children. The authors further

note that cultural socialisation may help form positive and healthy ethnic identities and mental health of intercountry adoptees. Nevertheless, these works still lack particulars as to how much exposures are necessary for the child to know his or her roots.

Despite the claims made by the critics of intercountry adoption, [Bartholet \(1996\)](#), [Strong \(1995\)](#), [Liu \(1994\)](#), [Worthington \(2009\)](#), [Wechsler \(2010\)](#), [van Ijzendoorn and Bakermans-Kranenburg \(2022\)](#) argue that intercountry adoption best serves the child's interests and most basic human rights. They stress the child's right to live in a family environment and the negative impact of institutional care on child development. [Bartholet \(1996\)](#) notes that the foundation of a child's human right to grow in a family can be found in international law through the provisions of the UNCRC. Furthermore, children have the right to genuine family care based on the core human rights principles as having been recognised by the courts in India, Malawi and South Africa involving celebrity adoptions. She points out that adoption abuse or baby buying and the concept of nationalism do not justify limiting intercountry adoption. She further examines the subsidiarity provisions in the UNCRC and the Hague Convention 1993, which generally prefer in-country placements such as foster care and institutional care over intercountry adoption. She points out that such provisions are inconsistent with the core principles based on the child's best interests and the right of the child to grow up in a family, which generally have been endorsed in the same treaties and elsewhere in the human rights law. It follows that these core principles trump the subsidiarity provisions. In this regard, it is also interesting to note that the Hague Convention 1993 seems to conflict with the UNCRC concerning the hierarchy of alternative care options for a child's placement. Interestingly, many authors including [Pfund \(1994\); 1997](#), [Carlson \(1994\)](#), [Bartholet \(2007a; 2007b\)](#) and [McKinney \(2007\)](#) have concluded that intercountry adoption is to be preferred over foster care and institutional care based on the Hague Convention 1993, which aims to provide permanent family care for children without families. The UNCRC, on the other hand, places intercountry adoption at the lowest of the hierarchy in preferring in-country placement, which may also include institutional care. A memorandum presented by the [Center for Adoption Policy Studies \(n.d.\)](#) addresses this issue to resolve the conflicts between the UNCRC and the Hague Convention 1993. The author claims that intercountry adoption was placed lower in the hierarchy under the UNCRC as there was no regulation provided, which has been addressed later by the Hague Convention 1993. Furthermore, although in-country alternatives are favoured, neither Convention called for the creation of such alternatives if they currently do not exist.

[UNICEF \(n.d.\)](#) further states that institutional care should only be considered as a last resort based on temporary care for a child's placement. Thus, intercountry adoption may be considered as a range of alternative care options which may be available for children whom a permanent family cannot be found for them in their birth countries. Based on the UNICEF's position, [Smolin \(2004\)](#) and [Dillon \(2003\)](#) have specifically deliberated on the legal confusion surrounding the relationship between the UNCRC and the Hague Convention 1993 regarding the position of intercountry adoption as noted above. The issue of the preference for in-country placement such as foster care and institutional care over intercountry adoption has been discussed. [Dillon \(2003\)](#) notes that neither the instrument indicates whether a country can validly preclude intercountry adoption as optional care when the numbers are high for children in institutions and children who are impossible to be reunited with birth families or to be placed in domestic adoption. She also highlights that the UNCRC lacks clarity on the right of a child to a home and family, particularly when such a right is only available through intercountry adoption.

The author also addresses the difference between genuine child trafficking and profiteering from intercountry adoption. In addition, investigations have been made into the problems of the intercountry adoption system in several countries. She views intercountry adoption as a method to provide substitute families for children in need by assuming that better efforts can be made for eliminating the abuses and corruption in some of its systems. On the other hand, [Smolin \(2004\)](#) asserts that the position of intercountry adoption over foster care is still ambiguous since it depends on whether foster care may provide permanent care for children. These previous works on the relationship between the Hague Convention 1993 and the UNCRC seem to be short on methods of harmonising between the two international legal instruments, particularly on the position of intercountry adoption as appropriate care for children without families.

2.3. Sending and Receiving States' Perspectives

Intercountry adoption law is regulated in some countries either in their capacity as the sending or receiving state, or both. This section reviews the literature from the perspectives of receiving country Australia and sending country, the Philippines as well as Singapore as both receiving and sending countries. In addition, the literature on the practice of intercountry adoption in Muslim countries such as Morocco and Jordan will also be included.

In Australia, studies by [Monahan and Young \(2006\)](#) and [Dickey \(2007\)](#) generally focus on the discussion of family law. Notably, the legislative framework for family issues such as marriage, divorce and custody of a child has been well explained by the authors. Unfortunately, they provide inadequate information regarding child law, particularly on intercountry adoption in Australia. The following studies, however, have successfully investigated the law and practice of intercountry adoption in Australia as the receiving state. For instance, the statutory framework and adoption process in Australia have been examined by [O'Halloran \(2006\)](#). The author has described intercountry adoption as emerging trends in adoption practice and each state and territory has its legal framework for intercountry adoption. There is, however, a lack of details on the procedures for intercountry adoption.

[Australia, Department of Social Services \(DSS\) \(2020\)](#) provides information on intercountry adoption in Australia as it acts and carries out the duties of the Australian Central Authority under the Hague Convention 1993. Besides that, each state and territory in Australia has a Central Authority. It follows that these central authorities share the responsibility for intercountry adoption. As the Australian Central Authority, the department has primary responsibility for developing and maintaining intercountry adoption arrangements with other countries. At present, Australians can apply to their state or territory Central Authority to adopt from the 13 partner countries such as Bulgaria, Chile, People's Republic of China, Colombia, Hong Kong, India, Latvia, Poland, South Africa, South Korea, Sri Lanka, Taiwan and Thailand. The website further provides intercountry adoption information and support services, legislation, country programs, key policy documents and research. While sharing this responsibility with the state and territory authorities, the department is not involved in processing the individual adoption application. This is because the responsibility for processing the adoption applications is assumed by the Central Authority in each state and territory. For instance, the Central Authority in the State of Victoria is the [Department of Justice and Community and Safety \(2022\)](#) which is responsible for providing information on

intercountry adoption in the State of Victoria, including legislative and policy frameworks such as the Adoption Act 1984, particularly on the eligibility requirements of adoptive families. The department will assist the adoption process in Victoria until the final stage by working closely with Intercountry Adoption Australia. The role of the department is vital since the arrangement of intercountry adoption is authorised only through the Australian government. It follows that other arrangements, such as expatriate adoptions are not supported by the government. Similarly, the [State Government of Victoria \(2005\)](#) provides information regarding the intercountry adoption system in Australia and Victoria including its history as well as legislative and policy framework. It points out several types of arrangements of placement of children from Non-Hague Convention countries, from Hague Convention countries with full adoption order, from Hague Convention countries without full adoption order, from the People's Republic of China and where recognition of foreign adoption is sought. It follows that placement of children from Hague Convention countries with full adoption order from the overseas country and under the bilateral arrangement such as adoption from the People's Republic of China will be automatically recognised in Australia. Furthermore, [Intercountry Adoption Australia \(n.d.\)](#) provides a guide to Australians who wish to adopt from overseas. It assists in the education process until the process of bringing the child home including matters regarding passport, citizenship and birth certificate. It is necessary for children adopted outside of the Australian adoption system to obtain a permanent visa before they are can apply for Australian citizenship. In addition, Australian citizens who have lived outside Australia for an extended period of time and have adopted a child through the legal system of another country may be able to apply for an adoption visa if they meet the visa's expatriate provisions. The Adoption visa basically allows children adopted outside Australia to live in Australia with their adoptive parents. Additionally, the [Australian Institute of Health and Welfare \(AIHW\) \(2021\)](#) provides a variety of reports and statistics on adoption in Australia including intercountry adoption. For instance, in 2020-21, there were 42 intercountry adoptions from mostly Asian countries, 6% from Taiwan, 29% from South Korea, and 14% from Thailand. Despite details on the intercountry adoption system in Australia, these studies do not disclose enough information on other adoptions which have not been arranged through the Australian government such as expatriate adoption.

Alternatively, [Lindley \(2010\)](#) investigates the practice of intercountry adoption from the Philippines to the U.S. Four institutions have been examined by the author relating to intercountry adoption in the Philippines as the sending state, namely state, private child care agencies, public child care agencies and informal institutional practices. The legislation on intercountry adoption in the Philippines has also been included in the discussion including the Intercountry Adoption Act 1995 and the Hague Convention 1993. In the Philippines, the Intercountry Adoption Board (ICAB) acts as the Central Authority. It follows that the ICAB plays a key role in the intercountry adoption system in the Philippines and is responsible for supervising intercountry adoption applications. In addition, [The Philippine Institute for Development Studies \(PIDS\) and UNICEF \(2010\)](#) point out that the enacted laws in the Philippines are to protect children against violence, abuse, neglect and exploitation. In this regard, the Intercountry Adoption Act 1995 declares that it is the policy of the state to provide a family that can provide love and care as well as opportunities for growth and development for every neglected and abandoned child. The official website of ICAB or now known as the [Republic of the Philippines, National Authority for Child Care \(n.d\)](#) also provides information regarding the relevant legislation and procedures for intercountry adoption in the Philippines. It follows that Republic Act No. 8043 and the Implementing Rules and Regulations (IRR)

on inter-country adoption provide the legal basis for the implementation of intercountry adoption programme in the Philippines. ICAB is the policy-making authority and it establishes guidelines on how to select and match prospective adoptive parents to a child and further determines if a child is suitable for adoption. ICAB is also responsible for making final decisions regarding adoption applications and matching proposals. Notably, the ICAB has partnerships with several countries, such as Australia and the U.S. Although studies have been conducted regarding the intercountry adoption system in the Philippines, the issues of abuses and cultural heritage are still insufficiently explored.

In Singapore, matters regarding adoption have also been explored in the literature on family law. For instance, [Khoo \(1984\)](#) specifically studies the parent-child law in Singapore including the historical background of adoption and the Adoption of Children Act 1970. The author notes that there is no automatic citizenship right conferred to the adopted child. Also, the adoption statute does not provide the recognition of a foreign adoption order. Accordingly, the adopted child might have problems later on in inheriting the adoptive parent's property in Singapore. This work provides a good discussion of earlier adoption law in Singapore. Unfortunately, the particulars concerning the intercountry adoption process are still inadequate. Seemingly, the process is not clearly presented in the previous literature due to the reason that Singapore does not have specific legislation on intercountry adoption.

Nevertheless, recent research has been conducted on the latest development of adoption law in Singapore including intercountry adoption. Based on the Adoption of Children Act in Singapore, [Leong \(2013\)](#) examines the adoption process and requirements as well as the adoption order and its effect. The author also notes that many adoptions involve foreign children who are brought into Singapore from foreign countries for adoption purposes. The adoption process of a foreign adopted child has been provided in brief, especially about the home study report and the Dependant's Pass requirements. Furthermore, the [Singaporean Ministry of Social and Family Development \(2022\) \(MSF\)](#) provides guidelines on the intercountry adoption process in Singapore as well as from the People's Republic of China and overseas. For instance, the Dependant's Pass is required for Singaporean citizens who wish to adopt a child from another country. The pass allows the adopted child to remain in Singapore until the adoption is finalised. Singapore does not have specific legislation on intercountry adoption and is not a state party to the Hague Convention 1993. On 9th May 2022, the Singaporean parliament passed the new Adoption of Children Act 2022 which will take effect in 2023 to better protect the welfare of children. Among the changes are to find a good home for every child. It points out that by default, only Singaporeans, permanent residents and foreigners can adopt in Singapore with their Singaporean spouse. Other changes include balancing the interest of the birth parents and the child as well as putting in place a sound regulatory system for the adoption process. It follows that all adoption agencies must publish fees for all their services. Although the intercountry adoption process in Singapore is generally provided by the MSF in the capacity of sending and receiving states, the literature on intercountry adoption from a legal perspective seems lacking.

Since legal adoption is not recognised in Islam, legislative frameworks for the kafālah system in Muslim countries have been developed. Intercountry kafālah or kafālah overseas has been practised in certain Muslim countries including Morocco and Jordan. These countries are considered as the sending states in intercountry adoption but they are not state parties to the Hague Convention 1993. It follows that they have their own

law and practice with regard to the placement of a child in the care of a Muslim foreign couple. [Bargach \(2002\)](#) examines the kafālah system in Morocco, including the kafālah law, a brief history of the kafālah law in Morocco as well as the legal procedures and problems. [Bargach \(2007\)](#) points out that Morocco allows intercountry kafālah, though the practice is quite complicated and hard to accomplish. Since kafālah does not terminate the parent-child relationship between the child and his or her birth parents, the judge of minors who is responsible for handling kafālah applications in Morocco remains as the legal guardian of a kafālah child. [Kingdom of Morocco Ministry of Justice and Freedom \(2012\)](#) provides, in brief, the kafālah system in Morocco and refers to the judge as “judge in charge of minor’s affairs.” In addition, the [U.S. Department of State \(2021\)](#) provides the processes and requirements for adopting a child from Morocco under the Ministry of Justice to the U.S. The author notes that the prospective adoptive parents must be Muslims and the kafālah custody must be obtained from a Moroccan court before the child can be adopted and brought to the U.S. The statistics of adoption from Morocco to the U.S recorded 17 cases in 2020; 30 cases in 2019 and 18 cases in 2018. Nevertheless, these past works on intercountry kafālah in Morocco lack particulars relating to the strengths and weaknesses of the kafālah law in protecting children taken into kafālah by foreign adoptive parents since Morocco is not a state party to the Hague Convention 1993.

[Mohd and A.Kadir \(2014\)](#) observe the practice of foster care or al-iḥtīdān in Jordan including intercountry placement of children. They note that there are two types of foster care, namely institutional and individual. Institutional foster care means that children in need of care and protection are looked after in institutions by caregivers. On the other hand, individual foster care means that the children are cared for by foster parents in a family setting. They further point out that the Ministry of Social Department is generally responsible for the intercountry placement of a child through individual iḥtīdān. Additionally, the [Committee on the Rights of the Child \(2006\)](#) of Jordan’s Third Periodic Report states that the foster care programme in Jordan was first introduced in 1998. Since adoption is not legal in Jordan, foster care allows a child in need of care and protection to be looked after by a substitute family without terminating the child’s biological parentage. These works, however, did not explain the law in detail, especially regarding the child’s citizenship and manner to travel to the receiving state. Alternatively, the [U.S. Department of State \(2020\)](#) provides some information on how to adopt a child from Jordan to the U.S and its requirements. Similar to Morocco, Jordan is not a state party to the Hague Convention 1993. Since Jordanian law does not recognise full adoption, Americans who wish to adopt Jordanian children must obtain guardianship from the Ministry of Social Development and consequently adopt the child in the U.S. This guardianship is also known as Custodianship and Alternative Families which is in line with the Jordanian Juvenile Law Number 24 of 1968 and amendments. The statistics of adoption from Jordan to the U.S recorded 0 case in 2020; 1 case in 2019 and 0 case in 2018. Though this work discusses the process of intercountry kafālah from Jordan, it is specifically designed for American citizens only. Thus, the process may not cover nationals from other countries.

2.4. Malaysian Perspective

There is no statutory provision for intercountry adoption in Malaysia. There are only a few works in the literature on adoption that examine intercountry adoption as an alternative means of child protection in Malaysia. In general, previous works have highlighted the law and practice of domestic or local adoption when discussing family

law. Notably, [Ibrahim \(1997; 1984\)](#) discusses some matters pertaining to family law in Malaysia, such as marriage, divorce and children. As for adoption, the author examines the adoption statutes in West Malaysia as well as Sabah and Sarawak. Similarly, [Majid \(1999\)](#) analyses the practice of adoption in light of family law in Malaysia. She discusses customary or de facto adoption in addition to statutory adoption. Examination of the statutes of adoption in Malaysia has been well examined by both authors together with the reported cases on adoption matters. However, these writings seem to be lacking regarding the adoption of a Malaysian child by a foreigner, and the adoption of a foreign child by a Malaysian citizen.

There have been many studies focusing on family law in Malaysia for non-Muslims. For instance, a great number of authors including [Ibrahim et al. \(2014\)](#), [M.G Pillai \(2009; 2011\)](#) and [Abdullah \(2006\)](#) have successfully examined the adoption law for non-Muslims in West Malaysia based on the Adoption Act 1952 (Act 257) (AA). The authors note that there are no statutory provisions regarding intercountry adoption in Malaysia and the law is lacking in addressing the issue. [Abdullah \(2006\)](#) points out that the legislation in Malaysia does not prohibit Malaysian citizens to adopt children from overseas. Similarly, foreign nationals are allowed to adopt children in Malaysia provided that they fulfil the requirement of ordinarily resident. [M.G Pillai \(2009; 2011\)](#), on the other hand, examines the practice of intercountry adoption by referring to several Indian cases and the Hague Convention 1993. In submitting reform proposals, the author states that there are a few loopholes in the AA and a provision for intercountry adoption with proper safeguards is needed. The author also submits for Malaysia to ratify the Hague Convention 1993.

Alternatively, many studies have been conducted on Islamic family law in Malaysia including adoption. For instance, the written work by [Mohd Zin et al. \(2016\)](#) and [Mohd \(2011\)](#) mention that Islam does not recognise legal adoption but it encourages Muslims to look after children without families, such as orphans and foundlings through *kafālah*. The authors point out that *kafālah* is a form of adoption that is allowed by Islam since it preserves the biological parentage of a child. The discussion also includes the adoption of a Muslim child in Malaysia under the Registration of Adoptions Act 1952 (Act 253)(RAA) and the legal effect of adoption in Islam in terms of lineage, inheritance, consanguinity (*mahram*) and marriage prohibition. Unfortunately, the literature on adoption in Malaysia is still insufficient, especially regarding the applicability of intercountry adoption in Malaysia.

[UNICEF East Asia and Pacific Regional Office \(EAPRO\) \(2006\)](#) investigates alternative care for children without primary caregivers in Tsunami-affected countries including Malaysia. The author points out several alternative care options in Malaysia such as adoption, foster care, guardianship (for Muslim orphans), kinship care and residential care. The author found that residential care is the major child protection service for children without families in Malaysia. The author further states that intercountry adoption is not permitted in Malaysia and it recommends that Malaysia should ratify the Hague Convention 1993. The same recommendation was also made by the [Committee on the Rights of the Child \(2007\)](#). The Committee provides several other concluding observations for Malaysia. For instance, it acknowledged that Malaysia has a traditional form of adoption of non-Muslim children and an Islamic form of foster care of Muslim children. Furthermore, the Committee recommends that Malaysia should review the legislative framework for domestic adoption by introducing a national uniform adoption law to regulate the adoption of non-Muslim children. Significantly, [Mohd \(2007; 2008\)](#)

and [A.Kadir \(2011\)](#) point out that adoption and foster care are among the means to protect children in need of care and protection including abandoned children in Malaysia. [Mohd \(2007; 2008\)](#) further notes that although there is no reservation made by Malaysia on the provision of intercountry adoption in the UNCRC, the practice has not been employed in Malaysia yet. Similarly, these past works, do not provide particulars regarding the practice of intercountry adoption as a child protection measure since it is not formally regulated in Malaysia.

[Mohd Wahid \(1992\)](#) reviews adoption as one of the means to protect children in need of care and protection. She highlights the role of the Social Welfare Department in adoption matters in Malaysia. She also notes that Malaysia does not formally practise intercountry adoption but several cases of such adoption had occurred in Malaysia. History showed that some foreigners had adopted a child from a neighbouring country and completed the adoption in Malaysia. She points out that foreigners must be residing in Malaysia for at least 2 years before they are allowed to apply to the Social Welfare Department for adopting a child. Moreover, in discussing adoption in Malaysia, [Suhor \(2008\)](#) provides some information pertaining to adoption by foreigners in Malaysia. He points out the requirement of ordinarily resident and the case of *TPC v. ABU* [1983] 2 MLJ 79, in showing the applicability of intercountry adoption in Malaysia to a certain extent. It follows that the procedures for adoption as prescribed by the AA and the RAA are applicable to the adoption by foreigners residing in Malaysia. Unfortunately, these writings provide inadequate information on how foreign adoptive parents may bring the child back to their home country after applying for adoption under the AA or the RAA.

[A.Kadir \(2018\)](#) investigates the practice of intercountry adoption in Malaysia. The author points out that there is no specific legislation regarding intercountry adoption in Malaysia but it is permitted based on the requirement of residence under the AA and the RAA. Significantly, the author notes that the adoption of a child from Sabah and Sarawak is also restricted since the states have their own adoption statutes. The study has also explored legal challenges in implementing intercountry adoption as a child protection measure in Malaysia. However, this study lacks detail regarding the viability of the ratification of the Hague Convention 1993 if Malaysia were to formally practise intercountry adoption. In addition, some information on adoptions from Malaysia to the U.S. is provided by the [U.S. Department of State \(n.d.\)](#). It states that Malaysia is not a state party to the Hague Convention 1993, and adoption of a non-relative is generally difficult and involves time-consuming procedures. It notes that during the adoption process, the prospective adoptive parents may have to remain in Malaysia for 2 years or more. The adoption processes and requirements have been provided with regard to the adoption of Muslim and non-Muslim children according to the RAA and the AA, respectively. The author states that prospective adoptive parents who are non-Muslims may not adopt Muslim children. The child must also meet all the requirements set by Malaysia before he or she is eligible to be adopted. Furthermore, the adoptive parents must apply for the child's passport and meet the U.S. immigration requirements before bringing him or her to the U.S. The statistics of adoption from Malaysia to the U.S recorded 0 case in 2020; 1 case in 2019 and 1 case in 2018. This information, however, applies to American citizens who wish to adopt children from Malaysia only and does not cover citizens from other countries.

3. Conclusion

Since there are limited resources on intercountry adoption in Malaysia and a lack of detail from a legal perspective, further research needs to be done on intercountry adoption in Malaysia. Research pertaining to intercountry adoption in other states such as Australia, the Philippines, Singapore and Muslim countries, namely Moroccan and Jordan can be a good comparative study as well as a good example for Malaysia to consider intercountry adoption as a means of child protection measure either in the capacity as the sending or receiving state. However, regulations need to be put in place if Malaysia were to formally practise intercountry adoption since the existing legal provisions in the adoption statutes seem inadequate to better protect the welfare of children as Malaysia does not ratify the Hague Convention 1993.

Acknowledgement

Part of this article was extracted from a doctoral thesis submitted to International Islamic University Malaysia (IIUM), Kuala Lumpur.

Funding

This study received no funding.

Conflict of Interests

The authors reported no conflicts of interest for this work and declare that there is no potential conflict of interest with respect to the research, authorship, or publication of this article.

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