

PARENTAL CHILD ABDUCTION ACROSS BORDERS:
AN ANALYSIS OF THE INTERNATIONAL, ISLAMIC
AND MALAYSIAN LEGAL FRAMEWORK

BY

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ABSTRACT

Globalisation has given rise to diversity in many facets of life, including cross-cultural marriages. As much it sounds appealing, there are many implications and negative consequences of these types of marriages. One of which is Parental Child Abduction. It usually takes place when the marital relationship does not sustain and results in divorce. Apart from deciding who will get what and how much, in terms of wealth, one crucial decision is the custody of children. In many instances, parents do not want to take laws into their own hands, therefore, abduct their own children. Parental Child Abduction has become a global phenomenon now. Parental Child Abduction is not new to Malaysia as it has gained importance after the highly publicised case of *Raja Bahrin*. By looking at all these challenges, the international community unanimously approved, adopted, and signed the Hague Convention on Civil Aspects of International Child Abduction, 1980. The 1980 Child Abduction Convention is an attempt to address the problem by using an automatic return mechanism of the abducted child to his country of habitual residence and for the courts of that State to adjudicate on the issue of custody, but due to conflicting substantive and procedural laws in various countries, it is difficult to resolve the issue. This Convention works in countries who are a member to it and like many other Muslim countries, Malaysia is also not a member to it. The present research examined and made a thorough analysis of the dual legal system of Malaysia, namely both the civil law and Islamic law to know whether Malaysia has adequate legal and procedural laws to address the inevitable issues and implications of Parental Child Abduction within and across the border of Malaysia. The crux of the thesis lies in The Hague Abduction Convention on Civil Aspects of International Child Abduction, 1980, which is critically explained with its compatibility with Islamic law. This is followed by proposing substantive reforms to cope with domestic and cross border Parental Child Abduction in Malaysia. Data were collected from one hundred and fifty (150) legislators and related authorities of various NGOs on issues related to Parental Child Abduction. The collected data was then analysed by using qualitative and quantitative legal research methods. The findings of this research reveal that there are legitimate concerns on the part of stakeholders and on the fact that the opinion on the ground is against the accession. The findings of the present research proposed to strengthen section 52 of the Child Act, to amend section 361 of the Penal Code, to employ more *Sulh* officers, to establish an Arbitration Tribunal or *tahkim* and to establish a mediation centre. These findings will have invaluable implications for policymakers and related stakeholders.

خلاصة البحث

لقد أدت العولمة إلى تنوع ملحوظ في العديد من جوانب الحياة، بما في ذلك الزواج من ثقافات مختلفة، ويقدر ما يبدو أن الأمر يبدو مباشراً، إلا أن هناك أيضاً العديد من الآثار والنتائج السلبية لهذه الزيجات. ومن هذه السلبيات خطف أحد الوالدين لأبنائهما. تحصل مثل هذه الحالات عادة عندما لا تكون العلاقة الزوجية مستقرة وبالتالي يكون الطلاق هو الخيار. وبصرف النظر عن تحديد من سيحصل على كم؛ من حيث الثروة، فإن هناك قرار حاسم يتمثل في رعاية الأطفال. وفي كثير من الحالات، لا يرغب الآباء في أخذ القوانين بأيديهم، وبالتالي، يقومون بخطف أطفالهم. لقد أصبح اختطاف الوالدين لأطفالهما ظاهرة عالمية مقلقة الآن. لقد جاءت اتفاقية اختطاف الأطفال في عام 1980 كمحاولة لمعالجة المشكلة عن طريق وضع آلية عودة سليمة للطفل المختطف إلى بلده الذي يقيم فيه بشكل اعتيادي، إلا أنه وبسبب تعارض القوانين الموضوعة والقوانين الإجرائية من بلد إلى آخر؛ أصبحت الأمور أكثر تعقيداً وأصبح من الصعب حل هذه المشكلة، حالياً، يُعمل في هذه الإتفاقية في الدول الأعضاء، وكما أن العديد من الدول الإسلامية ليست عضواً فيها، فإن ماليزيا أيضاً ليست عضواً. ولذلك، فإن هذه الدراسة تقوم على اختبار تحليل شامل على النظام المزدوج في القانون الماليزي، وهذه الإزدواجية تتمثل في القانون المدني والقانون الإسلامي. تقوم الدراسة على تقييم هاذين القانونين على حد سواء وذلك لمعرفة ما إذا كانت ماليزيا لديها إمكانيات قانونية وإجرائية لتوفير مثل هذا النوع من الحماية للأطفال ولمعالجة مثل هذه القضايا والآثار المترتبة على ذلك ضمن وخارج حدودها. أيضاً، توفر هذه الدراسة تحليلاً نقدياً مستفيضاً حول هذه الحالات من منظور إجتماعي وقانوني، يلي ذلك تحليل مفصل من منظور إسلامي. كذلك يكمن جوهر هذه الدراسة من خلال النظر في اتفاقية لاهاي للإختطاف 1980، والمتعلقة بالجوانب المدنية لإختطاف الأطفال على الصعيد الدولي، والتي تم التطرق إلى جوانبها بإستفاضة ومقارنتها مع جوانب الشريعة الإسلامية بما يتعلق بتلك القضايا. تقدم هذه الدراسة أيضاً إصلاحات جوهرية للتعامل مع اختطاف الوالدين لأطفالهما على المستويين الداخلي والخارجي في ماليزيا. وختاماً، يعد هذا البحث محاولة لتحليل الموقف على أرض الواقع، من خلال إستخدام منهجية البحث المسحي. لقد تم جمع البيانات من المشرعين والسلطات ذات الصلة من مختلف المنظمات غير الحكومية حول مختلف القضايا المتعلقة بإختطاف الوالدين لأبنائهما، وتبين أن هناك مخاوف مشروعة من جانب أصحاب الشأن وذلك على حقيقة أن المعطيات على أرض الواقع تعارض الإنضمام. إن نتائج هذا البحث لها آثار لا تقدر بثمن بالنسبة لواضعي السياسات وذوي الصلة.

APPROVAL PAGE

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DECLARATION

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

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*Sultan Wazir Khan and Mrs. Shehnaz Sultan (Dad and Mom),
Dr. Muhammad Tahir Jan and Muhammad Haisam Tahir (Husband and Son),
The whole Sultan and Jan Family.*

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The Hague Convention on Civil Aspects of International Child Abduction, 1980
The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996.
The Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007.
The United Nations Convention on the Rights of the Child.

LIST OF ABBREVIATIONS

| | |
|---------|---|
| A.C | Court of Appeal Cases |
| A.H | Anno Hegriane, The Islamic Calendar |
| CLJ | Current Law Journal |
| Ed. | Edition |
| Eds | Editors |
| Etc. | Et cetera; and so, forth pages that follow. |
| Fam LJ | Family Law Journal |
| GIA | Guardianship of Infant Act. |
| HCCH | Hague Conference on Private International Law |
| IAIS | The International Institute of Advanced Islamic Studies |
| Id | Idem, the same |
| IFLA | Islamic Family Law Act |
| IFL | International Family Law |
| IPCA | International Parental Child Abduction |
| LRA | Law Reform Marriage and Divorce Act |
| MLJ | Malaysian Law Journal |
| NGO | Non-governmental Organization |
| OJJDP | Office of Juvenile Justice and Delinquency Prevention |
| P.B.U.H | Peace be Upon Him |
| PhD | Doctor of Philosophy |
| PCA | Parental Child Abduction |
| REJA | Reciprocal Enforcement of Judgments Act |
| S.W.T | Subhanau Wa Ta'ala, Glory be to Allah, the Most Exalted |
| UNCRC | United Nations Convention on the Rights of the Child |

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The world has become a global village¹ and globalisation² directly and indirectly affects family life. The term globalisation was initially introduced in economics and political science from 1990. The emphasis on globalisation in the 21st century has been on the increased migration and movement of individuals between and within countries and on the flow of money and changing role of governments.³

Literature review shows that families are affected and reformed in three major ways by globalisation. First, movement of some of the family members or families within the society and across the borders, reconfigures families. Second, fluctuating income between different families or between the individuals within families, modifies social relations. Third, culture is altered by globalisation and variations in culture alters everything. New international family known as global citizens,⁴ ascended due to increased mobility and migration of growing number of multicultural and multiracial

¹ It means that people from all over the world are connected globally to each other especially through the internet and other electronic communication connections so this way the world has become a global village. The term global village is discussed in detail in the books by Charles Ess, Fay Sudweeks, Culture, Technology, Communication: Towards an Intercultural Global Village, (Albany State University New York Press, 2001) and Wellman, Barry, Networks in the Global Village: Life in Contemporary Communities, (New York Press, 2018).

² Globalisation is a process of interaction and integration among the people of different countries, governments, and organizations of different nations by the help of information technology. Globalization can affect the environment, culture, political and economic developments, and systems of societies around the world. See research of Parrenas, Rhacel, Children of Global Migration: Transnational Families and Gendered Woes, (Stanford University Press, 2005).

³ Rodrik, D, Has Globalization Gone Too Far? (Washington, D.C.: Institute for International Economics, 1997). See also, Castles, S. and Miller, M, The Age of Migration: International Population Movements in the Modern World, (New York: Guilford Press, 2003), 20.

⁴ A global citizen is aware of and understands the wider world - and their place in it. They take an active role in their community, and work with others to make our planet more equal, fair, and sustainable. For further deliberation see Levintova, Ekaterina, Terri Johnson, Denise Scheberle, and Kevin Vonck. "Global Citizens are Made, Not Born: Multiclass Role-playing Simulation of Global Decision Making", *Journal of Political Science Education*, vol. 7, no. 3 (2011): 245-274.

families.⁵ Huge numbers of individuals are moving from rural to urban areas and from developing to industrialized countries in search of opportunities and resources. Globalisation is associated with transnational phenomena,⁶ as it builds bridges by eradicating the cultural distances and cultural barricades.⁷

People are more connected across the borders in the digital age especially through the internet which is indeed a powerful tool which not only enables communication between individuals, but also allows whole groups of people to interact with each other. This form of communication has been accompanied by the ability of individuals to connect in virtual communities across the world with common interests and concerns. It has not only transformed families' abilities to maintain and protect their members but also transformed the role of nation-states. The concept of modern families infers tradition, limitations, intimacy, and close control while globalisation understood to be a modern, unidentified, and uncontrolled force.⁸

When individuals, families, communities, and societies increasingly become integrated into new complex and multifaceted globalised systems, their values, traditions, and relationships change because globalisation conveys new perceptions about gender, matrimonial relationships, women's and children's rights, work citizenship, and identity. Families play a vital role in every society, as they are the legal

⁵ Stark, Barbara, "When Globalization Hits Home: International Family Law Comes of Age", *Vand. J. Transnat'l L.*, vol.39 (2006): 1551; Ottenheimer, Martin, "Kinship and Family: An Anthropological Reader", *Anthropological Quarterly*, vol. 80, no. 2 (2007): 597; Ahmad, Aqueil, *New Age Globalization: Meaning and Metaphors*, (Springer, 2013),4-5.

⁶ The process of connectivity of people across the national borders is known as transnational phenomenon. See: Schmalzbauer, Leah, "Searching for Wages and Mothering from Afar: The case of Honduran Transnational Families", *Journal of marriage and family*, vol. 66, no. 5 (2004): 1317-1331.

⁷Fass, Paula S, *Children of a New world: Society, Culture, and Globalization*,(NYU Press, 2007).

⁸ Ziehl, Susan C, "Forging the links: Globalisation and Family patterns", *Society in Transition*, vol.34, no. 2 (2003): 320-337. See also Edgar, Don, "Globalization and Western Bias in Family Sociology" *The Blackwell companion to the sociology of families* (2004): 3-16.

primary source for reproduction and in socialising, stabilising an adult personality development of the next generation.⁹

Globalisation changes the family institution because it tries to adjust to new demands by taking benefit of increased mobility. People leaving their families behind, mostly start new families in the new countries as they start working in different countries.¹⁰ So, migration, therefore, is commonly connected with new work prospects, but there are other social reasons too for individuals and families to migrate. Political and growing economic disparities within and between societies could be the other reasons for people to migrate.¹¹ International migration has led to a new type of family form, also known as transnational families¹² in which more women are the migrants. Transnational families are characterized by retaining roots in their home societies, and simultaneously also creating new ties in their host countries.¹³

Researchers have shown that international relationships produce an abundance of conflict. Every group of people respond differently to these changes. In some cases, these concepts empower individuals and their families to change their lives for the

⁹ Ottenheimer, Martin, "Kinship and Family: An Anthropological Reader ", *Anthropological Quarterly*, vol. 80, no. 2 (2007): 597. And is discussed by, Ziehl, Susan C, "Forging The Links: Globalisation and Family Patterns", *Society in Transition*, vol.34, no.2(2003):320 ; Ravallion, M, "The Debate on Globalization, Poverty and Inequality: Why Measurement Matters", *International Affairs*, vol.79, no.4 (2003): 739-753. See also; Parrenas, Rhacel, *Servants of Globalization: Women, Migration, and Domestic Work*, (Stanford University Press, 2015),6-7.

¹⁰ Carmody, Dianne Cyr, and Peggy S. Plass, "Family Abductions: An Examination of the Role of Offender Gender ", *Gender Issues*, vol.18, no. 2 (2000): 58-73.

¹¹ Ahmad, Aqueil, *New Age Globalization: Meaning and Metaphors*, (Springer, 2013),17.

¹² Transnational families are defined here as families that live some or most of the time separated from each other physically between two or more nations but maintains close ties and relationships and hold together and create something that can be seen as a feeling of collective welfare and unity, for example 'familyhood', even across national borders. See Schmalzbauer, Leah, "Searching for Wages a Mothering from Afar: The Case of Honduras Transnational Families", *Journal of Marriage and Family*, vol.66 (2004):1317-1331.

¹³ Kelly, R.M, *Gender, Globalization and Democratization*, (Lanham, MD: Rowman & Littlefield Publishers:2001) also see Morrison, Schiff and Sjöblom, *The International Migration of Women*, (New York university press,2008); Castles, S.and Miller, M, *The Age of Migration: International Population Movements in the Modern World*, (New York: Guilford Press,2003).

better. In other cases, they are forced into situations that are disadvantageous and destructive.¹⁴

As cultural diversity exists everywhere, one can see variation in many forms such as standard of living, social class, religious and ethnic groups between rural and urban areas and even between the regions. Other variations include levels of literacy, age of marriage, opportunities for the acquisition of skills and education, female labour force participation, parenting practices especially with respect to gender issues, and marriage opportunities. These factors are also different within the same society.¹⁵

The number of bi-national and bi-cultural relationships and marriages are also increasing which can bring diversity as well as new challenges and difficulties to the society. Mainly because of greater family diversity, marriage is facing a lot of new challenges in 21st century. The notion of 'traditional' homemaker family no longer constitutes the main family form or the only normative environment in which children are born and raised, in the modern world today, Instead, unmarried, and remarried families, single parenthood, one-person households, have become more common and are increasingly acknowledged and are accepted as a suitable living arrangement.¹⁶

Studies show that families and societies are profoundly affected by this trend of globalisation, as it has been found that it is difficult for the couple to live together

¹⁴ Rudra, N, *Globalization and the Race to the Bottom in Developing Countries: Who Really Gets Hurt*, (Cambridge: Cambridge University Press,2008) See also, Safa, H, "Questioning Globalization: Gender and Export Processing in the Dominican Republic", *Journal of Developing Societies*, vol.18, (2002):11-31; Kelly, R.M, *Gender, Globalization and Democratization*, (Lanham, MD: Rowman & Littlefield Publishers,2001).

¹⁵For further deliberations on these variations see Eitzen, D. S. & Zinn, M. B, *Globalization the Transformation of Social Worlds*, (Thomson Wadsworth,2006) see also Legrain, P, *Open World: The Truth About Globalization*, (Great Britain: Abacus, 2002) See also Trask, Bahira, *Globalization and Families: Accelerated Systemic Social Change*, (Springer science,2009),3-10.

¹⁶ Edgar, D, "Globalization and Western Bias in Family Sociology".In the *Blackwell Companion to the Sociology of Families*, by J. Treas, & M. Richards J. Scott, (Oxford University Press, 2004),3-16. See also Saodah Abd. Rahman and Md. Sayed Uddin, "The Impact of Globalization on Family Values", *Int. J. Adv. Res. (IJAR)*, vol.5, no.8, (2017): 968-977. and Prichard, Paul, "Transformations in Parenting: New Possibilities Through Peer-led Interventions" (Ph.D. thesis, Western Sydney University,2018),120.

although they have similar background and is even harder when they are from different countries and have different cultures, religions, languages, family structures and traditions. Such couples with different background comparatively have more conflicts, mostly do not agree especially regarding child-rearing approaches, religious issues, role of in-laws and the resulting pressure may increase and ends in divorce. The situation becomes worse especially when the couple have children.¹⁷

Large number of children around the world become the victim of tug-of-war between their parents and it has been a growing problem mainly because of the circumstances such as cross-border marriages and the changing face of relationships and family's role.¹⁸ When such marriages break down (either legal or not), one of the parents decide to take the child or children back to other places or his or her country of origin, without the other parents' consent, resulting in what is termed as "Parental Child Abduction".¹⁹ Parental Child Abduction is now a worldwide and growing phenomenon affecting both Muslims and non-Muslim countries. It has emerged as a subject of interest among different disciplines and practices. The issue of Parental Child Abduction has affected not only the individuals and children but also the international community.²⁰

¹⁷ Steger Manfred, B, *Globalization a Very Short Introduction*, (Oxford University Press,2003). See also Khanna, Parag, *Connectography: Mapping the Future of Global Civilization*, (Random house,2016),12.

¹⁸ Freeman, Marilyn, "Parental Child Abduction: The Long-term Effects" International Centre for Family Law, Policy and Practice. <[http://www. childabduction.org](http://www.childabduction.org)> (accessed 30 November 2019); See also Schnitzer-Reese, Ericka A, "International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court", *Northwestern Journal of International Human Rights*, vol.2, no.1 (2004); Shear, L.E. and Shear Kushner, J.C, "Taking and Keeping the Children: Family Abduction Risk and Remedies in US Family Courts", *Journal of Child Custody*, vol. 10, no. 3-4 (2013): 252-294.

¹⁹ Ottenheimer, Martin, "Kinship and Family: An Anthropological Reader", *Anthropological Quarterly*, vol. 80, no. 2 (2007): 597; See also Blair, D. Marianne, and Merle H. Weiner, "Resolving Parental Custody Disputes-A Comparative Exploration", *Fam. LQ*, vol. 39 (2005): 247.

²⁰ Malhotra, Anil, "To Return or Not to Return: Hague Convention vs. Non-Convention Countries", *Family Law Quarterly*, vol.48, no. 2 (2014): 297-318.

Parental Child Abduction can be defined in variety of ways. For this study, the definition consists of several important elements. The most important element is that a child has been taken abroad from the care of a person or a body in charge of the child's care without consent or permission of that person. Enticing, concealing, detaining, or harbouring of a child by one parent from the other is also considered another important factor.²¹ It can happen during a marriage where couple are still together, or after separation prior to divorce or it can happen years after a divorce.²²

In private international law, Parental Child Abduction refers to unilateral removal or retention of children by one of the parents, guardians, or close family members. Generally, parents do not abduct their child for any material gain, but the exclusive care of the child is the main motivator for the parents to abduct their own child.²³ However, it is interesting to note that from an Islamic viewpoint, material gain is not the main issue. Emphasis is given to abduction or kidnapping of an ill-motivated parent for child removal or retention with the intention to usurp from the other parent the right of custody or access.²⁴

²¹ Hague Conference, "Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Part I – Central Authority Practice. (Bristol:Jordan Publishing,2003) And also see Boudreaux, Monique C., Wayne D. Lord, and Stephen E. Etter, "Child Abduction: An Overview of Current and Historical Perspectives", *Child Maltreatment*, vol. 5, no. 1 (2000): 63-71.

²² Greif, Geoffrey L, "The Long-term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy", *The American Journal of Family Therapy*, vol. 37, no. 4 (2009): 273-286. And Carmody, D. C. Plass, P. S, "Family Abductions: An Examination of the Role of Offender Gender", *Gender Issue*, vol.18 (2000):58-73.

²³ Walsh, Michael R., and Susan W. Savard, "International Child Abduction and the Hague Convention", *Barry Law Review*. vol.6 (2006):29; Kruger, Thalia, *International Child Abduction: The Inadequacies of the law*, (Bloomsbury Publishing, 2011),75.

²⁴ Aiyar, Smita, "International Child Abductions Involving Non- Hague Convention states;The Need for a Uniform Approach," *Emory International Law Review*, vol.21 (2007):320; Elgeed, Mohammad Ahmed awad, "International Child Abduction:An Islamic and Hague Convention Perspective"(Phd Thesis, Aberdeen,2006). See the details of Islamic views on Parental child Abduction in chapter three of this thesis where it is discussed in detail.