



FOSTER CARE: CONCEPT AND PROVISIONS OF
THE LAW IN MALAYSIA

BY

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A dissertation submitted in fulfilment of the requirement
for the degree of Master of
Comparative Laws

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JUNE 2011

ABSTRACT

The study deals with the concept of foster care in Malaysia. Analysis focuses on the concept and provisions of the law on foster care. The law and practices in other countries, including Muslim countries, have also been examined for comparison purposes. This study has embarked on the premise that there is no proper law that regulates foster care in Malaysia. The concept of foster care in Malaysia is examined based on the provisions in the legislation as well as on the practice of the Social Welfare Department. The study has further analysed relevant provisions in Malaysian legislation. References have also been made to the law and practice on foster care in countries like Singapore, United Kingdom and Australia including Muslim countries such as Egypt, Algeria and Bahrain. Islamic law recognizes foster care as *kafālah*. These comparisons can help to identify the weaknesses of foster care law in Malaysia and as a guideline for improving the law. The study reveals that foster care is one of the means to protect children in need of care and protection. These children require appropriate alternative care for their protection. It is believed that children's welfare is best served in a family setting. This study further proves that the limited provisions on foster care in legislation are not sufficient to govern the foster care system in Malaysia. Finally, the study reveals that the law in Malaysia should be improved by introducing proper legislation and regulations on foster care. It is to be hoped that this study provides increased knowledge about foster care as an appropriate alternative care for children in need of protection in Malaysia.

خلاصة البحث

تتناول الدراسة مفهوم الرعاية البديلة في ماليزيا، ويركز التحليل على مفهوم وأحكام القانون بشأن الرعاية البديلة، كما بحثت في الدراسة القوانين والممارسة في البلدان الأخرى، بما في ذلك بلدان المسلمين لأغراض المقارنة. وقد شرعت هذه الدراسة على فرضية أنه لا يوجد قانون ملائم ينظم الرعاية البديلة في ماليزيا. وقد تم فحص مفهوم الرعاية البديلة في ماليزيا بناء على الأحكام الواردة في التشريعات فضلا عن ممارسة وزارة الرعاية الاجتماعية. وقد حلت الدراسة الأحكام ذات الصلة في التشريعات الماليزية، كما أنها تراجع قانون الرعاية البديلة وممارستها في دول أخرى مثل سنغافورة، والمملكة المتحدة، وأستراليا، بما في ذلك بلدان مسلمين مثل مصر، والجزائر، والبحرين. وتعرف الرعاية البديلة في الشريعة الإسلامية بالكفالة. وهذه المقارنة تساعد في تحديد نقاط الضعف في قانون الرعاية البديلة في ماليزيا وكمبدأ توجيهي لتحسين القانون. وتكشف الدراسة أن الرعاية البديلة هي إحدى الوسائل لحماية الأطفال المحتاجين إلى الرعاية والحماية. وهؤلاء الأطفال يحتاجون إلى الرعاية البديلة المناسبة لحمايتهم. وتعتبر مصلحة الأطفال هي أفضل ما يخدم في إعداد الأسرة. وهذه الدراسة تثبت أيضا أن وجود أحكام محدودة في الرعاية البديلة في التشريعات ليست كافية لتحكم نظام الرعاية البديلة في ماليزيا. وأخيرا، تكشف الدراسة أنه ينبغي تحسين القانون في ماليزيا عن طريق إدخال تشريعات ولوائح مناسبة للرعاية البديلة. ومن المأمول أن توفر هذه الدراسة زيادة المعرفة حول الرعاية البديلة باعتبارها الرعاية البديلة المناسبة للأطفال المحتاجين للحماية في ماليزيا.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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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 degree at IIUM or other institutions.

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ACKNOWLEDGMENTS

Alhamdulillah, praise be to Allah s.w.t, the Most Gracious, the Most Merciful for giving me strength throughout the completion of this dissertation. Without His Guidance and Blessings, this dissertation would not have been completed.

First and foremost, I wish to express my sincere gratitude to my supervisor, Dr. Azizah Mohd for her patience, guidance and encouragement in supervising this dissertation from the beginning until the end. Without her invaluable comments, suggestions and advise, it would not have been possible for me to complete this dissertation.

I am indebted to Mr. Nizam Kassim (Assistant Director, Children's Division of the Social Welfare Department), Mrs. Che Tom Ujang (Founder of Rumah Anak Yatim Shifa'), Mr. Yahya Mohamed Yusof (Founder of KEWAJA) and the late of Dato' Adnan Mohd Tahir (President of OrphanCARE) (May Allah s.w.t bless him) for their willingness to provide me with valuable information.

I am also grateful to all my friends, especially Niza, Qinah, Kak Zainab and Kak Aiman for their help and moral support.

Most of all, my heartfelt gratitude goes to my beloved parents, A. Kadir b. Ahmed and Zaharah bt. L. Abdullah for their constant love, support and prayers. My sincere gratitude also goes to my closest aunties, Rokiah bt. L. Abdullah and Rosnah bt. L. Abdullah for supporting and encouraging me at all times. I wish to express my special thanks to my grandmother, Meryam bt. Harun whose love has given me strength throughout my studies. Finally, my appreciation goes to all my siblings, Nadhrah A. Kadir (thank you for your help and support from miles away), Nadiah A. Kadir, Najwa A. Kadir and Muhammad Aiman A. Kadir for being my inspiration.

TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page	iv
Declaration Page	v
Copyright Page	vi
Acknowledgements	vii
List of Cases	xii
List of Statutes	xiii
List of Abbreviations	xiv
Transliteration Table	xv

CHAPTER ONE: INTRODUCTION 1

1.0 Background of the Study	1
1.1 Statement of the Problem	5
1.2 Objectives of the Study	5
1.3 Hypothesis	5
1.4 Significance of the Study	6
1.5 Literature Review	6
1.6 Scope and Limitation of the Study	19
1.7 Research Methodology	20
1.8 Outline of Chapters	21

CHAPTER TWO: THE CONCEPT OF FOSTER CARE IN MALAYSIA

2.0 Introduction	22
2.1 Definition of Foster Care	22
2.1.1 General Definition	22
2.1.2 Definition under Common Law	23
2.1.3 Definition under the Law in Malaysia	24
2.1.4 Definition Based on Practice of the Social Welfare Department in Malaysia	25
2.1.5 Definition under Islamic Law	25
2.2 Differences between Foster Care and Adoption	26
2.3 Purposes of Foster Care	29
2.4 Kinds of Foster Care	31
2.4.1 Temporary Foster Care	31
2.4.2 Permanent Foster Care	33
2.4.3 Individual Foster Care	36
2.4.3.1 The Social Welfare Department	38
2.4.3.1.1 'Foster Home' Programme	38
2.4.3.2 Non-Governmental Organization	40
2.4.3.2.1 OrphanCARE	41
2.4.3.2.2 KEWAJA	42

2.4.4 Foster Placement and Institution.....	43
2.4.4.1 The Social Welfare Department.....	44
2.4.4.1.1 Children’s Homes.....	44
2.4.4.1.2 Rumah Tunas Harapan.....	46
2.4.4.2 Non-Governmental Organization.....	48
2.4.4.2.1 Rumah Anak Yatim Shifa’.....	49
2.4.4.2.2 Shelter Home for Children.....	50
2.4.4.3 Advantages and Disadvantages of Foster Care Institutions.....	51
2.4.4.4 The Roles of Foster Care Institutions.....	55
2.5 The Roles of the Social Welfare Department in Foster Care and Foster Placement.....	58
2.6 The Roles of Non-Governmental Organization in Foster Care.....	61
2.7 Conclusion.....	67
CHAPTER THREE: FOSTER CARE LAW IN MALAYSIA.....	69
3.0 Introduction.....	69
3.1 Historical Background of Foster Care in Malaysia.....	69
3.2 Relevant Legislations Governing Foster Care in Malaysia.....	70
3.2.1 Common Law.....	70
3.2.2 Federal Constitution.....	75
3.2.3 Child Act 2001.....	76
3.2.4 Adoption Act 1952.....	80
3.2.5 Registration of Adoption Act 1952.....	85
3.2.6 Care Centres Act 1993.....	88
3.2.7 Child Care Centre Act 1984.....	90
3.2.8 Guardianship of Infants Act 1961.....	93
3.2.9 Convention on the Rights of the Child 1989.....	94
3.2.10 Islamic Family Law (Federal Territories) Act 1984.....	97
3.3 Foster Care and National Child Protection Policy.....	100
3.4 Foster Care and Child Protection Policy.....	102
3.5 Conclusion.....	104
CHAPTER FOUR: FOSTER CARE IN OTHER COUNTRIES.....	105
4.0 Introduction.....	105
4.1 Foster Care in Singapore.....	105
4.1.1 Overview.....	105
4.1.2 The Ministry of Community Development, Youth and Sports....	106
4.1.3 The Fostering Scheme.....	107
4.1.4 Selection Process of Foster Parents.....	108
4.1.5 Fostering Allowances and Supports.....	110
4.1.6 Permanency Planning.....	111
4.2 Foster Care in United Kingdom.....	112
4.2.1 Overview.....	112
4.2.2 Foster Care Placements.....	114
4.2.2.1 Local Authority Foster Parents.....	114
4.2.2.2 Private Foster Parents.....	125
4.2.3 Fostering Service Provider.....	129

4.2.4 Fostering Allowance	132
4.3 Foster Care in Australia	132
4.3.1 Overview	132
4.3.2 In Victoria	134
4.3.3 Victoria's Out of Home Care	135
4.3.4 Community Service Organizations	137
4.3.5 Screening and Registration of Carers.....	139
4.3.6 Types of Foster Care	141
4.3.7 Reimbursements and Benefits.....	142
4.3.8 Aboriginal Child Placement Principle	143
4.3.9 Contacts with Natural Parents.....	144
4.4 Conclusion	145
CHAPTER FIVE: FOSTER CARE IN MUSLIM COUNTRIES.....	146
5.0 Introduction	146
5.1 Foster Care in Egypt.....	146
5.1.1 Overview	146
5.1.2 Relevant Legislations on Foster Care	147
5.1.3 Roles of the Government in Foster Care.....	153
5.1.4 Roles of Non-Governmental Organizations in Foster Care	155
5.1.5 Family Foster Care Policy in Foster Care Associations	157
5.2 Foster Care in Algeria	159
5.2.1 Overview	159
5.2.2 Law and Practice of Foster Care	159
5.3 Foster Care in Bahrain	161
5.3.1 Overview	161
5.3.2 Law and Practice of Foster Care	162
5.3.3 New Foster Care Programme.....	163
5.3.4 Child Welfare Centre	165
5.4 Provisions of Foster Care in the Legislations of Other Muslim Countries	166
5.5 Conclusion.....	170
CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS	171
6.0 Introduction.....	171
6.1 Summary of Study	172
6.2 Weakness of the Law in Malaysia	177
6.3 Recommendations.....	177
6.3.1 The Need for Proper Legislation and Regulations on Foster Care	178
6.3.2 Improvement in Foster Care Administration and Service	178
6.3.2.1 Foster Care Service Provider	178
6.3.2.2 Foster Care Agreement	179
6.3.2.3 Regular Trainings.....	179
6.3.2.4 Foster Care Associations.....	180
6.3.2.5 Roles of Social Worker	180
6.3.3 Promoting Foster Care as a Means to Protect Children	181
6.3.4 Improvement of National Child Protection Policy	181

6.3.5 Other Suggestions	182
6.3.5.1 Encouraging Fostering or Suckling in Foster Care.....	182
6.3.5.2 Expanding Cottage Care System.....	182

BIBLIOGRAPHY	184
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LIST OF CASES

Hitchcock v W.B and F.E.B [1952] 2 QB 561
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Fosterage Act (Bahrain)
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Fostering Services (England) Regulations 2011
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Islamic Family Law (Federal Territories) Act 1984 (Act 303)
Public Health Law (Algeria)
Registration of Adoption Act 1952 (Act 253)
Convention on the Rights of the Child 1989

ABBREVIATIONS

AA	Adoption Act 1952
AC	Appeal Cases
AIHW	Australian Institute of Health and Welfare
All ER	All England Report
Anor	Another
Art.	Article
CA 2001	Child Act 2001
Cap	Chapter
CFLQ	Child & Family Law Quarterly
CRC	Convention on the Rights of the Child 1989
CSO	Community Service Organisation
CYFA	Children, Youth and Families Act 2005
CYPA	Children and Young Persons Act 2001
DHS	Department of Human Services
Ed.	Editor
edn.	Edition
FLR	Family Law Review
GIA	Guardianship of Infants Act 1961
Ibid	Ibidem (same as above)
IFLA	Islamic Family Law (Federal Territories) Act 1984
IUM	International Islamic University Malaysia
IKIM	Institute Kefahaman Islam Malaysia
JKM	Jabatan Kebajikan Masyarakat
JMCL	Journal of Malaysian Comparative Laws
Ky.	Kysye Law Report
Ky. Ecc	Kysye Ecclesiastical Report
LJ	Lord Justice
Ltd.	Limited
MCYS	Ministry of Community Development, Youth and Sports
MLJ	Malayan Law Journal
MWFC	Ministry of Women, Family and Community Development
NCPP	National Child Protection Policy
No.	Number
OIC	Organization of Islamic Conference
Ors.	Others
para.	Paragraph
QB	Queen Bench
RAA	Registration of Adoption Act 1952
s.	section
Sdn.Bhd	Sendirian Berhad
ss.	sections
SWD	Social Welfare Department
UK	United Kingdom
UNICEF	United Nation Children Fund
Vol.	Volume

TRANSLITERATION

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

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

Short Vowels	
َ	a
ِ	i
ُ	u

Long Vowels	
ا + َ	ā
ي + ِ	ī
و + ُ	ū

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF STUDY

Children are vulnerable human beings who always need care and protection. In order to survive, they must rely on other people, especially the parents. From birth, they should be provided with parental care as well as love and affection. Besides, it is the duty of the parents or the guardians, to look after their children properly by raising, feeding, clothing, educating, maintaining and guiding them until they become independent. In bringing up the children, parents are responsible for ensuring that they can grow up in a caring and safe environment so that their well being is safeguarded. Furthermore, every Muslim should be responsible for those who in their care. The Prophet (s.a.w) has said,

Every one of you is a guardian and every one of you is responsible (for his wards). A ruler is a guardian and is responsible (for his subjects); a man is a guardian of his family and responsible (for them); a wife is a guardian of her husband's house and she is responsible (for it); a slave is a guardian of his master's property and is responsible (for that). Beware! All of you are guardians and are responsible (for your wards).¹

Children without families, including those who have been abandoned, abused and neglected, are the most vulnerable children in many parts of the world. These children have been deprived of a family environment and require the utmost care and protection. Abandoning a child is considered as a ruthless act where a newborn baby is dumped anywhere it could be, for example in a public toilet, in front of houses or

¹ Bukhari, Muhammad ibn Isma'il, *The Translation of the Meanings of Sahih Al-Bukhari*, Arabic - English, Vol. 7, translated by Muhammad Muhsin Khan, Dar al-Fikr, at 82.

even in a dumpster.² Some of these abandoned newborn babies are found dead. Those that survive are sent to the welfare institutions for shelter. The rampant child abandonment cases in Malaysia is worrying.³ In the first week of 2011, there were seven reported cases. A total of ninety nine cases were reported in 2010.⁴ This is similar to reported child abuse cases which are also increasing.⁵ Basically, abused children will not be removed from their homes unless it is necessary. If children have to be separated from parents who are potential child abusers,⁶ they will be admitted to the welfare institutions.

In curbing these social problems, the government has taken some initiatives to reduce the number of these cases and to ensure that more children are being protected. With regard to child abandonment cases, a proposal has been accepted by the Cabinet to charge a person who abandons a baby with murder if the baby is found dead.⁷ This offence carries the death sentence. Besides that, the “Kami Prihatin” (We Care) campaign was also launched to enhance awareness among the community to

² “Total of 472 Babies Discarded since 2005”, *The Star Online*, 19 August 2010, <<http://thestar.com.my/news/story.asp?file=/2010/8/19/nation/6882020&sec=nation>> viewed on April 16, 2011. Mohd Faizal Abdullah, “The Dilemma for Unwed Mothers”, *New Straits Times*, 29 October 2009, at 22.

³ P. Selvarani, “When the Mother is Also a Child”, *New Sunday Times*, 02 January 2011, at 16. “Abandoned Babies: Welfare Officers on 24 hour Standby”, *The Star Online*, 15 February 2011, <<http://thestar.com.my/news/story.asp?file=/2010/2/15/nation/20100215095701&sec=nation>> viewed on April 16, 2011. Ili Liyana Mokhtar and Anis Ibrahim, “149 Babies Abandoned Since Last Year”, *New Strait Times*, 2 December 2010, at 20. “Three More Cases of Abandoned Babies”, *The Malaysian Insider*, 13 August 2010, <<http://www.themalaysianinsider.com/malaysia/article/three-more-cases-of-abandoned-babies/>> viewed on April 17, 2011. Syed Zahar, “Abandoned babies: A Real Need for Prevention and Cure”, *malaysiandigest.com*, 05 April 2010, <<http://www.malaysiandigest.com/opinion/2894-abandoned-babies-a-real-need-for-prevention.html>> viewed on April 16, 2011.

⁴ “7 Cases of Abandoned Babies in 1st Week of 2011”, *News Straits Times*, 08 January 2011, <<http://www.nst.com.my/nst/articles/7casesofabandonedbabiesin1stweekof2011/Article/>> viewed on April 16, 2011.

⁵ Sario, R., “Sharp Rise in Child Abuse Cases”, *The Star Online*, 23 January 2011, <<http://thestar.com.my/news/story.asp?file=/2011/1/23/nation/7855829&sec=nation>> viewed April 16, 2011.

⁶ In 2008, most abusers were mothers with 772 cases, followed by fathers with 294. See Jabatan Kebajikan Masyarakat, Laporan Statistik 2008, at 127.

⁷ Lim, K., “Baby-dumping: Is There a Deterrent or a Solution?”, *Malaysian Mirror*, 17 August 2010, <<http://www.malaysianmirror.com/featuredetail/181-social-issues/48849--baby-dumping-is-there-a-deterrent-or-a-solution/>> viewed on April 18, 2011.

appreciate and love their babies and children.⁸ Furthermore, the “Get On Board” campaign by UNICEF aims to stop child abuse in Malaysia.⁹ These are among several initiatives taken by the government to reduce the problem. However, focus should also be made in respect of children who have become victims of these social issues. They should be provided with appropriate care in a family environment, which they have been deprived of since some of them have no families to look after them, while others need to be separated from their families due to reasons like abuse and neglect.

It seems that child protection services as afforded by the law in Malaysia require regulations on foster care. Foster care in general refers to a placement of a child in the care of a person other than a parent. Foster parents will look after the children in their own homes either temporarily or permanently. The Social Welfare Department (hereinafter referred to as the SWD), as a responsible organization for child protection, will take over the care of children in need of care and protection before suitable foster parents can be found. Currently, there is no specific legislation governing foster care in Malaysia, unless several laws relating to child protection in general, for example the Child Act 2001¹⁰ (hereinafter referred to as the CA 2001). Foster care that is run in Malaysia is based on the practice of the SWD. The statistics of the SWD show that there were 127 applications for fostering in 2009 with 25 applications being cancelled and 50 children placed in foster care. The applications have increased to 180 in 2010 with 6 cancelled and 32 placements taking place. The

⁸ Rohani Ibrahim, “Kami Prihatin: There’s Light at the End of the Tunnel”, *Utusan Online*, 09 April 2010, <http://ww2.utusan.com.my/utusan/special.asp?pr=theMessenger&y=2010&dt=0409&pub=theMessenger&sec=Features&pg=fe_01.htm> viewed April 18, 2011.

⁹ UNICEF, “Get on board, Malaysians. Stop child abuse now!”, *UNICEF Malaysia*, 06 October 2010, <http://www.unicef.org/malaysia/media_news10-unicef-urges-malaysians-to-get-on-board-to-stop-child-abuse.html> viewed on viewed April 18, 2011.

¹⁰ Act 611.

number of children that have been placed in the care of foster parents has decreased by 18. These children are referred by the Children's Homes run by the SWD. There were 37 children from Rumah Kanak-kanak Tengku Budriah have been placed in foster care in 2010. It is the highest number from among all Children's Homes. The number of children who were returned back to the SWD is three in 2009 and two in 2010. Nevertheless, the statistics also show that there is a small number of children who have been placed in foster care by OrphanCARE, a non-governmental organization (hereinafter referred to as the NGO), through cooperation with the SWD. There were 4 applications in 2009 with 1 cancelled, and 6 applications in 2010 with 1 cancelled. Among the applications, 5 children have been placed in foster care.¹¹ It seems that the application was cancelled possibly due to the delay in the arrangement of foster care.

Regulation of foster care is well managed by the laws in other countries like the UK and Australia. They have specific legislation and regulations to govern the foster care system. In these countries, foster care has developed into one of the main types of alternative care for children in need of care and protection, other than adoption and institutional care. Meanwhile, Muslim countries like Egypt, Algeria and Bahrain are developing their *kafālah* system to provide substitute care for orphans and abandoned children or foundlings. They also include children who have to be separated from their parents by court order due to abuse or neglect. These children are placed with a suitable foster family under the legislation in accordance with Islamic law which does not recognize adoption. *Kafālah* has been administered in Muslim countries in the form of foster care.

¹¹ Interview conducted by the author with Nizam Kassim, Assistant Director, Children's Division, Social Welfare Department of Malaysia, on 23 February 2011.

1.1 STATEMENT OF THE PROBLEM

This study is undertaken based on the premise that there is no adequate legislation to regulate foster care in Malaysia. Furthermore, the CA 2001 does not provide adequate provisions governing foster care, other than a brief provision to place a child without a family under the guardianship of a family or welfare institution.

1.2 OBJECTIVES OF THE STUDY

The research is undertaken based on the following objectives:

- (i) To examine the concept and provisions of the law on foster care in Malaysia.
- (ii) To examine the role of the SWD in procedures relating to foster care.
- (iii) To make a comparison between foster care in Malaysia and other countries.
- (iv) To provide suggestions in order to improve the law governing foster care in Malaysia.

1.3 HYPOTHESIS

The research has been initiated based on the hypotheses that:

- (i) The law governing foster care in Malaysia is inadequate.
- (ii) Foster care is one of the means to protect children in need of care and protection.
- (iii) Regulation on foster care in Malaysia requires new legislation to provide better protection to children, in particular parentless children.

1.4 SIGNIFICANCE OF THE STUDY

The increasing number of children in need of care and protection due to reasons like abandonment, neglect and abuse demands an appropriate alternative or substitute care for protecting these children. This study recommends foster care as a means to protect children who are deprived of a family environment.

In order to provide significant findings on rules relating to foster care in Malaysia, the relevant provisions on foster care in Malaysian legislation will be examined. The study will provide further suggestions to improve the law relating to foster care in Malaysia. The analysis on foster care and the relevant legislation in Malaysia in this study will highlight the need for proper legislation on foster care.

It is highly believed that the study will be a useful reference for the legal fraternity, NGOs, government departments, practitioners, academics, students and the public at large.

1.5 LITERATURE REVIEW

There is quite a lot of literature on foster care, especially in countries where foster care is widely practiced and where the law regulates it.

With regards to foster care in Malaysia, not much research has been done on foster care. Nevertheless, there is some relevant literature on certain topics that are close to foster care. For example, Sri Devi Thambapillay¹² discusses about the effects of the CA 2001 on the family law in Malaysia. The author examines several provisions regarding foster care as provided for by the CA 2001, especially section

¹² Sridevi Thambapillay, "Akta Kanak-Kanak 2001: Kesannya Terhadap Undang-undang Keluarga" [2002] JMCL 1, <<http://www.commonlii.org/my/journals/JMCL/2002/1.html>> viewed on 2 May 2010.

30.¹³ There is also discussion on whether the natural parents can claim their children back after they are subject to the court order to place the children in foster placement. Though the provisions are well examined by the author, there is still lack of detail pertaining to the definition and the concept of foster care itself.

Rasamani, K.¹⁴ compiled all relevant laws applicable to children. The author highlighted the provisions on foster care under the CA 2001. For instance, an order made by the court to place the child under the temporary care of foster parents under section 30(1)(e) of the CA 2001.¹⁵ Nevertheless, the author did not mention the procedures in fostering a child since the CA 2001 is silent on this matter.

Azizah Mohd¹⁶ writes on the law of foundling, from Islamic legal principles and the law in Malaysia. The author points out that adoption and foster care are means to protect the abandoned child. The practice of foster care in Malaysia has been well explained by the author. She identified the limited provisions under the CA 2001 that refer to foster care, as well as the role of the Malaysian SWD in the foster care process. She noted that there is no specific provision on foster care under the Islamic law of the State Enactments in Malaysia. The position of foster care in Australia has also been discussed since there is a specific law regulating foster care. The author is of the opinion that a proper law regarding regulation of foster care should be introduced to help in the management of foster care in Malaysia.¹⁷

¹³ Section 30 of the Child Act 2001 provides for powers of Court For Children to make orders with regard to a child in need of care and protection. The order includes placing a child in foster care or a place of safety.

¹⁴ Rasamani, K., *Child Handbook*, Malayan Law Journal Sdn Bhd, 2004.

¹⁵ *Ibid.*, at 87.

¹⁶ Azizah Mohd, "*Law of Foundling (Laqīq): The Islamic Legal Principles and The Law in Malaysia*," (Ph.D. Thesis, IIUM, 2004). See also Azizah Mohd, *Protection and Adoption of Abandoned Children in Malaysia. A Comparative Overview with Islamic Law*, International Law Book Services, 2008.

¹⁷ *Ibid.*, at 127.

Chan Cheong Hoon¹⁸ discusses the role of the social worker in foster care. The author discussed briefly the concept of foster care with reference to western literature. The practice of the SWD in fostering a child is also mentioned with regard to the position of foster care in Malaysia. The author highlights that the CA 2001 has a little information on foster care, but there is no detailed explanation with regard to social work practice in Malaysia.

UNICEF¹⁹ has examined foster care as one of the alternative care for children without primary caregivers in the tsunami-affected countries, which includes Malaysia. This article has pointed out about foster care as has been practiced in Malaysia, as well as the involvement of the SWD in the process. Family or ‘cottage’ care in Malaysia, such as Rumah Tunas Harapan, is highlighted as providing a family-like environment by the participation of foster parents in looking after children with no parent or guardian. The ‘cottage’ care is based on a smart partnership between government, NGOs and the private sector.²⁰ However, this article did not mention about the principles and guidelines of the foster care system in Malaysia.

In Malaysian initial report on the Convention on the Rights of the Child²¹ (hereinafter referred to as the CRC), several statutes have been mentioned pertaining to children, some of which are relevant to foster care in Malaysia, such as the CA 2001 and Guardianship of Infants Act 1961²² (hereinafter referred to as the GIA). This report also states that children who are deprived of their family environment will

¹⁸ Chan Choong Hoon, “Jagaan Pelihara (Foster Care): Pengenalan dan Panduan Penyediaan untuk Pekerja Sosial” in *Polisi, Perundangan dan Amalan Kerja Sosial* edited by Azlin Hilma Hillaluddin, Fatimah Zailly Ahmad Ramli, Rusimah Sayuti and Yusmarhaini Yusof, Penerbit Universiti Utara Malaysia, 2005.

¹⁹ UNICEF EAPRO, *Alternative Care for Children without Primary Caregivers in Tsunami - Affected Countries Indonesia, Malaysia, Myanmar and Thailand*, <http://www.unicef.org/eapro/Alternative_care_for_children.pdf> viewed on 13 May 2010.

²⁰ *Ibid.*, at 33-34.

²¹ Government of Malaysia, *Implementation of the Convention on the Rights of the Child First Country Report*, Ministry of Women, Family and Community Development, 2007.

²² Act 351.

be placed in the care, custody and control of foster parents. The introduction of the Family System Children's Home in providing proper care, protection and love in a family environment for foster children has also been mentioned. Besides that, discussions are made on fostering in the application of adoption, the concept of *kafālah* under the Islamic Family Law (Federal Territories) Act 1984²³ (hereinafter referred to as the IFLA) and the involvement of the SWD, NGOs as well as the private sector in providing welfare services for children in need of care and protection. Nevertheless, this report lacks detail pertaining to the concept of foster care itself in Malaysia.

The concept of foster care in *Sharī'ah* has been examined by Azizah Mohd²⁴ as *tarbiyyah*, which refers to the act of taking a child into the custody of foster parents or someone who is not a legal guardian, for the purpose of taking care of the child. She identifies that foster care is allowed in *Sharī'ah* as long as it does not affect the biological family roots of the child. By referring to *Qur'ān* and *Sunnah*, she points out that the concept of foster care in *Sharī'ah* aims to help those children in need of care and protection, such as those who have been abandoned. She suggests fosterage or suckling in encouraging foster care, as well as being a solution to social problem in foster family.²⁵ Relevant provisions in the CA 2001 pertaining to foster care have also been well explained by her. However, there are no specific procedures, guidelines or principles on the concept of foster care in Malaysia.

Shamsudin Suhor²⁶ discusses the definition, concept and the procedures of adoption in Malaysia. In the application for adoption there is a probation period. In

²³ Act 303.

²⁴ Azizah Mohd. Pengangkatan dan Pemeliharaan Anak in *Undang-undang Keluarga (Islam)* Jilid 14 edited by Najibah Mohd Zin *et al.*, Dewan Bahasa dan Pustaka, 2007, at 311.

²⁵ *Ibid.*, at 318.

²⁶ Shamsuddin Suhor, *Anak Angkat dan Undang-undang*, Dewan Bahasa dan Pustaka, 2008.