



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

LAW OF FOUNDLING (*LAQĪT*): THE ISLAMIC LEGAL PRINCIPLES AND THE LAW IN MALAYSIA

BY

AZIZAH BINTI MOHD

**INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA**

DECEMBER 2004

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AZIZAH BINTI MOHD

**THESIS SUBMITTED AS A REQUIREMENT FOR
THE DEGREE OF PHD IN LAW**

**AHMAD IBRAHIM KULLIYYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA**

DECEMBER 2004

ABSTRACT

The thesis examines legal principles governing foundling or *laqīṭ* in Islamic law and the law as applicable in Malaysia. As Islamic law is expected to contribute to the efficacy and adequacy of the law of foundling or abandoned child in Malaysia, the study, which is based on library research and informal interviews is divided into two parts. The thesis analyzes the foundling's rights to custody, guardianship, maintenance, his status as a free man and religious status, his parentage and inheritance in Islamic law based on rules in the *Qur'ān* and the *Sunnah* of the Prophet, *āthār* of the Prophet's Companions and various opinions of the Muslim jurists particularly the *sunnī* schools of law. The study includes examination on such foundling's rights under various child protection laws in Malaysia representing the modern law based on various statutes and decided cases. Examination extends to the law relating to adoption and fostering serves as the best means of protecting the abandoned child. Reference is made to the child law in Egypt and adoption and fostering in Australia whenever appropriate. The study evidently proves that, Islamic law has provided detailed rules relating to foundling. The law that emphasizes the obligation to save the foundling's life ensures the protection of his rights. The study also reveals that the law of foundling or abandoned child in Malaysia which is governed by various statutes affecting children lead to difficulties in reference. The absence and ambiguity of certain provisions crucial to protect the foundling in the laws as well as provisions governing Muslim foundling specifically shows that there are *lacuna* and room for improvement.

ملخص البحث

قام هذا البحث بتحليل أهم أحكام اللقيط في الشريعة الإسلامية والقانون المطبق في ماليزيا. وأظهرت أن الشريعة الإسلامية تستطيع القيام بدورها في الاسهام بفعالية وكفاية من أجل تحسين تطبيق قانون اللقيط في ماليزيا. يتكون هذا البحث من قسمين واعتمد على عمل المكتبية والمقابلة غير رسمية. تناول هذا البحث تحليل القضايا الهامة المتعلقة بحالة اللقيط وديانته وحقوقه المكفولة له من الحضانة والولاية والنفقة وغيرها في الشريعة الإسلامية مستندة على نصوص الكتاب والسنة وآثار الصحابة والأدلة الأخرى المعتبرة في الشريعة الإسلامية مع مناقشة آراء الفقهاء فيها وخاصة فقهاء المذاهب السنية الأربعة. وتناولت هذه الدراسة تحليل حقوق اللقيط في القانون الحديث المطبق في ماليزيا الذي يتضمن مجموعة من القوانين المتعددة في حماية حقوق اللقيط مع مناقشة نصوص تلك القوانين والنظرالى الأحكام القضائية في المحاكم الماليزية المتخصصة. وبالإضافة الى ذلك تناولت هذه الدراسة تحليل نظام التبني والتربية والبحث عن أفضل الوسائل لحماية الطفل المنبوذ مع المراجعة بعض القوانين في الدول الأخرى المطبقة حينما ملائمة مثل قانون الطفل في مصر والقانون الذي يتعلق بالتبني والتربية في استراليا. من أهم النتائج التي ابرزها البحث أن الشريعة الإسلامية قد وضعت قواعد هامة التي تتعلق باللقيط حيث اهتمت الشريعة الإسلامية اهتمام قويا بحماية حياة اللقيط ورعاية حقوقه. وتبرز هذه الدراسة أيضا على أن عدم انتظام نصوص القوانين المتعلقة بحماية حقوق اللقيط في ماليزيا في وثيقة قانونية واحدة يؤدي الى صعوبة مراجعة ومعالجة حل مشاكل وقضايا اللقيط. وتبين كذلك أن هناك بعض النصوص الغامضة الموجودة في القانون تؤدي الى صعوبة تطبيق القانون. وكذلك عدم وجودهناك نصوص كافية لمعالجة قضايا أو مشاكل القيط وخاصة فيما يتعلق بقضايا اللقيط المسلم بماليزيا. وهذا كله قد يشير بوضوح بأن هناك فراغا متروكا في وثيقة القانون التي تحتاج الى تحسين واصلاح.

APPROVAL PAGE

The thesis of Azizah Binti Mohd has been examined and is approved by the following;

Najibah Mohd Zin (Supervisor)

Normi Abdul Malek (Internal Examiner)

Abdullah Abu Bakar (External Examiner I)

Siti Zalikah Md. Nor (External Examiner II)

Zaleha Kamaruddin (Chairperson)

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name.....

Signature.....

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ACKNOWLEDGEMENTS

In the Name of Allah Most Gracious Most Merciful. Alhamdulillah, praise be to Allah s.w.t. without whose Blessings and Mercy, this study would not have been possible.

I wish to record my appreciation for the help given by many people without whose assistance, this study would not be completed. My heartiest appreciation goes to my supervisor Assoc. Prof. Dr. Najibah Mohd Zin for her expert guidance, endless support and devotion which has contributed significantly to the completion of the thesis. I am also thankful to Assoc. Prof. Dr. Abdullah Abu Bakar for his ideas and comments especially during the early preparation of the thesis.

I am grateful for the help I received from the staff of the Department of Social Welfare Malaysia especially the previous Director General Dato' Syed Abd. Rahman Syed Mohamad, Tuan Haji Harun Mohd Isa, the Director of Child Protection Department, Puan Siti Darmawan Amaruddin and En Mohamad Azmi Mokhtar and Mr Chin Yew Loong; the staff of the DOSW, Wilayah Persekutuan branch particularly Madam Jama'eah Abd Ghani. Similar gratitude goes to the Staff of National Registration Department especially Tuan Haji Kamaruddin Abd. Ghafar and Tuan Haji Ismail Rejab, the staff from JAKIM particularly ustaz Shahirman and Assoc. Prof. Siti Zaharah Jamaluddin, University of Malaya for giving me full assistance in collection of the data and information.

A lot of thanks to the staff of IIUM Library, especially Pn. Noraini Abu Bakar, Library of the University Malaya Kuala Lumpur and Nilampuri, Library of University Kebangsaan Malaysia, Library of IKIM and JKSM, Library of UNICEF and Library of HAWA.

I am also grateful to a number of organizations and individual in Victoria, Australia and Egypt for the help I received in the collection of the data which has significantly contributed to the production of the thesis. First, Australian Institute of Family Studies particularly Assoc. Prof. Dr. Adam Tomison, Dr Janet Stanley, Sarah Wise, Carole and staff in the library. Secondly, the Department of Human Services Division of Victoria (Headquarters) especially Janice Robertson, David Clements, Karen O'Neil and Stephen Coventry; and Department of Human Services (Eastern Region), particularly Angela Smith and Hasmig Tchilinguirian. Thirdly, Australian Against Child Abuse and the staff especially Neerosh Mudaly, Goldie, Neville Adams and Derby. Fourthly, Children and Welfare Association of Victoria particularly, Michael White, NAPCAN Victoria, Melbourne University particularly Dr Phillip A Swain and Dr Lynda Campbell from the School of Social Work, Monash University, especially Dr Chris Goddard, Bernadette Saunders, Dr Phillip Mendez and Prof Thea A Brown, School of Social Work. Special thank and acknowledgement to Brother Nawas and family for their sincere help and hospitality. Fifthly, the staff at the Malaysian Student Department, Malaysian Embassy in Cairo, Egypt especially the Director, Ustaz Wan Bakar Wan Dagang, Ustaz Mohd Nor, Ustaz Abdul Hadi and Ustaz Sulaiman. Sixthly, the Chief Mufti Dār al-Ifta', Cairo, al-Fāḍil Dr Aḥmad Muḥammad Ṭayyib, the staff of al-Azhar University Library, the staff of Cairo University Library, the staff of 'Ayn

Shams University Library and the staff of Dār al-Kutub. Special thanks to Brother Mohammad Amin Mohammad Tahir for the assistance given while we were in Egypt.

My Appreciation and gratitude also goes to Public Services Department of Malaysia, the International Islamic University Malaysia and AIKOL for the sponsorship of the study and study leave. Many thanks to the Research Centre for funding given for the research in Australia and Egypt. A lot of thanks to Assoc. Prof. Dr Nik Ahmad Kamal Nik Mahmud, Assoc. Prof. Dr Mahamad Ariffin and Dr Mohamad Deen Mohamad Nafiah, Dr Shafie Musa and Dr Uzaimah Ibrahim for the support given. Special thanks to PhD adhoc committee meeting, for their fruitful comments and suggestions for the improvement of the thesis, Assoc. Prof. Dr Mohamad Som Sujimon and Dr Ismail Mohd @ Abu Hasan for sharing their knowledge, bro. Jamiri, bro. Sham and Ustaz Zainuddin for the help especially on technicalities, Dr Sharifah Zubaidah and Kak Bashir for editing the thesis, Dr Farah Nini for her academic assistance and moral support, and all friends who always give me assistance and moral support, the help of many which I will never forget.

Personal gratitude is due to my parents and parents in law, who's inspiration and encouragement has provided me with moral support and strength. A lot of thanks to them, my brothers and sisters and in laws especially Mansor and wife, Siti 'Aisyah, for editing my thesis proposal and looking after my children while I was abroad, also my maid for her patience and sincerity of handling my kids while I was absent.

I'm greatly indebted to my husband, Badruddin for his endless support, understanding, patience and assistance personally and academically which had contributed significantly to the completion of this thesis. To him I convey my love and utmost gratitude also to our children, 'Ammār, Amnān and Munīr who had to bear my absence.

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LIST OF ABBREVIATIONS

AA	Adoption Act 1952
AC	Appeal Cases
AGM	Annual General Meeting
AIHW	Australian Institute of Health And Welfare
All ER	All England Reports
AMR	All Malaysia Reports
Anor	Another
Art.	Article
Cap.	Chapter
Ch	Chancery
CLJ	Current Law Journal
CPA	Child Protection Act 1991
CRC	Convention On The Rights of The Child 1989
Cr. App. Rep.	Criminal Appeal Report
GIA	Guardianship of Infants Act 1961
DHS	Department of Human Services of Victoria
Div.	Division
DNA	Deoxyribonucleic Acid Test
DOSW	Department of Social Welfare Malaysia
D.R.	Dewan Rakyat
Ed.	Edition or Editor
edit	Editor
etc	et cetra (and so forth)
f.n.	foot note
Fam.	Family
F.M.S.	Federated Malay States
IA	Indian Appeals
Ibid	Ibidem (same as above)
IFLA	Islamic Family Law (Federal Territories) Act 1983
IUM	International Islamic University Malaysia
IKIM	Institute Kefahaman Islam Malaysia
ins.	Inside
JAKIM	Jabatan Kebajikan Islam Malaysia
JAI Sel.	Jabatan Agama Islam Selangor
JCA	Juvenile Courts Act 1947
JH	Jernal Hukum
JKM	Jabatan Kebajikan Masyarakat Malaysia
JMCL	Journal of Malaysian And Comparative Law
JPN	Jabatan Pendaftaran Negara
LRA	Law Reform (Marriage & Divorce) Act 1976
Ky.	Kysye Law Report
Ky.Ecc	Kysye Ecclesiastical Report
LJ	Lord Justice

LN	Legal Notification
Ltd.	Limited
MLJ	Malayan Law Journal
No.	Number
NRD	National Registration Department
NSW	New South Wales
Ors	Others
QB	Queens Bench
p.	page
para	paragraph
pp.	pages
PINTAS	Pelan Induk Tindakan Social
P.U. (A)	Pemberitahuan Umum (A)
P.U. (B)	Pemberitahuan Umum (B)
P.U. Sel.	Pemberitahuan Umum Selangor
r.	rule
RAA	Registration of Adoptions Act 1952
s.	section
Sdn. Bhd.	Sendirian Berhad
ss.	sections
UK	United Kingdom
UNCRC	United Nations Convention On The Rights of The Child
WGPA	1989
Wef	Women & Girls Protection Act 1973
v.	With effect from
VAA	verses
Vol.	Victorian Adoption Act 1984
	Volume

TRANSLITERATION TABLE

a	z	q
b	s	ك k
ت t	sh	ل l
th	ş	م m
j	ض d	ن n
ḥ	ط .	ه h
kh	ظ >	و w
د d	ع ‘	’
dh	غ gh	ي y
r	ف f	

short vowels

- a

- i

- u

long vowels

ā

ī

ū

ى ⑦

diphthongs

- aw

- ay

doubled

aww

ayy

- uww

- iyy

CHAPTER ONE

INTRODUCTION

1.0. - Background of The Research

Both civil and Islamic law impose the duty on parents to look after their children. The former mainly stresses on responsibility and the duty of the guardian to take care of the children while the latter regards them as a trust from Allah. On this basis the *Qur'ān* states:

ان الله يأمركم أن تؤدوا الامانات الى أهلها...

which means:

“Allah doth command you to render back your trusts to those to whom they are due...”¹

In another verse, the *Qur'ān* states:

الذين هم لأماناتهم وعهدهم راعون

which means:

“Those who faithfully observe their trusts and covenants...”²

Al-Shawkānī while explaining the above quoted verses claims that the word “*amānah*” (trust) in the above two verses are of general application. It includes all

¹ Al-Qur'ān, Sūrah al-Nisā' 4:58.

² Al-Qur'ān, Sūrah al-Mu'minūn 23:7.

kinds of trust in worldly and religious matters and is applicable to all Muslims.³ His view is further supported by al-Qurṭubī who regards that, the word ‘*amānah*’ is general and applicable to all human beings who carry the trusts entrusted by Allah.⁴ One of them is the duty to take care of children. This is due to the fact that, one of the basic purposes of the Islamic law (*maqāṣid al-shar‘iyyah*) is to guarantee the right to life.⁵ This right is applicable to all human beings regardless of their age. As the *Qur’ān* states:

ولا تقتلوا أولادكم من املاق

which means:

“Kill not your children on a plea of want....”⁶

Al-Qurṭubī in his commentary on the above quoted verse observes that Islamic law clearly prohibits parents from killing their children out of poverty.⁷ Their duty is to keep the children alive without committing any action which is harmful to the children. Even though abandoning children does not amount to a deliberate act of killing, by leaving the child abandoned, it might lead to the loss of innocent life.

Furthermore, Islamic law rules that those who hold the responsibility shall feed and maintain the children continuously. The *Qur’ān* states:

³ Muḥammad ibn ‘Alī al-Shawkānī, *Faṭḥ al-qadīr*. Dār al-Fikr, n.pp, n.d., Vol. 1, p.480 & Vol. 3, p. 473.

⁴ Muḥammad ibn Aḥmad al-Qurṭubī, *al-Jāmi‘ li aḥkām al-Qur’ān*, Dār al-Kitāb al-‘Arabī, n.pp, 1967/1387, Vol. 5, p.252 & Vol. 12, p. 107.

⁵ See Abī Ishāq Ibrāhīm ibn Mūsā al-Lakhmī al-Shāṭibī, *al-Muwāfaqāt fī ‘ilm al-uṣūl al-aḥkām*, Dār al-Fikr, n.pp, n.d., Vol. 2, p. 4.

⁶ Al-Qur’ān, Sūrah al-An‘ām, 6:151.

والوالدات يرضعن أولادهن حولين كاملين لمن أراد أن يتم الرضاعة، وعلى المولود
له رزقهن وكسوتهن بالمعروف...

which means:

“The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms...”⁸

It is understood from the above quoted verse that the interest in and responsibility for the child’s welfare are questions of first priority. So long as the marital bond remains, the parents are jointly responsible for the upbringing of the child. According to al-Qurṭubī, the Muslim jurists have a consensus on the point that a father is fully responsible for the maintenance of his child until he is able to maintain himself⁹ or for a girl until she marries.¹⁰

The child is innocent and in need of protection and a dependant in need of guidance. The responsibility for providing a suitable upbringing is placed unequivocally on the adults who relate to a particular child and where this fails, on the *qāḍī* who represents

⁷ Al-Qurṭubī, *al-Jāmi‘ li aḥkām al-Qur’ān*, Vol. 7, p. 133.

⁸ Al-Qur’ān, Sūrah al-Baqarah, 2:233.

⁹ Al-Qurṭubī, *al-Jāmi‘ li aḥkām al-Qurān*, Vol. 3, p. 163.

¹⁰ See Abī ‘Abd Allāh Muḥammad ibn ‘Abd al-Raḥmān al-Maghribī al-Ḥaṭṭāb, *Mawāhib al-jalīl*, 2nd Ed., Dār al-Fikr, n.pp, 1992/1412, Vol. 6, p. 80.

the society.¹¹ However nowadays, some of the children are neglected and abandoned. There are children who are left in the backyard or in the street without proper identification. The obvious reasons for the abandonment are due to illegitimacy, orphanage and poverty.¹² But the Muslim jurists such as, al-Sarakhsī (d. around 490 A.H.), Ibn al-Humām (d. 681 A.H.), al-Shīrāzī (d. 427 A.H.), al-Shirbīnī (977 A.H.), al-Zuhaylī and ‘Abd al-Karīm Zaydān provide a better explanation on reasons of abandonment. For them, abandonment occurs due to destitution or in order to avoid accusation of adultery and various other reasons, such as a desire to be without the children and to ignore the responsibility.¹³ In modern times, contributing factors to abandonment include family problems faced by the parents, abnormality of the children mentally and physically, illegitimacy and condition of the parents such as insanity and drug addiction.¹⁴

¹¹ See Muḥammad Abū Zahrah, *al-Wilāyah ‘al-Ḍ al-naḥs*, Dār al-Fikr al-‘Arabī, n.pp, n.d., pp. 73-98. ; See also, Muḥammad Muṣṭafā Shalabī, *Aḥkām al-usrah fī al-Islām; dirāsah muqāranah bayna fiqh al-madhāhib al-Sunniyyah wa al-madhāhib al-Ja‘farī wa al-qānūn*, Dār al-Nahḍah al-‘Arabīyyah, Beirut, 1977/1397, pp. 770-771. ; See also P. Holland, *What is a child? Popular image of childhood*, Virago Press, London, 1992, quoted in Catherine Panther Brick, “Nobody’s children”, ins. Catherine Panther Brick and Malcolm T. Smith (edit), *Abandoned children*, Cambridge University Press, United Kingdom, 2000, p. 4.

¹² The European anthropologists view that poverty is a factor leading to abandonment especially in the earlier centuries. See Pier Paolo Viazzo, Maria Bortolotto & Andrea Zanotto, “Five centuries of foundling history in Florence: Changing patterns of abandonment, care and mortality”, ins. Catherine Panther Brick and Malcolm T. Smith (edit), *Abandoned children*, p. 71.

¹³ See Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, Dār al-Ma‘rifah, Beirut, 1986/1406, Vol. 10, p. 209. ; See also Kamāl al-Dīn Muḥammad ibn ‘Abd al-Wāḥid al-Sīwāsī ibn al-Humām, *Sharḥ fath al-qadīr*, 2nd Ed., Dār al-Fikr, Beirut, n.d., Vol. 6, p. 110. ; see also Abī Ishāq Ibrāhīm ibn ‘Alī ibn Yūsuf al-Fayrūzabādī al-Shīrāzī, *al-Muhadhdhab fī fiqh al-Imām al-Shāfi‘ī*, 3rd Ed., al-Muṣṭafā al-Bābī al-Ḥalabī, Egypt, 1976/1396, Vol. 1. p. 567. ; see also Muḥammad al-Shirbīnī al-Khaṭīb, *Mughnī al-muḥtāj*. Muṣṭafā al-Bābī al-Ḥalabī, Egypt, 1933/1352, Vol. 2, p. 417. ; See also Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa adillatuhu*, 3rd Ed., Dār al-Fikr, Damascus, 1989/1409. Vol. 5, p. 764. ; See also ‘Abd al-Karīm Zaydān, *Majmū‘ah buḥūth fiḥiyyah*, Maktabat al-Quds, Baghdād, 1986/1407, p. 352. For further reading see M.S. Sujimon, “The treatment of the foundling (*al-laḳīṭ*) according to the Ḥanafīs”, *Islamic Law And Society*, Vol. 9 No. 3, 2002, pp. 358 – 359.

¹⁴ Mohd Sham Kassim, “Kes- kes yang ditinggalkan keluarga di hospital”, in *Lapuran Bengkel Kanak- kanak Yang Meninggalkan Keluarga Dan Kanak- kanak Yang Ditinggalkan Keluarga*, Faculty of Medicine, Universiti Kebangsaan Malaysia, 1988, pp. 96 & 97.