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AN APPRAISAL OF CHILD PROTECTION THROUGH ADOPTION UNDER MALYSIAN REGISTRATION OF ADOPTIONS ACT 1952 AND KAFALAH IN MOROCCO

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INTRODUCTION

- Children are regarded as the most vulnerable human beings who always in need of care and protection
- Parentless children, including orphans as well as those who are abandoned, abused and neglected require the utmost care and protection
- Due to their circumstances, these children are deprived of parental care or family environment and require substitute care :
“to substitute for natural parental care, either partially or completely.”

-Encyclopedia Americana

United Nations Convention on the Rights of the Child 1989 , art 20(3)

“Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”

ADOPTION

Adoption under the Civil law perspective:

- a legal establishment of a parent-child relationship where it does not exist naturally.
- -it refers to a child born to one set of parents and then becomes the child of other parents legally
- it legally and permanently terminates the relationship between a child and his or her birth parents

Islamic law perspective law :

- it is not recognised
- al-tabanni, the deliberate and intended act of making someone else's birth child as one's own
- The basis for such non-recognition is traced in the Qur'an and the case of Zayd bin Harithah, the adopted son of the Prophet Muhammad (SAW).

- Qur'an, 33:4:

... nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells (you) the Truth, and He shows the (right) Way

- Qur'an, 33:5

Call them by (the names of) their fathers: that is just in the sight of God. But if ye know not their father's (names, call them) your Brothers in faith, or your Mawlas.

- The case of Zayd Ibn Harithah: he was adopted by the Prophet (SAW). After the adoption, he was known as Zayd Ibn (son of) Muhammad. However, after the revelation of the Qur'anic verse, Zayd was no longer known as Zayd Ibn Muhammad but was renamed as Zayd Bin Harithah

KAFALAH

- a man takes an orphan or a foundling into the family for the purpose of rearing, educating, and treating him or her as his own child. He has to protect, feed, clothe, teach and love the child as his own without attributing the child to him and allowing him or her to inherit his property
- “foster parenting” or “legal fostering”,
- Islam recognizes kafalah as a child protection measure to allow Muslims to look after a child just but without certain rights, such as, filiation and inheritance

Legal Implications of Kafalah:

- blood ties are retained between the child and his or her natural parents
- Foster parents are not allowed to be affiliated to the foster child
- the foster child is not entitled to inherit
- Can still benefit from the property: will, gift or waqf
- After reached puberty would be affected by the Islamic constraints in mingling with his or her foster family members of a different gender
- must cover their awrah
- marriage is not prohibited

ADOPTION UNDER MALAYSIAN REGISTRATION OF ADOPTIONS ACT 1952

- Adoption Act 1952 (AA) – non-Muslims
- Registration of Adoptions Act 1952 (RAA)
- both Muslims and non-Muslims.

In line with the Islamic principles, adoption under the RAA is not designed to modify or change the child's status, lineage and inheritance rights.

- the registration of de facto or customary adoption under the RAA allows it to be legally recognized and to safeguard the adoptive parent's right to custody and their continuing responsibilities to maintain and educate the adopted child
- By applying to the National Registration Department (NRD) for registration
- the NRD will issue an **adoption certificate**
- the effect of adoption under the RAA as it does not sever the legal relationship between the child and his or her natural parents.
- the registration of the adoption under the RAA is intended for securing the child's welfare

Requirements

- child under the age of eighteen years
- the child must also be in the custody of, and has been brought up, maintained and educated by prospective adoptive parents for a period of at least two consecutive years
- Prospective adoptive parents; 25 years old, and at least 18 years older than the child they wish to adopt
- to be ordinarily resident
- express consent to the adoption

- Tang Kong Meng v Zainon bte Md Zain & Anor

The court in this case examined the two requirements of de facto adoption namely, 'custody' and 'maintenance' factors as prescribed by section 6 of the RAA. The defendants registered the adoption under the RAA since they had physical custody of the child for more than two years. As for the 'maintenance' factor, there was no evidence that the child had been maintained by the defendants since it was paid by the natural mother. The court declared that the adoption under the RAA was null and void.

Kafalah in Morocco

- kafalah is regulated by the Law No.15-01
- There are two types of kafalah:
 - (a) notary certified kafalah :children with known parentage whose birth parents' relinquish their consents through the legal document
 - (b) judicial kafalah for abandoned children with known or unknown parentage who have been left permanently in the care of the state or orphanages

Law No.15-01

- defines kafalah:
as the commitment of foster parents to be responsible for the protection, education and maintenance of an abandoned child, which basically is the same as to what a father would do for his child except there is no right to filiation and inheritance
- a declaration of abandonment by the court
- requires prospective foster parents:
 - a. adult Muslim (married or a single woman)
 - b. financially stable
 - c. has no conviction of criminal offences
 - d. free from contagious diseases

- A committee consisting of representatives from legal and several ministries is established to conduct investigation relating to the application
- The judge grants the kafalah order to the prospective foster parents if the investigation shows that they have successfully met all the conditions
- the judge of minors remains responsible as the legal guardian for the child
- the judge of minors is still responsible to make significant **decisions** regarding the child's life

APPRAISING ISLAMIC PERSPECTIVES ON ADOPTION IN MALAYSIA AND KAFALAH SYSTEM IN MOROCCO

- share the same concept of providing permanent care for someone else's child whose parents are unable or unwilling to look after the child
- both adoption under the RAA and kafalah preserve the child's biological parentage and the child is not entitled to certain rights, such as, the rights of filiation and inheritance.

Unlike the RAA, the Law No. 15-01 provides express provision regarding a declaration of a child as abandoned before kafalah takes place

- explicitly provides for the criteria of the eligible prospective foster parents

- provides for monitoring

- The RAA requires for the relinquishment of the birth parents' consent (for abandoned child), the Child Act 2001 requires 2 years of probationary period

- The RAA does not expressly provide these criteria for prospective adoptive parents except for age, residence and consent requirements

- no such provisions after the adoption

Conclusion

- Adoption under the RAA and kafalah shares the same concept of providing parentless children with permanent family care.
- These legal child protection measures allow children who are deprived of parental care or family environment to live and grow up in a family setting just like other ordinary children
- legal implication- they do not terminate the parent–child relationship
- Significantly, the adoption under the RAA ensures that the adopted children are entitled to certain legal rights

○ thank you