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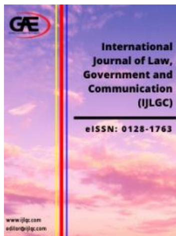

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A COMPARATIVE STUDY ON CHILD ABDUCTION LAWS IN MALAYSIA AND INTERNATIONAL LAWS

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Abstract:

Child abduction is a problem that occurs due to family breakdowns. It is also a consequence of family breakdowns that is spreading rapidly worldwide due to international marriages and the increase in transportation systems that makes movements of individuals easier. International child abduction is embodied in the Hague Convention on the Civil Aspects of International Child Abduction 1980 also known as the Hague Convention. Even though it is apparent that this convention sets out to improve the probabilities of abducted children being returned to the country from which they were originally abducted from, it is to be noted that many countries are not a party to any conventions and even member countries fail to adhere to the aims set up in the convention. The objective of the study is we will be examining the legislations on child abduction both in Malaysia and also international laws and making a comparative study on legislations of both countries. The method used is doctrinal legal research in which we will analyse cases.

Keywords:

Child Abduction, Convention, Legislations, International Child Abduction And The Hague

Introduction

International child abduction is embodied in the Hague Convention on the Civil Aspects of International Child Abduction 1980 also known as the Hague Convention. Even though it is

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apparent that this convention sets out to improve the probabilities of abducted children being returned to the country from which they were originally abducted from , it is to be noted that many countries are not a party to any conventions and even member countries fail to adhere to the aims set up in the convention. When international marriages increased in 1970's, parental child abduction began to rise and turned out to be an international problem. It was a serious challenge and source of concern for all the concerned authorities and it remains to be a serious problem today (Andrews, P. D. (2012).

Taking into account that Malaysia is not a signatory state to any international instrument on this issue, particularly the Hague Convention on the Civil Aspects of International Child Abduction in 1980 or known as the Hague Convention on Child Abduction (HCCA), strong domestic laws and efficient enforcement agencies are seen as a must in order to prevent the occurrence of parental child abduction. Furthermore, the aim of the HCCA is not to determine a custody claim based on its merit but to remedy the wrongful removal of children from their existing homes. Statistics obtained from the Crime Investigation Department, the Malaysian Royal Police Headquarter, Kuala Lumpur shows the existence of the act of parental child abduction. If the issue is not immediately curbed, it has the potential of turning into a huge national problem. This is because parental child abduction involves not only the personal fights between husband and wife but could very well leave an impact on the safety and diplomatic relationship between one country to another. It is said that even though the act does not involve the use of force, compulsion or deceitful means, it may in certain situations, involve indirect compulsion on the basis of a child parent relationship where a child will normally obey the instruction from either mother or father. (Suzana Muhamad Said (2012)).

When the child is abducted across the borders then it becomes difficult to navigate and get back the child because of the conflicting laws of different nations. Parental child abduction is a crime in most parts of the world but in some countries, it goes unchecked and unpunished. This crime affects the child and the left-behind parent who has the legal custody of the child, but the child has taken away from the parent unlawfully. This crime affects the innocent child psychologically and mentally because moving the child from his familiar place and environment to an unfamiliar environment makes the child psychologically ill (Freeman, M.(2006). Children feel insecure and get anxiety and depression, constant moving of places makes them tired and frustrated. Mostly, the abducted parent tries to hide their identity and change their names, so this behaviour of the parent will smash children's selfconfidence. Children will have trust issues when their parent keep lying to everyone and change their identity. Even when children are returned, they get psychological problems such as post-traumatic effects and they fear re-abduction and can have attachment disorder with left-behind parent. Children struggle in trusting others after the abduction and it takes ages for the child to recover from the traumatic effects of the abduction and to feel comfortable and to trust others. (Gregg, D. M. (2014)).

International child abduction is not something new and it generally refers to wrongful removal or wrongful retention of child to another country by the child's parent or guardian. It is an international phenomenon spread from north to south and east to west and it is not confined to just one country. kidnappings or parental child abduction can be seen more in multicultural nations with high immigration (Cardin, L.(1997). Definition of parental child abduction is "taking, retention, or concealment of a child or children by a parent, another family member,

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or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member (Janet Chiancone, L. G. (2001).

Literature Review

International Legislation On Child Abduction

In the case of Re L (Minors) (Wardship: Jurisdiction) (1974) 1 WLR 250 Court of Appeal Buckley LJ reiterates :

"..........To take a child from his native land, to remove him to another country where maybe his native tongue is not spoken, to divorce him from social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to a child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which he must necessarily elapse before all evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child...."

Simply to say that a child that is abducted from his foreign is already facing enough due to a family breakdown let alone to face complications arising due to his removal from his native country to another country in which he may face difficulties due to exposure to foreign languages and culture which is alien to him. He may also feel disconnected from the social customs and foreign education system being practiced there. And this will affect him psychologically. The court feels that it is in the best interest of the child that the child should not face these disturbing factors and it would be better if this sort of case be dealt with in his native country courts as it would procure time in order to investigate the case, gather evidence and etc and during that time of which the child will be exposed to a foreign country and its culture. Re L was a kidnapping case but it to be noted that Buckley's LJ'S dicta has been cited and approved as being in coherence with the relevant applications under the Hague and European Conventions.

The Hague Convention on the Civil Aspects of International Child Abduction 1980 was implemented into England and Scotland legislation by Part I of the Child Abduction and Custody Act 1985. The convention sets up a network of central and core authorities which must cooperate amongst each other and promote cooperation amongst the competent authorities in their respective authorities in their respective states to ensure the prompt return of the children and to achieve the other objects of this convention as embodied in article 7. The Lord

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Chancellor's Department is the Central Authority in England and Wales however its functions are carried out by the Official Solicitor.

In the preamble it is states that the states signatory to the present convention is firmly convinced that the interests of children are of paramount importance in matters relating to their custody in which they desire to protect children internationally from harmful effects of their wrongful removal and retention and to establish procedures to ensure their prompt return to the State of their habitual residence as well as to secure protection of rights of access. Article 1 is in regards to the objects oh the convention namely to secure the prompt return of children wrongfully removed to or retained in any contracting state and to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. Article 2 states that all contracting countries shall take all appropriate measures to secure within their territories the implementation of the objects of the convention. For this purpose they shall use the most expeditious procedures available. Article 4 states that the convention shall apply to any child who has habitually resident in a contracting state immediately before any breach of custody or access rights. The convention shall cease to apply when the child attains the age of sixteen years.

In the case of Re M (a Minor) (Child abduction) (1994) 1 FLR 390 Court of Appeal, LJ Butler-Sloss LJ reiterates:

" ....The Hague Convention provides a summary procedure for the expeditious return to the country of habitual residence of children who are wrongfully removed to or retained in another contracting state in order that the courts of the country of habitual residence should determine their future.....The interests of the child in each individual case are not paramount since it is presumed under the convention that the welfare of children who have been abducted is best met by return to their habitual residence....provision is made by article 13 for limited consideration of the welfare of the child......."

In the case of B v B (Abduction) (1993) 1 FLR 238, Court of Appeal, Sir Stephen Brown P reiterates:

" .... It is important when considering applications under the Hague Convention that its should be borne in mind that these are matters which affect the comity of nations. It is a convention on the civil aspects of international child abduction. Its purpose as the preamble and article 1 indicate is to deal summarily with the mischief of taking children from the appropriate jurisdiction in a manner which is considered to be unlawful......"

In the case of Re E (A minor) (Abduction) (1989) 1 FLR 135 Court of Appeal, Lord Balcombe LJ states that:

"............ The whole purpose of this convention is to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence or having taken the child with the agreement of any other party who has custodial rights to another jurisdiction then wrongfully retaining that child....."

Habitual residence is the linking factor used in the convention to determine whether the child comes within the ambit of the convention. Habitual residence is embodied in Article 4 that the

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convention shall apply to any child who has habitually resident in a contracting state immediately before any breach of custody or access rights. The convention shall cease to apply when the child attains the age of sixteen years. And whether there has been wrongful removal or retention is embodied in article 3 (a) whereby it states that the removal or retention of a child is said to be considered to be wrongful where –

(a) It is in breach of rights of custody attributed to a person , an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention

In the case of Re J (A minor) (Abduction: Custody Rights) (1990) 2 AC 562 House of Lords, the facts were that the parents were UK emigrants to Western Australia where they met and cohabitated. Their child was born in 1987. When their relationship broke down, the father was told by his solicitor that the mother had sole custody and guardianship of their child, but that he could apply for a custody order. The father showed an intention to make an application but did not do so. Later on, the mother brought the child to England with the intention of creating a long term home there for herself and her child. It so happen that four years later the father was granted custody by the Australian court and the judge had also made a declaration that the child's removal from Australia had been wrongful. The father applied under the Hague convention for the return of the child. The High Court in England dismissed the father's application holding that there was no wrongful removal or retention on the mother's part. The court of Appeal dismissed the father's appeal. He appealed to the House of Lords. It was held in the House of Lords that the appeal be dismissed and that there was no wrongful retention for the purposes of the Hague Convention as the mother's removal of the child had caused him no longer to be habitually resident in western Australia. Amongst the issues raised in this case was whether the removal of J from Australia to England by the mother was wrongful within the meaning of article 3 of the convention. The court took into account the terms or article 3 of the convention that the removal could only be wrongful if it was in breach of rights of custody attributed to i.e possessed by the father at the time when it took place. Since section 35 of the Family Act 1975-1979 as amended by Western Australia had rendered the mother sole custody and guardianship of J, and the father failed to make an order to the court to the contrary prior to the removal thereby the court concluded that the father had no custody rights relating to J of which the removal of J by the mother could be a breach. The legal rights of custody belonged to the mother solely, which included the right to decide where J is to reside. Therefore, the removal of J by the mother was not regarded as wrongful within the ambit of article 3 of the convention.

The term Habitual residence was dealt in depth in this case where the court stated that habitual resident as used in article 3 is no where defined. The court regarded that expression is not to be treated as a term of art with some special meaning but it is rather to be understood accordingly to the ordinary and natural meaning of the two words which it contains. Whether a person is a habitual resident in a specified country is a question of fact to be by reference to all the circumstances of any particular case. It is noted in this case that there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day when he or she leaves it with the settled intention not to return to it but to take a long term residence in Country B. However that individual cannot however become a habitual resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but have not yet become

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habitually resident in Country B. And it is to be noted that where a child's age is in the sole lawful custody of the mother' s his situation with regard to habitual residence will necessarily be the same as hers. Weighing the case at hand the court noted that the mother had left Western Australia with a settled intention that neither she nor J should continue to be habitually resident there. Before 22 March 1990, when the retention of J in England by the mother began both she and J had ceased to be a habitual resident in western Australia. A fortiori they had ceased to be habitually resident there by 12 April 1990, the date of the order of Anderson J. Thereby it was deemed that the continued retention of J in England by the mother was never at any time a wrongful retention within the meaning of article 3 of the convention. Habitual residence is thus deemed as the connecting factor in determining child abduction. And Lord Brandon's dicta on habitual residence is commonly referred to in other contexts where family matters are concerned.

As mentioned earlier article 3 of the convention deals with wrongful removal or retention. It is stated in article 3 of the convention that the removal or retention of a child is considered to be wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention (article 3 (a)). And also at the time of removal or retention those rights were actually exercised either jointly or alone, or would have been so exercised but for the removal or retention (article 3 (b)). The rights of custody mentioned in article 3 (a) may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

Article 5 of the convention states that rights of custody shall include rights to the care of person of the child and in particular the right to determine the child's place of residence. In the case of Re B (A minor) (Abduction) (1994) 2 FLR 249 Court of Appeal, Waite LJ reiterates the purposes of the Hague Convention is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression rights of custody when used in the convention therefore needs to be construed in the sense that will best accord with that objective. In most cases that will involve giving the term the widest sense possible.

In the case of McKee v McKee, a Canadian case,the Californian court had awarded custody to the mother, but allowed the father access to the child. While the child was with the father, it was taken to Ontario in Canada without the mother s knowledge. Notwithstanding this, the trial judge in Ontario awarded custody to the father and decided that the child should remain in Ontario. The Supreme Court of Canada reversed it, but the Privy Council restored the original decision of the trial judge, ruling that a judge should not take a foreign custody order for granted, but must inquire into the welfare of the child. The existence of a foreign order is merely an element to be considered as part and parcel of the general question as to what is in the best interests of the child.

The return of a child is embodied in article 10 of the convention whereby it states that the Central authority of the state where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child. Article 11 states that the judicial

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or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children. And article 12 states that where a child has been wrongfully removed or retained in terms of article 3 and at the date of commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority even where the proceeding have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Amongst the defences that can be forwarded under the convention is accounted for in article 13 of the convention whereby it states that notwithstanding the provision of article 12, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that th person , institution or other body having care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention (article 13 (a)) or there is grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.(article 13 (b)) .The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this article the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the Child's habitual residence.

In regards to the defence of acquiescence it is illustrated in the case of Re A (Minors) (Abduction: Custody Rights) (1992) Fam 106 Court of Appeal, whereby in this case after divorce the mother without the knowledge of the father removed their two sons aged 7 and 5 from Australia to England. The father then wrote to her expressing his sorrow at what she ahd done and explaining that although she had acted illegally, he loved the boys too much to fight for their return. His letter states : " i think you know what you have done is illegal but i am not going to fight it. I am going to sacrifice myself rather than them." On the same day however he began proceedings under the Hague Convention. It was conceded before the judge in the High Court in England that the removal had been wrongful under article 3, but the wife argued that the father had acquiesced in the children's removal under article 13 (a) and that there was grave risk that the children's return would place them in an intolerable situation under article 13 (b). The judge found that the father had not acquiesced and there was no grave risk and ordered the children's return forthwith under article 12. The mother appealed. It was held in allowing the appeal that the father had acquiesced in the children's removal. In regards to cases that is in regards to consent and acquiesced in the wrongful removal of a child it is pertinent that the case be considered on its own special facts. In this case it was noted that the difference of consent and acquiescence is simply one of timing. Consent if it occurs preceded the wrongful taking or retention. Acquiescence if it occurs, follows it. In each case it may be expressed or it may be inferred from conduct including inaction, in circumstances in which different conduct is to be expected if there were no consent or as the case may be acquiescence. Any consent or acquiescence must of course be real. Therefore a person cannot acquiescence in a wrongful act if he is not aware of the act or does not know that it is wrongful. The use of the words by Thorpe

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J " the whole conduct and reaction of the husband must be investigated in the round". It was held that such considerations does not arise in this case because the father's letter of September 23, 1991 is incapable of any construction other than a clearly expressed acquiescence. Another issue that was addressed in this case is whether an acquiescence can be withdrawn it was held that it cannot be withdrawn in the sense that once there is acquiescence the condition set out in article 13 is satisfied. In contrary if an apparent acquiescence followed immediately by a withdrawal of the acquiescence may lead the court to question whether the apparent acquiescence was real or whether it was due to emotion which cannot be deemed as real acquiescence. In the current case the period lasted from 27 September until December 1991 when the proceeding was served upon the mother. Acquiescence means acceptance and it may be in two form namely active or passive. If it is active it may be signified by express words or consent or by conduct. If it is passive it will result from silence and inactivity in circumstances in the aggrieved party may reasonably be expected to react. It is pertinent to ponder on the circumstances of the case and how long a period will elapse before the court will infer from such inactivity whether the aggrieved party had accepted or acquiesced in the removal or retention. It is crucial to note that a party cannot be deemed to have acquiescence unless he is aware at least in general terms of his rights against the other party. It is not pertinent that he should know the full or precise nature if his legal rights under the convention but he must be aware that the other parent's act of removing or retaining is unlawful. And if he is aware of the factual situation giving rise to those rights, the court will no doubt infer that he was aware of his legal rights either if he could be reasonably expected to have known of them or taken steps to obtain legal advice. If the acceptance is active it must be made clearly and using unequivocal words or conduct and the other party must believe that there has been an acceptance.

In the case of Re A (minors: Abduction) (1991) 2 FLR 241, where the husband's language and behaviour was ambivalent and the wife did not believe that the father was agreeing to what she had done.

In the case of of Re S (Minors) (Abduction : Acquiescence) (1994) 1 FLR 819 Court of Appeal, whereby in this case the parents were British Born immigrants to Australia. Following the breakdown of the marriage, the mother had removed the three children aged 4,8,and 9 to England wrongfully under article 3 of the Hague convention. Eight months later the father applied for a summary return order under article 12. The mother resisted the order under article 13 (a) on the basis that the father had delayed in bringing proceedings and this amounted to acquiescence in the removal of the children. The judge held that the father had not acquiescence as he had been given wrong legal advice and held accordingly that he had no jurisdiction to refuse a return order. The mother appealed contending that the judge had applied the wrong test of acquiescence. It was later held that her appeal be dismissed and that the judge had applied the right test of acquiescence and there was no reason to interfere with his decision.

In the case of Re AZ (a Minor) (Abduction: acquiescence) (1993) 1 FLR 682 page 687,
" Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long term acceptance of the existing state of affairs"

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In the same case Sir Donald Nicholls V-C reiterated

" ....i add only a brief comment on the concepts of acquiescence in the removal or retention of a child. The context is an exception to the general convention rule of summary and speedy return of a child who has been wrongfully removed to or retained in another contracting state. If the person who had care consented to the removal or the retention, he cannot afterwards when he changes his mind seek an order for the summary return of the child pursuant to the convention. Likewise if he acquiescence. It seems to me that the underlying objectives of the convention requires the court to be slow to infer acquiescence from conduct which is consistent with the parent whose child has been wrongfully removed or retained perforce accepting as a temporary emergency expedient only, a situation forced on him and which in practical terms he is unable to change at once. The convention is concerned with the children taken from one country to another. The convention has to be interpreted and applied having regard to the way responsible parents can be expected to behave. A parent whose child is wrongfully removed or retained in another country is not to be taken as having lost the benefits the convention confers by reason of him accepting that the child should stay where he or she for a matter of days or a week or two. Parents may again through force of his circumstances accept that the child should stay where he or she is for an indefinite period likely to be many months or longer. Here it is a question of degree. The court will look at all the circumstances and consider whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return. That is the concept underlying consent and acquiescence in article 13. In applying this test the court must be satisfied that the parent knew at least in general terms if his rights under the convention. Whether he knew or not is one of the circumstances to be taken into account. The weight or importance to be attached to that circumstance will depend on all the other circumstances of the particular case.

It was decided in the case of Re A (Minors) (Abduction: Acquiescence) (No.2) (1993) 1 All ER 272 CA it was held that if the court is satisfied that there is acquiescence it must then exercise its discretion to decide whether to return the child taking into account the child's welfare and all the circumstances of the case.

Another defence that can be forwarded in international child abduction is grave risk or physical or psychological harm etc as embodied in article 13 (b) in the convention. Whereby the burden of establishing the defence under the article 13 (b) as under 13 (a) is a heavy burden in which the parent must discharge. A high degree of intolerability must be established to bring into operation article 13 (b).

In the case of Re C (A minor) (Abduction) (1989) 1 FLR 403 Court of Appeal, whereby in this case a child age 4 was taken from Australia to England by the mother despite a consent order having been made on marriage breakdown that neither parents would remove the child from Australia without the consent of the other. The father brought proceedings in the English High Court under the Hague Convention for the child's return. The mother argued that there was no wrongful retention or removal and that there was grave risk that the child's return would expose him to psychological harm under article 13 (b). She argued that as she could not accompany the child back to Australia she would herself be creating the risk of harm under article 13. The judge dismissed the application. The father appealed. The father appealed. It was held that the appeal be allowed and the court ordered the child's return and that there was wrongful removal but article 13 did not apply as if the mother's argument were to succeed it would defeat the purpose of the convention and be in contrast to international relations.

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Butler- Sloss LJ reiterates that

" It is to be noted that the grave risk of harm arises not from the return of the child but the refusal of the mother to accompany him the court questioned whether a parent can create the psychological situation and then rely on it. If grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him the it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return."

In situations in which the child objects to being returned it is to be noted that the court may refuse to order the child's return if he or she objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's view as embodied in article 13 (b).

In the case of Re S (A Minor) (Abduction: Custody Rights) (1993) fam 242 Court of Appeal, whereby in this case on her parents divorce the child a girl aged b10 with a severe stammer and associated behavioural problems was taken from France to England by her English mother who alleged that she feared violence from the father. She later added the additional reason in which the child suffered speech problem. In England the child's stammer and behavioural problem disappeared. The father applied under the Hague Convention for the child's return. The mother accepted that she removed the child wrongfully but argued that under article 13 that there was grave risk that the child 's return would expose her to physical or psychological harm and that the child objected to being returned and had reached the age and degree of maturity at which it was appropriate to take into account of her views. The judge refused to make the order sought on the basis that the child objects to being returned. The father appealed. It was held that the father's appeal be dismissed and he was refused the application for return and that the child had attained an age and degree of maturity at which it was appropriate to take account her views. There was no ground for interfering with the trial judges finding that there was no exceptional circumstances which warranted a refusal to return the child to France.

Bracewell J in the case of in Re (A minor: Abduction) (1992) 1 FLR 105, 107-108, it was reiterated that

" The wording of the article is so phrased that i am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word objects imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

It is necessary for the judge to find out the reason in which the child objects to being returned. If the sole reason is because it wants to remain with the abducting parent who is also asserting that he or she is unwilling to return then it will be a highly relevant factor when the judge comes to consider the exercise of its discretion.

It is to be noted that article 13 doe not state any age in which is to be considered as not having attained sufficient maturity for its view to be taken into account. In article 12 of the United Nations Convention on the Rights of the Child 1989 (Treaty series No.44 of 1992 (Cm. 1976)) which has been ratified by both France and United Kingdom and had come into force in both countries before Ewbank's J's judgement states that states parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters

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affecting the child, the views of the child being given due weight in accordance with the age of maturity of the child. The child will be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly or through a representative or an appropriate body in manner consistent with the procedural rules of national law.

If the court comes to the conclusion that the child's view was induced by some other person namely the abducting parents or that the objection to return is due to the fact that he or she wishes to remain with the abducting parent then little or no weight should be given to those views.

In the case of Layfield v Layfield (unreported) on 6th December 1991, in the family court in Australia, Bell J ordered a 11 year old to be returned to the united kingdom because he found that although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia but to remain with her mother who had removed her wrongfully removed the girl from united kingdom to Australia. However in cases where the court finds that the child or children have valid reasons for their objections to being returned then it may refuse to order the return. In the case of Re M (Minors) on 25th July 1990, the court refused to order the return of three children aged 11,9,and 8 to America. The court took into account that the children objected to being returned and that each of them had attained an age and a degree of maturity in which it is appropriate to consider their views and that the children give valid reasons in refusing to return to their father in America due to this previous behaviour

In the case of P v P (Minors) (child Abduction) (1992) 1 FLR 155 pg 161, Waite J it was reiterated that

" ....the underlying purpose is to ensure stability for children by putting a brisk end to the efforts of parents to have their children's future decided where they want and when they want by removing them from their country of residence to another jurisdiction chosen arbitrarily by the absconding parent. It would be contrary to that underlying assumption and purpose to give the convention an interpretation which allowed the absconding parent to insist as of right that the convention's mandatory procedures for a child's return should be suspended while detailed investigations was made into the child's views, the terms and the circumstances in which and the persons to whom, they had been expressed and perhaps in borderline cases the medical and psychological factors involved in gauging the child's degree of maturity. There are many instances in which an investigation would be necessary. When they do arise it will be because the judge exercising his discretion in exceptional circumstances thinks that such an investigation is necessary and not because one or other parent has exercised any supposed right to insist upon it...."

In the case of Re M (A Minor) (Child Abduction) (1994) 1 FLR 390 CA, it was stated by Butler- Sloss LJ that the court must be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the state of habitual residence. In the case of Re K (Abduction: child's objections) (1995) 1FLR977,FD, the children were ordered to be returned to the USA although one of them was a girl aged 7 being terrified to return. Waite J stated that he considered a child aged 7 as being on the borderline for the purposes of refusing return because of the child's wishes but the court invited the courts welfare officer to report on her. The court will usually refuse to hear oral evidence in respect of the child's wishes.

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In cases of child abduction involving non convention cases, it is illustrated in the case of Re F (A minor) (Abduction: custody rights) (1991) fam 25, Court of Appeal, whereby in this case under israeali law both parents were joint guardians and had joint custody of the child including the right to determine the child's place of residence. When the marriage did not work the father took their second child from Israel to England without the mothers knowledge and in breach of her right of custody. The Israeli court granted the mother custody care and control and ordered the child immediate return to his mother. The father was granted interim custody, care and control of the child by an English court judge who concluded that the child had not been removed in breach of a previous court order and that the child should not be returned to Israel on the facts of the case. The judge also ordered that the mother be restrained from moving the child from jurisdiction. The mother appealed. The court held in allowing the appeal and ordered that the child immediately return and that although Israel was not a party to the Hague convention the general principles of the convention applied to the extent that in normal circumstances it was in an abducted child's best interest that he should be returned to his country of habitual residence so that custody matters could be decided here. The child's removal had been in breach of a right of custody.

In the case of Re M (Abduction: Non- Convention Country) (1995) 1 FLR 89 Court of Appeal, whereby in this case the two children aged 4 and 2 were born in Italy of an English mother and an Italian father. The marriage faced a breakdown the mother having been advised by her Italian lawyer that she stood little chance of obtaining custody in Italy brought the children to England and sought a residence order from the English court. The father obtained an interim order in Italy that they live with him, but custody was vested in Italian local authority. The father applied for and was granted a peremptory return order by Wilson j in the high court and the father had given undertakings. The mother appealed introducing fresh evidence to show that arrangements made in Italy regarding matters which had concerned Wilson j were inadequate. The court dismissed the appeal that the principles which applied in hague convention cases were also prima facie to be applied in non convention cases. There were sufficient material before Wilson J for him to be satisfied that a return order would be in the best interests of the girls and his decision was vindicated by the new evidence.

The children act 1989 states that the integral to the principles underlying the Hague Convention is the acceptance if comity between the nations of the Hague conference. This acceptance is based on the understanding that most of the member states of the hague conference base their decisions on the upbringing of children on the best interests of the individual child principle. Whatever the decision the legal principle upon which it must be made is the welfare principle and not considerations of international comity.

In the case of Re P (A minor)(Abduction) (1996) the times 19 July (abduction from Bombay to England by mother) the court of appeal allowing the mother's appeal held that where a child was abducted to England from a non convention country, the English court in considering whether or not the child should be ordered to be returned to the country where she habitually resided, should give importance to the overall welfare of the child. The authorities stated that in a non convention case the welfare of the child was the only consideration that governed the courts.

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Malaysian Legislation On Child Abduction

Parental child abduction is prohibited either directly or indirectly by family law statutes and also under the Penal Code and other related statutes. These include the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA), the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (IFLA), the Penal Code (Act 574) and the Child Act 2001 (Act 611) (Suzana Muhamad Said (2012).

The word guardian is predefined in Section 2 of the Adoption Act 1952 (Rev 1981) whereby it defines the term as having relation to a child as any person or body of persons other than its natural parents, who has custody of the child. Section 2 of the Registration of Adoptions Act 1952 (Rev 1981) on the other hand defines the word to mean the person having the legal right to the custody of the child. The Guardianship of Infants Act 1961, which is the main legislation governing guardianship and custody, does not define the term, but provides in s 3 that: The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education .A child s guardian may be deemed as the individualhas the parental rights and duties over a child , but some cases that responsibility for care and control of the child may be given to another individual who is not the guardian. A guardian is entrusted for the long-term welfare of a child. A person having custody possesses the right to the daily care and control of the child. However, despite the possible loss of custody, the guardian retains the authority to make decisions as to the religion and education of the child, and to hold property on its behalf. Section 5 of the Guardianship of Infants Act 1961 (the 1961 Act) provides that, the father of an infant shall be the guardian of the infant s person and property subject to the proviso that the High Court may make appropriate orders regarding custody and access by either parent. , section 88(1) of the Selangor Islamic Family Law Enactment 1984 provides

Although the right to hadanah or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child ..."

Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 by way of a rebuttable presumption. That section provides:

There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Section 10 of the 1961 Act, the High Court is given an overriding power to remove at any time a guardian, presumably in the interests of the welfare of the child. It provides as follows:

The Court or a Judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place.

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Section 11 of the 1961 act reads:

The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

Section 27 of the Civil Law Act 1956 n34 is an appropriate starting point for a discussion of the jurisdictional question. It reads as follows:

In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

In Malaysia the case is illustrated in the recent case of Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor Intervener)(2006) 6 MLJ 372 whereby in this case amongst the interesting issues raised were the proper approach that should be adopted in Malaysia in dealing with child custody issues and issues where one parent has already obtained a custody order in a foreign jurisdiction whether Malaysia should revaluate the issues in regards to which one of the parent should have custody, care, and control of the child and whether Malaysia should acknowledge the order given by the other country. Cases like this occur when parents kidnap their own children even though judicial proceedings have already taken place in more than one jurisdiction with the expectation that they might have a chance of having custody towards their child. In this case the husband or plaintiff and the wife or defendant were married on 11th may 1991 and they have a daughter who was born on 26th march 1992. All of them happen to be Australian nationals and they resided in UK from the year 1994 till the year 1997 and they later returned to their country of origin in the December 1998. The plaintiff and the defendant were facing marital conflicts upon which the plaintiff moved out from their matrimonial home. The daughter continued to stay with the defendant wife. In December 2002, the plaintiff had taken the daughter out of Australia for a holiday and they failed to return as scheduled by the end of January. They entered Malaysia in January 2003 and the plaintiff had registered his daughter in a school in Kuala Lumpur without prior knowledge and consent from his wife. The defendant then applied to the Australian courts on 4th February 2003 for an order in regards to custody and for the return of her daughter to Australia. An interim order was granted on 17th april 2003 and on the 7th October 2003 the final order was rendered on 25th may 2004 for the daughter to reside with the defendant. The plaintiff on the other hand was issued a social Visa on 19 august 2003 by the Malaysian immigration authorities in accordance with the Malaysia my second home programme where he was allowed to enter and remain in west Malaysia and Sabah until 18 august 2005. He filed and manage to obtain an ex parte interim order on 24th may 2004 in regards to the interim custody and interim guardianship of the daughter by the Malaysian jurisdiction. The defendant made an application to set aside the interim order issued by the Malaysian court and for the daughter to be delivered to her in accordance with the order issued by the Australian courts. The order were granted by the Malaysian court by Justice Faiza Tamby Chik namely due to several reasons which were forum non Conveniens upon giving special considerations to the orders in which were issued in the place in which the child happen to be ordinarily resident to and based on the welfare principle. The doctorine of forum non conveniens is when the court determines whether the Australian jurisdiction is best forum to trial the dispute in regards to the child's custody. Here it was

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decided that Australia is indeed the best forum due to the fact that its jurisdiction had made out the most and real and substantial connection with the trial at hand being that the child had no right to permanent residence in Malaysia and the parties are all Australian national and had been residing in Australia prior to the abduction and the daughter had been settled in Australia prior to the abduction as the daughter was attending school in Australia and was exposed to the culture in Australia. Besides the plaintiff solely had the tenuous connection with Malaysia through Malaysia my second home programme and the parental issues and marriages that had occurred all took place in Australia thereby its of best that it be inquired by the Australian courts. The Malaysian court should have primarily look into the welfare of the child. In the case of Re R (Minors) (Wardship: jurisdiction) (1981) 2 Fam LR 416 at p 425 per Ormrod LJ it was reiterated that:

"Kidnapping , like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to prompt return of the child to his or her own country, but not the sacrifice of the child s welfare to some other principle of law."

This was also reiterated in the case of in Re J (a Child) (Custody Rights: Jurisdiction) [2005] 3 WLR 14 by Baroness Hale of Richmond whereby in this case it was reiterated by the House of Lords that:

"If our courts have jurisdiction, then the welfare principle applies, unless it is excluded, and our law has no concept of the proper law of the child ."

The basis in which the court relied upon to give special consideration in regards to decisions to guardianship, custody and care to the country in which the child was ordinarily a resident was based on the authority cited in the English court of appeal case of In Re P (GE) (An infant) [1965] 1 Ch 568 based on the principle of interests of reciprocity

And if the mother whose child was kidnapped by the father has eventually to apply to the courts of the foreign country, they will surely respect an order made by the courts of the ordinary residence for the reason that it is the childs home and, as such, is entitled to special consideration. It can be said that the court adopted a different approach as that of applied under the Hague convention On the Civil Aspects of International Child Abduction (The Hague Convention) as this convention gives more emphasize to habitual residence instead of ordinarily residence. The concept of ordinary and habitual residence helps in determining cases where it is to be decided whether for the purpose of residing or for a temporary visit solely.

To quote the learned judge in regards to the issue of the welfare of the child he states that : ...

".......in applying the welfare principle in the interests of justice and the welfare of the daughter the court should not countenance such a unilateral movement of the daughter to Malaysia. In kidnapping cases such as the present, where the child is abducted by one parent and brought to another country without the other parent s knowledge and consent, it is in the child s welfare to be returned to its home country, unless there is compelling reason to the contrary, or the child would come to harm if returned. It is in the daughter s welfare and interest for her to be returned to Australia, her home, her school, her friends and relatives, where the issue as to who

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is to have custody can be decided by the Australian court, the court of the country to which the daughter has the most real and substantial connection. ”

The court adopted the approach set out in the case of Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam (1997) 3 MLJ 768 whereby in this case two children were kept in Malaysia by their mother against their father wishes who happen to be a Canadian national. It was held in this case that the Malaysian court will not make orders in regards to custody as it was an issue to be trialled by the Canadian Courts. To quote the trial judge in this case he reiterated that:

“ ... we do not think it is desirable for the Malaysian courts to make a full inquiry into the wife-husband disputes in cases such as the present where the court is satisfied that no obvious harm will come to the children by sending them back to Canada.”

He further stated that:

“... the basic rule is that the paramount consideration is the well-being of the infants. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these Canadian nationals.”

Based on the welfare principle it is crucial that the child should be returned to their home country unless there are substantial reasons to prove otherwise. However it is to be noted that this principle is not followed universally in Malaysia and that once the courts jurisdiction is been invoked, thereby the court makes their own independent assessment in regards to the welfare of the child and it cannot simply comply with any order made by a foreign court.

In the case of Mahabir Prasad V Mahabir Prasad [1982] 1 MLJ 189, in this case the parties were married in India with two children. The father came to Malaysia to set up a home here and the mother and children followed. The marriage later faced difficulties and the mother returned to India. She then petitioned for divorce in india and was awarded custody of the two children who had then stayed with the father with the parties mutual consent. The father then applied to the Malaysian courts for custody of his children. The federal court in Malaysia held that due to the fact that a court hearing the application for custody was not bound to give effect to a foreign court order if it would not be for the children’s benefit. The court referred to the priniciple laid out in the case of In Re J (a Child) (Custody Rights: Jurisdiction) whereby in this case it was reiterated that:

“... there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child his home country. On the other hand, summary return may very well be in the interests of the individual child.”

It is crucial to note the citation made in the case of In Re J (A child) (Custody Rights: Jurisdiction) it is stated that :

“It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably

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to be preferred to another. Indeed, we do not have any fixed concept of what will be in the best interests of the individual child"

The decision and approach taken by the Malaysian Courts in the case Herbert Thomas Small V Elizabeth Mary Small makes it evident that an order for return of an abducted child will be made by the Malaysian Courts if there is evidence put forward that the child will be harmed or that the child's home state is not accounting to the welfare principle in deciding the issued pertaining the custody of the child.

As mentioned earlier the Hague Convention is set out to lessen any attraction for a dissatisfied parent to abduct his or her own child in the hope that a different judicial system would favour him or her and to promote international respect and trust of foreign legal systems. However it is to be noted that Malaysia has not acceded to it. This is regrettable due to the fact that there is obligation on the state parties under article 11 of the convention on the rights of the child to decrease illicit transfer and non return of children from other countries. Malaysia has acceded the convention on the rights of the child in 1995. The benefits of being a member is reciprocal and mutual.

The case of Herbert Thomas Small v Elizabeth Mary Small makes it evident that a judiciary in a country which is not party to the Hague Convention settle the problems of parental child abduction. For instance in cases of abduction of a non-Muslim child into Malaysia, the Malaysian court will order the return of the children unless there is evidence that the child will be harmed or that the foreign court will not decide issues of custody based on the welfare principle. This approach should be reciprocated by other countries which are not yet parties to the Hague Convention and they should consider adopting this approach set out by Malaysia.

In the case of Raja Bahrin, (1986) 11 Fam LR 233, Raja Bahrin, who is a Muslim and a Malaysian citizen, married X in Malaysia in 1981. X is an Australian citizen who became a Muslim. Their two children were born in Malaysia. The children has both Malaysian and Australian citizenships. The marriage faced a breakdown and X sought Raja Bahrin s permission to take both their children to Australia to visit her sick grandmother who had been hospitalized. X and the children arrived in Australia on 13 November 1985.On 27 November 1985, and without informing Raja Bahrin, she applied in the Melbourne registry of the Family Court for guardianship and custody of the children, and injunctive relief designed to prevent Raja Bahrin from interfering with her custody of the children. The applications came before the Family Court, ex parte, on 28 November 1985, and the judge made in substance the orders sought, and further ordered that all relevant documents be promptly served upon Raja Bahrin. On 16 January 1986, he obtained an order, ex parte, from the Court of the Chief Kadi at Terengganu, that, until further order, X resume cohabitation with him and he would have guardianship and custody of the children. Jurisdiction over Muslims with respect to matrimonial matters, guardianship and custody are exercisable by Islamic courts. On 19 January 1986, he flew to Melbourne to contest X s applications. It was later argued before the court that, in permanently removing the children from Malaysia, X had kidnapped the children. The Australian Family Court, having heard the parties, ordered X to return to Malaysia with the children for the purpose of the case, and that Raja Bahrin pursue proceedings in Malaysia in the High Court rather than in the Kadi Court. X appealed and the matter came before the Australian Full Family Court, where it was reversed on legal grounds. In brief, the appeal court held that the choices open to the trial judge were either to return the children to Malaysia or

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order a full custody hearing in Australia. The orders made against Raja Bahrin denying him access to the Kadi Court and requiring undertakings to be performed in Malaysia were outside the court s jurisdiction, and therefore unenforceable. Likewise, the orders made for X to return to Malaysia were flawed as they were also outside the court s jurisdiction. The matter was remitted for hearing on the merits. However, in the meantime, X was given sole custody of the children and Raja Bahrin was restrained from removing the children, until further order. Presumably further orders were subsequently made, as the children remained in Australia under their mother s care. The marriage was dissolved and X subsequently remarried an Australian. Raja Bahrin, while visiting his two children in Australia, removed them from the jurisdiction without their natural mother knowledge or consent. The Australian Family Court had earlier awarded custody of the children to the mother who had remarried. The case did not come before the High Court in Malaya as Raja Bahrin was given custody of the children by the Syariah Court, given that all parties were Muslims. Gee J the judge in this case decided to exercise a summary procedure and embark upon a preliminary investigation as to whether it was in the best interests of the children to have a full hearing in Australia, or direct that they be returned to Malaysia so that the matter may be dealt with in the Malaysian court. In the case of Raja Bahrin, it was reported that he smuggled his children by boat from Australia to Indonesia and then onwards to Malaysia by air. The Australian boat captain who participated in the scheme was subsequently convicted. The Australian Attorney General had sought the extradition of Raja Bahrin, but to date, without success.

As a conclusion child abduction cases have increased due to the high mobility of persons around the world and the act of dissatisfied parents who has not been awarded custody over a child then reacting to initiate new court proceedings in another jurisdiction with the hope that the decision may favour them. However countries with a predominantly Muslim population for instance Turkmenistan and Uzbekistan, that includes our country Malaysia have not acceded to the Hague Convention as there are syariah laws that deal with the issues of custody. However, the failure to accede to the Hague Convention means that these countries will not benefit from the international legal system if its own children are abducted to countries overseas.

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