Issues at Hand in the Fatwas of Orphan Care and Legal Adoption

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Summary

This article aims to offering a comprehensive summary of the issues at hand when it comes to the fatwas related to orphan care and legal adoption from the perspective of the Islamic law. This summary is based on a wide survey of the fatwas and research, published in various Fiqh Councils decisions, theses on Islamic law, and academic research. The issues related to this topic could be summarized in the following questions:

• What is the difference between the following forms of child and orphan care mentioned in the Quran and Hadith:
  a. tabanni,
  b. kifala,
  c. istilhaaq
  d. ri'ayat al-laqeet wal-yateem?

• Is "adoption" as known in the western legal system equal to any of the above forms mentioned in the Islamic law?
• Is "adoption" as known in the western legal system a rewarded good deed according to the Islamic law?
• What are the rules that govern the interaction between the adopted child and the rest of the family members?
• What are the rules that govern the inheritance of the adopted child from the rest of the family members?
• What are the rules that govern the change of the adopted child’s name?
• What are the rules that govern the breastfeeding of the adopted child?

The following brief survey of the details of the topic will answer the above questions. Then, a proposal is made that aims for legal child adoption, which aims to avoid the prohibited practices in the Shariah and achieve the best interest of the child.
Crisis

Muslim children around the world face a serious crisis which the system of adoption could ease. The most vulnerable group of children today is Syrian “parentless” children. It is widely believed that the number of Syrians who are in need of humanitarian assistance is now 13.5 million, 6 million of those are refugees, and more than half of these refugees are children. Scores of refugee children, Syrian, as well as Afghani, Iraqi and others, are abused or exploited and they need caring and secure homes. However, unfortunately, Muslim families in the West in general have shown reluctance in adopting children due to a general perception that legal adoption is unlawful in the Shariah.¹

Forms of orphan and child care in the Shariah

The unequivocal claim that the Shariah prohibits “legal adoption” is not accurate.² Adoption is a complex and multi-faceted legal system that is defined in several ways, some of which go against the rules of the Shariah and some do not.³ Adoption is generally translated as “tabanni”, even though the word “tabanni” has a particular definition based on its history in the Arab culture before Islam that is not equal in every aspect with legal adoption today.

²This is the opinion of the vast majority of scholars and fiqh councils. It is based, however, on a definition of legal adoption in a “closed” or “confidential” form. Refer for example to: Yusuf al-Qaradawi, Al-Istilahaq wa'l-tabanni fil-shariah al-islamiyyah (Istilhaq and tabanni in the Islamic law), Wahba, Cairo, 2000; Rachel Zoll, Adoption denied: Islam has a system that doesn’t allow Muslim orphans to be placed, Associated Press, published: Dec. 17, 2010; Sayyid Muhammad Rizvi, Adoption in Islam, Al-Islam.org, October 29, 1990 / Rabi II 10, 1411; Shabnam Ishaque, Islamic principles on adoption: Examining the impact of illegitimacy and inheritance related concerns in a context of a child’s right to identity, International Journal of Law, Policy and the Family 22, 2008, pp. 393–420; Khalifa Jaballah, Al-tabanni fil-qano on al-wad’l wal-shariah al-islamiyyah (Tabanni between the positive law and Shariah), Masters of Arts, Faculty of Law and Political Science, M. Khairdar University, Algeria, 2014-2015; Fawaz Ismail Mohammad, Adoption and its alternatives, Majalat Kulliyat al-Ulum al-Islamiyyah, Vol. 7, No. 13, 1434/2013; Farida Zouzou, Maqasid al-shari’ fi tahreem al-tabanni wa r’ayat al-laqeet (Purposes of the Legislator in prohibiting adoption and caring for the laqeeet), Lecture, College of Shariah, University of Islamic Sciences Malaysia, no date.
Similarly, there are four related terms in the Shariah legal language, none of which is equivalent to adoption in every sense of the word: (1) *tabanni*, (2) *kafala*, (3) *istilhaaq*, (4) *ri’ayat al-iaqet*. The following are definitions and brief backgrounds.

**“Tabanni” (Claiming a son)**

Arabs in the pre-Islamic era used to add anyone they wished to their lineage through adoption. A man would adopt (*tabanna*, "to make a son") any boy of his liking as son (*mutabanna*). Once announced to the public, the boy would become like a son to him, sharing all responsibilities and rights of his adopted family and taking his new father’s name. The adoption was fully effective even the adopted son have a known father or come from a known lineage.

This practice was widespread in Arab society before Islam. Before the revelation, the Prophet (peace be on him) had himself adopted Zaid ibn Harithah, who had been captured as a child during one of the raids on his tribe. Hakim ibn Hizam had bought him for his aunt Khadijah, and after her marriage to the Prophet (peace be on him) Khadijah presented Zaid to him as a servant. When Zaid’s father and uncle learned his place of residence, they came to the Prophet (peace be on him) to demand Zaid’s return. The Prophet (peace be on him) gave Zaid a choice, and he chose to stay with the Prophet (peace be on him) in preference to his father and uncle. The Prophet (peace be on him) then set him free and publicly adopted him as his son. He was thereafter called Zaid ibn Muhammad and became the first of the freed slaves to accept Islam. Later, the Quran abolished this system, prohibiting *tabanni* and eradicating all its consequences: “Nor has He made your proclaimed sons to be your (real) sons; that is simply a saying of your mouths. But Allah speaks the truth, and He guides you to the (right) way. Call them by (the names of) their fathers; that is more just in the sight of Allah. But if you do not know their fathers, they are your brothers-in-faith and your wards” (33:4-5).

In the hadith: “The one who claims descent from someone other than his (real) father ... is cursed by Allah, His angels, and the people. Allah will accept neither repentance nor ransom from such a person on the Day of Resurrection” (Reported by al-Bukhari and Muslim). And Sa’d ibn Abi Waqqas narrated that the Prophet (peace be on him) said: “If someone claims a person as his father with the knowledge that he is not his father, the Garden will be forbidden to him” (Reported by al-Bukhari and Muslim). There is a consensus amongst scholars of Islam in every time that a false declaration of lineage does not create a legal or material reality, or make an adopted individual a son or daughter in the maternal/paternal sense or the Shariah sense of rights and responsibilities.

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4 For more details related to the mention of this story here, refer for example to: Kitab al-tabaqat al-kabir [1967], Ibn Sa’d, volume 2, p. 108; The History of al-Tabari: The Last Years of the Prophet: the Formation of the State (Translated: Ismail K. Poonawala), volume 9, pp. 99–101; and various interpretations of Surah al-Ahzab (No. 33), especially verses 4-5 and 37-40.

The Quran also clearly abolished all the effects of this system of adoption that relate to inheritance and to prohibition of marriage to the widowed or divorced wife of the adopted son. In matters of inheritance, the Qur'an does not recognize any claim except those based on relationship through blood and marriage: “But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah. Verily, Allah is the All-Knower of everything”. (8:75)

With regard to marriage, The Qur'an declared that only the wives of one's real sons, "the wives of your sons who are from your (own) loins" (4:23), not the wives of the adopted sons, are permanently forbidden in marriage. Accordingly, it is permissible for a man to marry the divorced wife of his adopted son, since she has never been related to him by blood in reality.

Zaid ibn Harithah, eventually married the Prophet's cousin, Zainab bint Jahsh. Zaid and Zainab did not get along well, and Zaid became increasingly dissatisfied and complaining frequently to the Prophet (peace be on him). Although the Prophet (peace be on him) knew, through revelation, that Zaid would divorce Zainab and that he would afterwards marry her himself, human weakness overcame him, and he was afraid of facing the people. Thus, whenever Zaid complained to him about his wife, the Prophet (peace be on him) would tell him, "Hold on to your wife and fear Allah". At that point Allah revealed some verses of the Qur'an admonishing the Prophet (peace be on him) and abolishing one aspect of the system of tabanni, which prohibited a man from marrying the ex-wife of his mutabanna/adopted son.

“And when you did say to him who had received the favor of Allah and your favor, 'Retain thy wife and fear Allah,' you did hide within yourself what Allah was about to make manifest, fearing the people; but Allah has more right that you should fear Him. Then, when Zaid had carried out the necessary formality (of divorce) from her, We gave her to you in marriage so that (in the future) there might be no difficulty for the believers with respect to (marriage to) the wives of their adopted sons when the latter have carried out the necessary formality (of divorce) from them; and Allah's command must be fulfilled”. (33:37) The Qur'an goes on to confirm: “Muhammad is not the father of any man among you, but he is the Messenger of Allah and the Seal of the Prophets; and Allah is the Knower of all things”. (33:38-40)

Therefore, “tabanni” was prohibited in order to protect lineages and the rules that apply to the relationship between the “adopted” child and the rest of the family remain to be the same rules that apply to all members of the family and others outside the blood related family.

However, Islam does not prohibit all forms of care for children who need care. In fact, Islam highly encourages raising and caring for children – one’s own children as well as children of others especially when their parents are deceased, missing or not capable of caring for them. The following systems are permissible, and highly encouraged in the Shariah.
“Kafala” (Guardianship)

With the exception of Indonesia, Malaysia, Somalia, Tunisia, and Turkey, the laws of most Muslim-majority states do not currently permit legal adoption. Instead, laws permit a system of guardianship (kafala), which resembles foster-parenting, but is more stable. Kafala is a commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way a parent would do. It involves the obligations of guardianship and maintenance without the creation of parenthood legal ties, or severing the biological family bonds of the child or alter the descent lines for the adopting family. Unlike foster-parenting, kafala is intended to be a permanent arrangement for a minor.

“Istilhaq” (Recognizing a filiation)

Istilhaq is recognition of filiation made by the father for a legitimate child. Recognizing filiation even in the last illness shall be proof of that filiation unless the child is illegitimate, subject to the following conditions: the recognizee must be of unknown paternity, the recognizer must be of legal age, sound mind and free-willed, the difference in age between the recognizer and the recognizee must allow for believing the recognition, and the recognizee must believe the recognizer. Just as it is not permissible for a man to claim a son of whom he is not the natural father, it is not permissible for a father to deny his paternity of a child born to him. Istilhaq is a process of admitting to a filiation or lineage and, contrary to some claims, is not supposed to be a way of allowing “legal adoption” from an Islamic point of view. These are two different processes.

“Ri’ayat al-laqeet wal-yateem” (Caring for a foundling or an orphan)

It is highly rewarded act of charity for a family to bring home an orphan or a foundling to care (ri’ayah), to rear, to educate, and to treat as their own child. However, a man is not to attribute the child to himself, nor does he give him the rights which the Shariah gave his natural children. The Prophet (peace be on him), "I, and the one who raises an orphan, will be like these two in the Garden", and he pointed to his middle and index fingers with a slight gap between the two. In this case, a foundling (laqeet) is regarded as an orphan (yateem).

“Closed” versus “Open” adoption

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6 Muslim Women’s Shura Council, Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child, American Society for Muslim Advancement 2011.

7 Refer for example to: Moroccan Mudawwanah for Personal Law, Statute 84/11 09/06-1984, 05/02 27/02/2005, 75/58 26/09/1975.

8 Refer for example to: UAE Personal Status, Fed. Law 28 / 2005.

Adoption can be defined as the legal creation of a parent-child relationship, with all the responsibilities and privileges thereof, between a child and adults who are not his or her biological parents. Generally speaking, there are two types of legal adoption, closed and open.\(^\text{10}\)

Before contemporary times in the United States and the West in general, adoptions were closed; there is no contact whatsoever between the birthparents on one hand, and the adoptive parents and child on the other, after the adoption takes place. In fact, there may be no contact before the adoption. In many cases, the adoptive parents did not know where the child came from, or who his or her birthparents were. The child might not have even known that he or she came into the family through adoption.

Even if the adoptive parents and birthparents know of each other at the time of the adoption, they do not stay in touch after the adoption takes place. The child often will not know who his or her birthparents are, especially before turning 18. When adoptions are closed, the original files that carry all relevant information are usually physically sealed.

But nowadays, the trend in adoptions, in the United States and the west in general, is toward open adoptions, in which all the parties to an adoption meet and often remain in each other's lives. Most American states have created procedures through which family members seeking to "open" a closed adoption may be able to access information about the other parties. However, the process and degree of access to information varies widely from state to state, with some states requiring a court order to reveal information that can be used to identify a party to an adoption.\(^\text{11}\)

Based on the above, it is clear that the “closed” type of adoption is contrary to the Shariah, while the “open” type could be compatible if the details are worked out in line of the rules mentioned above.

**Adopted child and inheritance**

Children raised under a *kafala* or *ri'ayah* system do not automatically gain inheritance rights from their guardians, even though they could have a share according to common custom (*urf*) or a specific will. These principles contrast with most secular laws of adoption in which the adopted child has the same inheritance rights as a biological child.

In contrast, there are no verses in the Quran which prohibit guardians from giving money to orphans. Quite the contrary, while blood-relations are considered primary,

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\(^\text{11}\) Refer to: National Council for Adoption, Adoption Factbook IV, Sterling, 2007; Virginia Department of Social Services, Directory of Licensed Child Placing Agencies, Richmond, January 2016.
spending on one’s dependents is highly praised in Islam. According to most opinions in the Schools of Islamic Law, a person can bequeath a maximum of one-third of their property, and more than one-third if the mandatory heirs consent. In addition, one can make a gift from their assets to anyone during his or her lifetime. There are no restrictions on the size of the gift, unless the intention is to harm legal heirs.

**The adopted child’s name**

The first restriction frequently cited from Islamic sources is on the issue of dissimulation through naming. As quoted before, the Quran clearly forbids the pre-Islamic practice of claiming adopted children as biological children: “Call to them by the names of their fathers. That is more equitable to God. But if you know not their fathers, they are your brothers in the way of life and your defenders” (33:4-5).

Although these above verses have generally been interpreted as a ban on “adoption”, their purpose (*maqsid*) is to avoid the change of identity of the child in a way that cuts him/her from their lineage.

According to article 92 the bylaws of the Child Law No 12 (1996) in Egypt, for example, “an orphan or a child of unknown parentage, male or female, carries the surname of the guardian family to be attached at the end of his/her first name. This action should be documented in the child’s file, and it does not to lead to any effects related to adoption.”

**Breastfeeding the adopted child**

The Quran considers milk-foster relationship (breast-feeding from the same mother) to be a close relationship that does not allow marriage (4:23). Adopted children, unless they have been breast-fed by the adoptive mother, are legally allowed to marry within the family. In contrast, Western states consider marriages between adopted siblings and adoptive parents and adopted offspring as incestuous and prohibited.

Some scholars have recommended breastfeeding by the adoptive mother as a way of making him/her a milk-foster son/daughter, even by artificially inducing breast milk.12

**Conclusion and suggestion**

Given the dire need of orphans and parentless children, especially refugees, and based on the survey in this article, it is Islamically highly recommended to adopt children by Muslim families. It is necessary, given the Shariah rules, to work with

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lawyers to adopt children within an “open” system and to work out the details in order to abide by the rules of the Shariah, as indicated above.

I find it useful here to quote a recent fatwa by the European Council for Fatwa and Research, under the title: The Custody of Refugee Children in Europe.\(^{13}\)

Since many Syrians and others migrated as refugees to non-Muslim lands, Muslims in Europe have duty incumbent by virtues of brotherhood and sisterhood in humanity and take in their custody under age refugees, let them live with their children and take care of them as they take care of their children as an endeavor to protect their distinctiveness.

It is not accepted to be slow when issuing this rule, let alone refraining from issuing a rule pertinent to the matter of concern due to the likelihood of Kulwah or the uncovering of some of what is to be concealed. These partial rules are to be observed as much as possible in normal circumstances. In addition, they are not definitive but likely to happen and cannot be an obstacle in the way of fulfilling this serious duty i.e. taking the underage refugees under one’s custody.

It is noteworthy that the Islamic rules are classified into various categories. One cannot neglect a rule of a higher category just to fulfill a rule of a lower category. Here we have two rules; one is of a lower category and is likely to happen and the other is not only of a higher category but also is definitive that it is classified as a necessity.

By all means, one cannot be complacent regarding his/her duty towards these refugees. After taking them under their custody, Muslims should consider and apply the most ideal tools to assist them in avoiding their fears.

In this context, Islamic centers, societies and school, especially big ones with muti-purpose facilities, have a significant role in taking under their care those who cannot be taken under the custody of Muslim families. They should exert efforts to set up social care centers and underage care centers and orphanages. They should also contact state concerned authorities to prepare a convenient atmosphere that respects their distinctive requirements. In addition, they should quality Muslim families so that they might fulfill their role effectively in terms of their duty of custody and care of the underage refugees in a legal way.

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