



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. APPLICATION NO. 95 OF 2015
IN THE MATTER OF ADVISORY OPINION ON ADOPTION UNDER ISLAMIC LAW
AND
IN THE MATTER OF AN APPLICATION BY H A B A
ADVISORY OPINION

This advisory opinion is the upshot of the Notice of Motion dated 11th December, 2015 whose central prayer is the determination on whether adoption is legally recognized under Islamic law.

The matter came up for hearing on 15th December 2015 where the applicant articulated her position.

The argument by the applicant under the Oath was that she was born in Somalia on 12th June 1994. After the erupt of the civil strife she lost her parents and later she was forced to seek a refuge at Hagardere refugee camp in Kenya with some of her family members.

The applicant further testified that she was placed under the care and control of one F H D who adopted her informally and left for Canada on the 3rd day of June 2015.

She further stated that after F H D left she was placed under the custody of her daughter one D H I who lives in [*particulars withheld*] estate in Nairobi.

Lastly the applicant submitted that her effort to join F H D who adopted her in Canada was declined by the Canadian authority on the ground that adoption is not recognize under Islamic legal system.

Having given consideration to the submission of the applicant, the question that falls for my consideration is Whether adoption is recognized under Islamic law?

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. Adoptions incorporate a child into a family as offspring and sibling, regardless of genetic ties. There are two main categories of adoption practices, generally termed as closed adoptions and open adoptions. However, in reality most adoption practices fall somewhere on a continuum between fully open and fully closed.

In “closed” or “confidential” adoptions, the birth family and the adoptive family have no identifying information about each other. Children may not be informed that they have been adopted, and they may have no way of tracing biological kin. If the child comes from a different cultural background than his or

her adoptive parents, their heritage might be marginalized or ignored. Closed adoptions, therefore, have the potential to dissolve all ties between an adoptee and her biological family.

The general consensus among major Sunni and Shi'i fiqh schools (*madhhab*) is that a certain type of adoption in which the child's identity is absorbed into the identity of the adoptive family is forbidden (*haram*). This consensus does not include the views of all Muslim scholars: some Muslim scholars have argued that the Quran does not prohibit adoption, which they therefore classify as an act towards which religion is indifferent (*mubah*).

"Open" adoptions, which are becoming increasingly common across the world, allow for a full disclosure of identities on both sides. Open adoptions facilitate direct interaction between the adoptive family, the adopted child, and any birth relatives. The child's birth culture may more easily be respected and promoted by the adoptive family and incorporated into the family's daily life.

The following verse from the Quran forbids the pre-Islamic practice of claiming adopted children as biological children:

'Nor has [God] made your adopted sons, your sons. That is but a saying of your mouths. And God says The Truth and He guides to the way. 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. And there is no blame on you in what mistake you make in it but what your hearts premeditate. And God has been Forgiving, Compassionate (Quran 33:4-5).

These verses have generally been interpreted as a ban on adoption. However, some jurist holds that they refer to harm in *dissimulation*, not harm in adoption. The Quranic injunction against lying to the adopted child is completely in line with modern psychiatric thought. The American Academy of Pediatric Psychiatry strongly recommends, for psychological reasons, that the child be told she or he is adopted. In addition, this principle is embedded in international laws. According to Articles 7 & 8 of the UN Convention on the Rights of the Child (1989), each child has the right to know and to preserve his or her identity.

As Sharvananda CJ observed in *Ghouse v Ghouse* [1988] 1 Sri LR 25 that:-

"Adoption is inconsistent with the truth....Natural parentage, which is so fundamental to entitlement in the Muslim law of intestate succession, cannot be established in the case of adoption, and hence an adopted child under Muslim Law, whatever be the Sect of the deceased Muslim, is not qualified for want of consanguinity to succeed to the intestacy of the deceased Muslim - no amount of deeming can make the blood of his adoptive parent flow in his body."

The fiqh of adoption developed from the need to balance the strong emphasis the Quran and the Sunnah place on the wellbeing of orphans, on the one hand, with Islamic restrictions on pre-Islamic Arabian adoption practices, on the other.

And they ask you about orphans. Say: Making things right for them (islah) is better. (2:220)

This is the primary verse regarding orphans in the Quran and acts as the foundation investigation of adoption.

The word "islah" means to repair, heal, and make good. Although many classical scholars have interpreted this term in a financial sense, the word is semantically broad enough to encompass everything in a child's life. Therefore, "islah" may be understood to mean "the best interests of the child."

To be Islamically sound, adoption practices must secure both the best interests of the child and further the public interest (*maslaha*).

Sharia calls for freedom, justice, and equality. As a human endeavor, fiqh reasoning has approximated

these ideals with varying results. Too often, fiqh scholars have stifled free interpretation (*ijtihad*) and encouraged strict following (*taqlid*), thus losing sight of the higher ideals of divine law. Al-Shatibi and other jurists in the fourteenth century introduced the notion of *maqasid al-Sharia* (the objectives of *Sharia*), aiming to bring fiqh rulings more in line with these ideals and the principles of compassion and justice as expressed in the divine revelation. The principles of *Sharia* remind us that “technicalities of the law cannot be allowed to subvert the objectives of the law,” such as justice, mercy, and compassion.

The six objectives and principles of *Sharia* include the inviolability of life (*al-nafs*), mind (*al-‘aql*), family (*al-nasl*), wealth (*al-mal*), dignity (*al-‘ird*), and religion (*al-din*). Any ruling under Islamic law should enhance and not frustrate these six aims. Therefore, adoptions of orphaned children must be evaluated under each principle of *Sharia*.

The Protection and Promotion of Life:

The right to life is both a universal human right and one of the main principles of Islam. Taking in and caring for a parentless child is so esteemed in Islamic sources that it is considered an act of worship. Early jurists used the Quranic edict on saving a life to sanction the care of abandoned children and orphans: “Whoever gave life to one person, it will be as if he gave life to all of humanity” (Quran 5: 32). Adoption of children protects and promotes life. Street children and children in institutions are at a greater danger of abuse and exploitation than children who are being raised in a stable family environment. In fact, as classical jurists have observed, taking in an orphan can literally mean saving a human life. Beyond necessities like food and shelter, children need affection and nurturing for proper development. Poor development caused by inadequate touch, stimulation, and bonding is a serious medical condition called “failure to thrive”.

The Protection and Promotion of Mind:

Adoption of children can further the protection and promotion of healthy minds. Research shows that children raised in institutions are more likely to experience neglect and abuse, severe emotional and behavioral problems, and cognitive and physical development setbacks. A study of Romanian state orphanages found that early neglect in institutional settings often led to severe disabilities, resulting in lifelong institutionalization. Research indicates that adopted children growing up in a stable family environment are less susceptible to mental health issues than children who are reared in institutional environments or in foster care in regard to educational attainment.

In addition to protecting mental health, this principle promotes intellectual development at all levels of society and includes the right to education. Adoptive parents, therefore, must encourage their children’s education and support them in developing their unique talents. According to the Organization of the Islamic Conference’s (OIC) *Covenant on the Rights of the Child in Islam*, parents and guardians must “encourage the child to acquire skills and capabilities to face new situations and overcome negative customs and to grow up grounded in scientific and objective reasoning.”

The Protection and Promotion of Family:

A family environment is almost universally recognized to be in the best interests of the child. According to a 2005 report entitled “Children in Islam: Their Care, Development and Protection,” issued by UNICEF and the International Islamic Center for Population Studies and Research at Al-Azhar University, “children deprived of parental care should be sponsored and provided for by people acting as if they were their parents.”

The Islamic principle of protection of family perhaps most obviously argues for adoption of orphaned children. The earliest bonds formed between children and their caregivers (or lack thereof) have a tremendous impact on relationships throughout an individual’s life. Research shows that children who grow up without the nurturing and love necessary for proper development have difficulties forming stable unions of their own, experiencing unhealthy marriages and early pregnancies. This is because substandard care-taking arrangements can result in serious attachment disorders with lifelong consequences.

Further, childlessness can put a strain on marriages, leading to unjust polygamous arrangements or divorce. Adoption can therefore strengthen marriages and prevent divorce, thus furthering the public interest.

The Protection and Promotion of the Right to Wealth:

Every human being deserves the right to earn a dignified living. Breaking through the cycle of poverty, however, can be very difficult for children raised in substandard environments without sufficient education and socialization necessary for a career. Enormous human potential and resources are wasted when a society cannot take proper care of its children. Institutional childcare has also been associated with long-term costs to society, because of recurrent health problems and/or conflict with the law.

Unlike the legal adoption, guardianship does not provide explicit inheritance rights from the guardian and can lead to economic hardship for children, who are the most vulnerable members of society. Indeed, the kafala system, despite its many benefits, risks “placing a substantial amount of emphasis on property” at the expense of the protection of vulnerable children.

The Protection and Promotion of Dignity:

Every human being is worthy of respect and dignity. Human dignity, however, is almost impossible to ensure for a child growing up on the streets, without the protection and the guidance of caring adults.

Children without families are more easily exploited and harassed. The rate of sexual and physical abuse is far higher in orphanages than in family settings. The development of secure attachment ties in early childhood influences multiple aspects of an individual’s life, including the sense of dignity and self-esteem. Some children growing up in institutional settings develop “indiscriminate friendliness,” acting without fear or caution towards all adults, including strangers. This puts them at significant risk for exploitation.

A stable family situation can help safeguard against these problems. Adoption of orphans, therefore, can promote human dignity.

The family, however, must be a safe haven for all members. The use of adopted or kafala children as de facto servants has occurred in both historical and contemporary contexts and is to be strongly condemned.⁵⁸

The Protection and Promotion of Religion:

Religious education and worship in a family environment is preferable to haphazard information provided in unstable environments. Children without guardians may fall prey to extremists and cults who promise a sense of belonging and use their recruits for their harmful political agendas. Many members of the Taliban, for example, are war orphans who grew up in refugee camps during the Soviet invasion of Afghanistan. Some of the most brutal extremist movements in the world, such as the Khmer Rouge in Cambodia and the Revolutionary United Front in Sierra Leone, utilize war orphans whose dire childhood circumstances restrict their spiritual development. The military regime of Siad Barre in Somalia also trained children from orphanages as soldiers and cadres, because these children “were not expected to have a civilian life.”

According to the OIC *Covenant on the Rights of the Child in Islam*, parents and guardians must “develop the personality, religious and moral value, and sense of citizenship and Islamic and human solidarity of the child and to instill in him/her a spirit of understanding, dialogue, tolerance, and friendship among peoples.” In addition, parents and guardians must respect the child’s right to form his or her personal views in all matters and allow the child to express these views freely.

The Court recognizes the desirability of ethnic, cultural, and religious continuity in a child’s life, as dictated by international conventions and state laws. However, the Court considers the spirit, dignity, and

compassion of a human being as essential factors to consider when adopting, rather than the general strictures of one's faith tradition. If it were not for Assiyya, the wife of Pharaoh who adopted the infant Moses, saving him from Pharaoh's decree, we might not have had the blessing of the being of the Prophet Moses. In the Qur'an, she is remembered as an example of one who is faithful (66:11); it was not an issue that she was not of the same faith as Moses when she decided to care for him. It was the compassion of her heart and her ability to stand with Truth, recognizing the need for his well-being and the joy he might bring, that were of greater importance.

Muslim scholars who argue against adoptions often bring up specific concerns regarding lineage and naming, inheritance, consanguinity (*mahramiyya*) among others.

The genuine concern raised by the learned jurist can be remedied by the following rules;

- i. An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family;
- ii. An adopted child inherits from his or her biological parents, but not *intestate* from the adoptive parents.
- iii. When the child is grown, members of the adoptive family are not considered blood relatives, and are therefore not *mahram* or within prohibited relationship to him or her. "Mahram" refers to a specific legal relationship that regulates marriage and other aspects of life. Essentially, members of the adoptive family would be permissible as possible marriage partners, and rules of modesty exist between the grown child and adoptive family members of the opposite sex.
- iv. If the child is provided with property or wealth from the biological family, adoptive parents are commanded to take care and not inter-mingle that property or wealth with their own. They serve merely as trustees.

It is high time that the aspirational, theoretical/legal and practical realities be squared in the area of Islamic "adoption" rules and practices. The prioritization of child welfare evident from the both the *Qur'an*, *Sunna*, and even the works of classical jurists must be brought to the fore. This is best achieved by reinterpreting and reconstructing classical *fiqh* positions to make them consistent with the *maqasid al Shariah* and the prioritization of human welfare (and more specifically child welfare in this context) rather than maintaining the *status quo* rules and practices that are best left to their own socio-historical contexts.

The foregoing demonstrates that there is sufficient basis in Islamic jurisprudence to argue for a qualified support of international adoptions. I have clearly established that taking care of orphans and foundlings is a religious obligation. Arguably one of the best ways to take care of these children is to place them in loving homes, provided that a child's lineage is not intentionally negated or concealed.

A reformed model of Islamic adoptions will enable Muslims to fulfill a religious obligation while ensuring that the most vulnerable do not fall through technical cracks and be negatively impacted by formal rules that no longer serve their intended purposes.

Dominance cannot be equated with truth...Minds fed on the myths of the dominant culture need to be provoked into rethinking their own complacencies, and weaned to the idea that whatever the culture which might prevail at any given moment, there is always another possibility, an alternative to understanding and to virtue.

In the premises, the question is answered in affirmative.

Dated , Delivered and Signed at Nairobi this 26th day of January, 2016.

Hon. A. I. Hussein

