

Guardianship through Open Adoption in the West: Between Fiqh and the Law of the Land

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Summary

This article aims to offer a comprehensive outlook 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 is based on a wide survey of the fatwas and research, published in various Fiqh Councils decisions, theses, and academic research. The issues related to this topic could be summarized in the following questions:

- What are the differences between the following forms of child and orphan care mentioned in the Quran and Hadith: *Tabanni, Kafala, Istilhaaq, Ri'ayat al-laqeet wal-yateem*?
- What is the difference between closed and open adoption?
- Is "open adoption" as known in the western legal system categorically equal to any of the above forms mentioned in the Islamic law?
- Is "open 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

Children around the world, especially Muslim children, face a serious crisis that the system of adoption could ease. The most vulnerable group of people today is Syrian "parentless" children. It is widely believed that the number of Syrians who are in need of humanitarian assistance is now close to 15 million, 7 million of them are refugees, and more than half of these refugees are children, hundreds of thousands of them ended up in Europe and many of them are parentless. Reports confirm that scores of refugee children, Syrian, as well as Afghani, Iraqi and others, are abused or exploited, especially organ theft, and they urgently need caring and secure homes. However, unfortunately, Muslim families in the West in general and the US in particular have shown reluctance in adopting children due to a general perception that legal adoption is unlawful in the Shariah.¹

¹ Refer to: www.syrianorphans.org; www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html; muslimvillage.com/2010/11/29/7493/muslim-orphans-caught-between-islamic-and-western-law. See also: European

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 and legal implications based on its history in the Arab culture before Islam. In fact, there are four related terms in the Shariah legal language, none of which is equivalent to legal adoption as a concept: (1) *tabanni*, (2) *kafala*, (3) *istilhaaq*, (4) *ri'ayat al-laqeet*. The following are definitions and brief backgrounds.

“*Tabanni*” (Claiming a child as 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 if the adopted son have a known father or come from a known lineage.⁴

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)

Council for Fatwa and Research: Fatwa 1/25 2015, Final Statement of The 25th Ordinary Session of The European Council for Fatwa and Research Held in Istanbul, Turkey.
http://islamireland.ie/site/assets/files/1727/final_statement_25_english.pdf

² This 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 wal-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-qanoon al-wad'I wal-shariah al-islamiyyah* (Tabanni between the positive law and Shariah), Masters of Arts, Faculty of Law and Political Science, M. Khaidar University, Algeria, 2014-2015; Fawaz Ismail Mohammad, *Adoption and its alternatives*, Majalat Kuliyat al-Ulum al-Islamiyyah, Vol. 7, No. 13, 1434/2013; Farida Zouzou, *Maqasid al-shari' fi tahreem al-tabanni wa ri'ayat al-laqeet* (Purposes of the Legislator in prohibiting adoption and caring for the laqeet), Lecture, College of Shariah, University of Islamic Sciences Malaysia, no date.

³ Ingrid Mattson, *Adopting children: What are the Islamic guidelines for Muslim Americans who wish to adopt and foster children*, Islamic Horizons, January/February 2008, pp. 23-26; Imad-ad-Dean Ahmad, *The Islamic view of adoption and caring for homeless children*, in *Adoption Fact Book III*, Washington: National Council for Adoption, 1999; Faisal Kutty, *Islamic adoptions and the best interests of the child*, Islamic Horizons, January/February 2015, pp. 38-41.

⁴ Yusuf al-Qaradawi, *Al-Istilahaq wal-tabanni fil-shariah al-islamiyyah* (Istilhaq and tabanni in the Islamic law), Wahba, Cairo, 2000.

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).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.

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. As for inheritance: "But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah". (8:75)

As for 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.

In fact, 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 complained 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, he was concerned about what people would say if he ended up marrying the divorcee of his previously adopted son. 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 the Quran

⁵ 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 4-5 and 37-40.

admonished the Prophet (peace be on him) and announced the abolishment of the system of *tabanni*, including the prohibition of a man from marrying the ex-wife of his *mutabanna*/adopted son. “And you [O Muhammad] said unto the one to whom God had shown favor and to whom you had shown favor, “Hold on to your wife, and remain conscious of God!” And thus would you hide within thyself something that God was about to bring to light, for you did stand in awe of [what] people [might think], whereas it was God alone of whom you should have stood in awe! [But] then, when Zayd had come to the end of his union with her, We gave her to you in marriage, so that [in future] no blame should attach to the believers for [marrying] the spouses of their adopted children when the latter have come to the end of their union with them. And [thus] God’s will was done”. (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, 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 highly encouraged in the Shariah: *Kafala*, *Istilhaq* and *Ri’ayah*.

“Kafala” (Guardianship or permanent foster-parenting)

The laws of most Muslim-majority states do not currently permit legal adoption and permit a system of guardianship called: *kafala*. *Kafala* resembles foster-parenting, but is more stable. It 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, nor altering the descent lines for the adopting family. Unlike foster-parenting, however, *kafala* is intended to be a permanent arrangement for a minor.⁶

“Istilhaq” (Recognizing a filiation)

Istilhaq in the Shariah is recognition of filiation made by the father for a legitimate child. It is the consensus of Fiqh scholars that 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.⁷ Just as it is not permissible for a man to

⁶ Refer for example to: Moroccan Mudawwanah for Personal Law, Statute 84/11 09/06-1984, 05/02 27/02/2005, and the Pakistani Law: www.pakistanadoption.com.

⁷ Refer for example to: UAE Personal Status, Fed. Law 28 / 2005.

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.

Some researchers claimed that *istilhaq* offers a loophole in the Islamic law to allow legal adoption in the contemporary sense.⁸ However, using “loopholes” is contrary to the believer’s consciousness. *Istilhaq* is a process of merely admitting to a biological filiation or lineage that already exists, not creating a relation.

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

It is a highly rewarded act of charity for a family to bring home an orphan or a foundling to care for (*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. Caring for the orphans is a highly recommended act that is mentioned in many forms in the Quran.⁹ The Prophet (peace be on him) said: "I, and the one who raises an orphan, will be like these two in the Garden" and pointed to his middle and index fingers with a slight gap between the two. In this case, a foundling (*laqet*) is regarded as an orphan (*yateem*).¹⁰

“Closed” versus “Open” adoption

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.

Specifically, there are two types of legal adoption (and variations in between in various legal systems): closed and open.¹¹ Before contemporary times in the United States and the West in general, adoptions were closed; there is no contact whatsoever between the birthparents and the adoptive parents and child after the adoption takes place. In fact, there may be no contact before the adoption too. 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

⁸ 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.

⁹ For example, Quran 2:215, 2:177, 4:2, 4:6, 4:36, 4:127, 6:152, 89:18, etc.

¹⁰ Refer for guidelines to, for example to: Tunisian Personal Law, 04/03/1958, No. 27, 20/70 19/02/1970, 156/66 08/06/1966; Bargach, J. (2002) Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco, Rowman & Littlefield Publishers.

¹¹ More details to be found in particular legislations. Refer for example to: Library of Congress Legal Reports, Adoption Law: United States, www.loc.gov/law/help/adoption-law/unitedstates.php, May 2013. Also: Pilotti, F. (1990). Intercountry adoption: Trends, Issues and Policy Implications of the 90’s. Montevideo: Social Affairs Unit. Triseliotis, J., Shireman, J. & Hundleby, M. (1997). Adoption, theory, policy and practice. London, New York: Cassell. Grotevant, H.D. & McRoy, R. (1998). Openness in Adoption. Exploring family connections. Thousand Oaks, London: Sage Publications.

birthparents are, especially before turning 18. When adoptions are closed, the original files that carry all relevant information are usually physically sealed. There is a consensus amongst scholars that this kind of adoption is prohibited in the Shariah.¹²

Today, however, the trend in adoptions in the West (United States, Canada, Europe and Australia) is moving towards open adoptions, in which all parties meet and often remain in each other's lives, one way or another. 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.¹³ This system is a "workable" system of legal adoption from the Shariah point of view,¹⁴ and it is essentially a different concept from "*tabanni*".

Adopted child and inheritance

Children raised under a *kafala* or *ri'ayah* system do not automatically gain inheritance rights from their guardians, which is contrast with most secular laws of adoption in which the adopted child has the same inheritance rights as a biological child. However, it could be worked out that the child would have a share according to a common custom (*'urf*) or a specific will (*wasiyyah*).

In fact, there are no verses in the Quran that prohibit guardians from giving money to orphans. Quite the contrary, while blood-relations are considered primary, 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 his/her 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.¹⁵ In previous research, I argued that giving a will for an heir or setting the will to the one-third limit are not set in stone, but subject to differences of opinions.¹⁶

¹² Yusuf al-Qaradawi, *Al-Istilahaq wal-tabanni fil-shariah al-islamiyyah* (Istilhaq and tabanni in the Islamic law), Wahba, Cairo, 2000; Sayyid Muhammad Rizvi, *Adoption in Islam*, Al-Islam.org, October 29, 1990 / Rabi II 10, 1411; Fawaz Ismail Mohammad, *Adoption and its alternatives*, *Majalat Kuliyat al-Ulum al-Islamiyyah*, Vol. 7, No. 13, 1434/2013; Farida Zouzou, *Maqasid al-shari' fi tahreem al-tabanni wa ri'ayat al-laqaet* (Purposes of the Legislator in prohibiting adoption and caring for the laqaet), Lecture, College of Shariah, University of Islamic Sciences Malaysia, no date.

¹³ 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.

¹⁴ Specific proposals in: Faisal Kutty, *Islamic adoptions and the best interests of the child*, *Islamic Horizons*, January/February 2015, pp. 38-41.

¹⁵ Amira Al-Azhary Sonbol, "Adoption in Islamic Society: A Historical Survey" in *Children in the Muslim Middle East*, ed. E. Fernea Austin, 1995, pp. 45-67.

¹⁶ Jasser Auda, *A Critique of the Theory of Abrogation*, London: Islamic Foundation, 2019.

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 states: "Call to them by the names of their fathers" (33:4-5). Although these above verses have generally been interpreted as a ban on "adoption", they are not meant to apply literally. The purpose (*maqsid*) of this verse is to avoid the change of identity of the child in a way that cuts him/her from their lineage. That is why many jurists and legislators judged that the child should keep his/her name unless their original name is unknown. If the original name is unknown, it is possible that the new family gives the orphan their name. According to Child Law No 12/92 (1996) in Egypt, for example, "an orphan or a child of unknown parentage, male or female, could carry the surname of the guardian family to be attached at the end of his/her first name."

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 considered "strangers" (*ajnabi*) in terms of rules related to *hijab* (Islamic dress code), and they are allowed to marry within the family. In contrast, Western states consider marriages between adopted siblings and adoptive parents and offspring as incestuous and prohibited.

Therefore, 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.¹⁷ This is a possible "*heelah*" (legal trick) according to many opinions.¹⁸ However, I disagree with legal tricks from a *maqasid* perspective. The partial and detailed moral rules of the *hijab* and men-women interaction should be observed as much as possible and given the relative circumstances. In the Quran: "Women advanced in years who do not hope for a marriage, there is no sin for them if they put off some of their clothes without displaying their ornaments" (24:60). Also (24:31): "And tell the believing women to lower their gaze and guard their private parts and not expose their adornment except that which normally appears thereof and to wrap their head covers over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those males attached to them who have no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed".

¹⁷ Ingrid Mattson, "Adoption and Fostering," in Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics, Afsaneh Najmabadi, BRILL, 2005; Elizabeth Hormann, "Breastfeeding an Adopted Baby and Relactation," La Leche League International, 2007.

¹⁸ Refer to fatwa in: <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=115715>

Conclusion

Given the dire need of orphans and parentless children, especially refugees, and based on the information in this article, it is an Islamic collective obligation (*wajib kifa'i*) to adopt children by Muslim families. It is necessary, given the Shariah rules, to work with lawyers to adopt children within an “open” system and to work out the details in order to abide by Shariah rules as much as possible and as indicated above. This conclusion adds to the earlier fatwa issued by the European Council for Fatwa and Research - ECFR, under the title: Custody of Refugee Children in Europe.¹⁹

Since many Syrians and others migrated as refugees to non-Muslim lands, Muslims in Europe have duty (*wajib*) 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 identity.

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 Khalwah (being alone with a stranger from the opposite sex) or the uncovering of some of what is to be concealed normally. 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 the serious duty of offering custody to underage refugees.

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

By all means, Muslims cannot be complacent regarding duties towards these refugees. After taking them under their custody, Muslims should consider and apply the most ideal tools to assist them in overcoming their fears.

In this context, Islamic centers, societies and school, especially the large ones with multi-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 invite 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 fully legal way.

¹⁹ European Council for Fatwa and Research: Fatwa 1/25 2015, Final Statement of The 25th Ordinary Session of The European Council for Fatwa and Research Held in Istanbul, Turkey. http://islamireland.ie/site/assets/files/1727/final_statement_25_english.pdf