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## Trends of Child Adoption in Contemporary Era: A Comparison of *Shariah* & Law Perspectives

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**Abstract:** *The value of family and lineage flows through Islamic history, thought, and law like a golden thread. Islam is a religion that governs every aspect of Muslims' lives. In the event of child adoption, there is no exemption to the court's jurisdiction up to the adoption of a minor. The ban of lineage, the development of non-mahram partnerships, and the question of inheritance and guardianship are all examples of constraints imposed by Shariah today. Under Muslim personal law, adoption rights do not consider entirely recognized. Partial adoption is recognized under Muslim personal law, until the adoptive child enters the age of foster care. The adoptive Muslim parents are just trustees of the adopted child's name, surname, estate, and so on. As a result, alternate types of adoption, as well as a legal fostering model known as kafālah, have been established. A kafālah allows children*



who have been separated from their families to be legally reared by families other than their own.

**KeyWords:** Muslim law, Adoption, custodian, *Maqasid al Syari'ah*, Fostering, *Kafalah*

## Introduction

The jurists believe that child adoption is an important topic that should be thoroughly investigated. After receiving legal confidence from the adoption determination, children are highly vulnerable parties as legal objects. Adopted children may be vulnerable to a variety of threats, including welfare and mental health insurance, as well as human trafficking.<sup>1</sup> Adoption occurs for three key reasons: physical factors, health, and social environment.<sup>2</sup> Adopted children are never allowed to share any of their custodian's property or belongings. They are, nevertheless, permitted to receive belongings and property from their custodians while they are alive.

Children's rights include *nasab* (lineage), *rada* (breastfeeding), *hadhānah* (maintenance), and living support and guardianship (protection) (*walāyah*). These rights are violated when parents abandon their children. Adoption becomes an acceptable tool for protecting their rights, including concerns such as *daruriyah* or *dharuri*. The objective of the law, according to *Maqasid al shari'ah*, is to help humanity. As a result, the notion of *Maqasid al shari'ah*, whose content is a benefit, aids in the establishment and development of Islamic law in order to address modern issues, particularly those not covered by the Qur'an and *al-sunnah*.<sup>3</sup> Adoption, in the sense of establishing legal filiation between adopter and adoptee, has long been the primary means of integrating abandoned and orphaned children into new homes in the "West," yet it is typically not considered lawful in Islam. This prohibition is still in place in the majority of Muslim-majority countries. However, Islamic law offers a legal option known as *kafalah*.<sup>4</sup>

The following essay on child fostering and adoption will break from traditional Islamic law by looking at what the classical sources have to say on valid filiation, orphans, adoption, and fostering. The purpose is to provide a better understanding of Islamic Legal perspectives on adoption, give some insight into some of the tensions and convergences, establish the framework for bridging the gap and filling the gap in orphan care. In accordance with contemporary concepts of child welfare and the spirit of *Shar'ah*, abandoned children and children of unknown parentage.<sup>5</sup>

### Background

It is legal to raise a child who is not one's biological offspring, in the case of an orphan, this is encouraged. The child, however, does not become a true child of the "adoptive" parents, according to Islamic belief. The child, for example, is named after the biological father rather than the adoptive father. This isn't to say that parenting a non-biological child isn't possible. It signifies the sponsored child's name is not the same as the supporting parents'. Taking care of an orphan is considered a blessing in Islam, and some even consider it a responsibility<sup>6</sup>.

The Prophet Muhammad (PBUH) once said that someone who cares for an orphaned child will be near him in Paradise, and he pointed out that this proximity would be equivalent to two neighbouring fingers on a single hand. Prophet Muhammad, who grew up as an orphan, dedicated great attention to the care of children. He adopted a former slave and reared him with the same love and care as he would a biological kid. Under Islamic law, the guardian/child relationship is governed by special laws, which distinguishes it from adoption in other cultures, where adoptive children are treated as if they were biological children in the eyes of the law. The Islamic phrase for adoption is *kafala*, which derives from the Arabic word *kafala*, which meaning "to feed." In essence, it represents the relationship between a foster parent

and a child. Some of the Islamic regulations that govern this relationship are as follows:

- Adopted kid retain their surnames at birth and can't modify the names which can be matched with the names of their adoptive family.
- An adopted kid come not inevitably from the adoptive parents, but from both biological parents.
- Adoptive family are not considered blood relatives until the child matures, as a result of which they are not *mahram* to him or her. Adopted family members are, in principle, acceptable as possible marriage partners, and there are modesty norms in place between the grown child and members of the opposite sex's adoptive family.
- If the biological family gives the child property or riches, the adoptive family are not allowed to blend that wealth with their own. They solely act as trustees for the property of the child's birth family.

#### **Definition of Terms:**

##### **Orphans:**

The standards for deciding whether a kid is an orphan vary between states and international organizations. As according UNICEF, an orphan is a child who has lost one or both parents, and there are now 143 million orphans in the globe. To make this agreement valid, an orphan is a child or kid who has lost the care of its parents after their disappearance or death or after the abandonment either the mother or the abandonment of the father, and also the situations or cases in which the parents cancels or finish he parental relationship of themselves with their kids which could be voluntarily or could be involuntarily. The term incorporates multiple notions from classical Arabic language which include the word *yatim* which means a child without a father and *laqit* which also means fatherless kid.

##### **Adoption:**

The Adoption is the legal formation of a parent-child relationship between a child and people who are not his or her biological parents, and with all of the responsibilities and benefits it involves. The adoptions do bring a kid into a family as both a child and a sibling, regardless of genetic links. The two most prevalent forms of adoption are closed adoptions and open adoptions. The majority of adoption practices, on the other hand, lie between fully open and completely closed.

The parents responsible for birth and the family who adopts the child have zero real and identifying information about each other in "closed" or "confidential" adoptions. Adopted children may not be notified about their adoption, and they have no real direction in tracing their biological parents and relatives. If the origin or culture of the child is different from the origin of the parents whom have adopted the child, then their heritage may be downplayed or could be neglected. So as a result, the closed adoptions can terminate any links between the child and the birth parents.

The "Open" adoptions, which are growing more widespread over the world, allow both parties to expose their genuine identities. The Open adoptions can provide interaction between the adoptive kid and the adopted family, as well as any birth relatives. The adoptive family may find it simpler to respect, promote, and incorporate the child's birth culture into their everyday lives.

As the Many families face a hybrid mode of adoption that has elements of both closed and the open adoption practices thus, the classifications of open and closed can more understood as idealistic types. The real evidence on the advantages and risks of each type of adoption has demonstrated opposed results, with a few adoptive kids enjoying the ability to interact with their biological family while others feel confused and insecure. Open adoptions, but at the other hand, are associated with improved psychological and behavioural results for the kid. Furthermore, new research shows that open adoptions are becoming much more common and gratifying for both birth moms and adoptive families.

### ***Kafala* (Guardianship):**

Apart from Malaysia, Somalia, Indonesia and Turkey, most Muslim-majority nations' laws now forbid legal adoption. Instead, the regulations provide for a system of guardianship (*kafala*), which is comparable to adoptive parenting but more stable. "The pledge to cheerfully take care of a minor's upkeep, education, and protection in the same way as a parent would do for a child. In accordance to Jamila Bargach, *kafala* is "primarily a gift of care and not a replacement for lineal lineage." By way of explanation, *kafala* assumes supervision and maintenance commitments without the formation of legal relationships that would result in legally distinct demands depending on individual status. This sort of guardianship is not terminated the best favor of the child family ties or modify the descending lines of the adoptive family. In contrast to foster care, *kafala* is considered to be a protracted agreement for a kid.

### **Convergences between *Kafala* and Adoption:**

While the emphasis of the above mentioned phrase is on adopting instead of *kafala*, the *kafala* can occasionally lead to adoption. Mauritania, Iran and the Egypt are among the nations that tightly enforce "non-international *kafala* and also refusing any official status of *kafala* or adoption. The Residents from these nations who live in a country where adoption is permitted are just unable to gain guardianship of a child in order to adopt the child in their home country. Other countries, like Algeria, Jordan, Morocco and Pakistan do permit *kafala* minors to be transferred abroad under specific conditions, notably with foreigners. Indonesia and Tunisia does allow complete *kafala* and adopting convergence, however adoptions are very limited to national applicants who are residing in the country or overseas.

### **Learning and Re-considering Adoption *Fiqh*:**

Hence majority of Shi'i and Sunni *fiqhi* schools agree to the sort of the adoption in which the identity of a child is incorporated into the adopting family personality is prohibited. This agreement will not reflect the view of Muslim intellectual: certain Muslim intellectual had expressed their disagreement to the agreement. Some contend that the Quran doesn't really forbid adopting, because they categories as an action towards which the Quran does not ban. The Adoption *Fiqh* arose within the necessity to have a sense of balance between the Sunnah and Quran significant emphasis on orphaned' welfare, on only one part, and Islamic prohibitions on old-Islamic Arabian adopting traditions.

#### **Adoption in old-Islamic Arabia:**

Adopting (*al-tabanni*) into the a tribe was common in Arabia during the old-Islamic period for patriarchal and economic reasons. The first name *Tabanni* comes from an Arabic word. Though the adoptee genetic family were still living, adopting could occur at any point in the life of a person, from youth to maturity. Adoption is also tied to enslavement because kidnappers have the power to take away prisoners' identity of birth and adopt them to their families. old-Islamic adoption necessitated a total "erasure of natal identity" for such reason.<sup>7</sup>

#### **Zayd's adoption and Repudiation;**

The adopting and subsequent collapse of Prophet Muhammad's relationship with Zayd Ibn Haritha can assist us comprehend the process of adoption in old-Islamic Arabia. Though, as a case involving the Prophet(SAW), this event involves unique situations which cannot be decided on the way to expand to the remainder of the Muslim population.

#### **History of Adoption in Islam;**

Throughout decades, Muslim legal scholars have just about completely concluded the OLD-Islamic adoption is forbidden, quoting the Quran (33;

4-5) and Zayd denunciation. *Tabanni* isn't even stated in traditional Islamic law writings.

Scholars, on the additional, felt that all Muslims took a collective obligation to guarantee that orphaned kids were cared for by a guardian or family.

*Kafala* arose as a replacement system which supplied orphans with a friendly and hospitable environment as well as the security .<sup>8</sup>

### **Women as Adopters**

These *fiqhi* prohibitions on adopting, particularly over name, were developed in a patriarchal context. The focus on referring to adoptees after their biological fathers' names obscured all legal ramifications of female adoption. As per some scholars, pre-Islamic adoption's patriarchal ethos provided a loophole that allowed females to accept and give up their adopted children their last given name in some cases.

Due to local customs, some exceptions have been made. When Islam was extended from outside Arabic Nation, legislators have to be forced to accept practices (*'urf*) that they had never encountered before. Thus started the *fiqh* practice of granting legal status to locally and nationally customs. The rules of the territory, as well as rules of global law, is a decisive element in Islamic regulation, according to *fiqhi* consensus: tradition are the ground of judgement. This is valid as the law doesn't really hurt anyone and is in the public interest.<sup>9</sup>

### **Adoption in the contemporary time:**

Many national and international laws with in twenty-first century had also brought adoption closer to Islamic principles. Adopted kids frequently have had the legitimate birth right to understand about their roots as well as are persuaded to adopt their social, racial, and biological history; secrecy is no longer common. In Australia's South Wales province, an example is given,



child is allowed to keep their birth family's last names, inheritance could be chosen by a will, and a collectively agreed "Adoption Plan" allows the birth family and the adoptive family to communicate. The idea that an adoption absorbs the identity of an adoptee is no longer a dominant viewpoint.<sup>10</sup>

### **Special concerns about Adoption:**

Muslim scholars who oppose adopting frequently raise issues such as lineage or identification, inheritance, blood kinship and secrecy and boundary problems. Taking part in this addition, the *Shura* Committees look at some of the most frequent adoption problems and offer advice on how to approach them as possible adopted families.

### **Lineage and Naming:**

This issue of dissimulation through name is first prohibition commonly addressed in Islamic literature. The Quran bans this, past-Islamic practice of recognizing the adopted child as genetic children inside the following verse.

“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).

In term of adoptions, different countries have different name customs. The family name of the adoptive household is often not ascribed to a child in cases in which the genealogy of the adoptee is uncertain. Many Islamic nations, on the other hand, allow the guardian's surname to be passed down to the child if the child is of uncertain ancestry. "An orphan or a kid of unknown parentage, male or female, carries the surname of the guardian family to be affixed at the ending of his/her first name," corresponding to article 92 of Egypt's Kid Law Number 12 (1996) regulations. This activity

must be recorded in the kid's file records , but that one must not need at all negative consequences.<sup>11</sup>

### **Inheritance:**

Kids educated in the *kafala* system do not automatically inherit the guardians' property. Traditionally, when a kid's caretaker died, the youngster was placed under guardianship of the dead.

The state treasury gave me an inherited part. The *fiqhi* basis here was twofold: 1) society as a whole is accountable for the goodness of bereaved children, and 2) genetic relations have precedence in heritage disputes. These ideas are in marked contradiction to most secular adoption laws, which grant adopted children the same inheritance rights as biological children.

### **Consanguinity and Marriage Prohibitions:**

It's indeed common knowledge that Quran lists the relatives who really are prohibited from marrying (4:23). Unmarriageable kin is people who are barred from marrying in Islamic law. Wedding, or a milk-raise connection can all lead to the status of unmarriageable kin.

Adoptees have traditionally been deemed unmarriageable (non-mahram) to the adoptive family unless they've been breastfed by the adoptive mother. As a result, Islamic law permits marriages between a kid raised through *kafala* as well as the family's biological children. Marriages among adopted siblings, adoptive parents, and adopted offspring, on the other hand, are considered incestuous and illegal in Western countries.

### **Privacy and Boundaries:**

Many researchers believe that while the adoptive child is not genetically connected to the genetical family, if he reaches puberty, he or she could develop sexual emotions for other family members and vice versa. Some measures, such as segregation and veiling, are recommended by these

researchers to avoid the formation of such emotions. Typically, Verse 24;31 will be used to show support.

As we have seen in numerous incidents of incest and child sexual abuse around the globe, blood ties are no guarantee against incest and sexual violence, irrespective of race or religion. Abuse occurs as a result of psychological illnesses, not a lack of veiling or isolation. Scholarly research has linked relationships between people who were reared together by a young age, even if they are not physically connected, to low perm count, separation, and adultery. In various cultural contexts, reversed sexual imprinting has indeed been recorded, notably in Chinese, Taipei, Israel, Lebanon, Indonesia, and northeast India.<sup>12</sup>

#### **Adoption Laws in Islamic Countries:**

All in all, any discern can deliver the parent support and love to a baby without awarding him any felony duties like inheritance.<sup>13</sup> In any case, the Quran offers unique principles approximately the criminal dating among a baby and his/her adoptive circle of relatives."<sup>14</sup> The parent/baby courting has unique principles underneath Islamic rule, which give the connection a chunk not similar to what is normal adoption practice nowadays. A part of the standards in Islam encompassing this courting: An followed child keeps their very own biological family call (surname) and doesn't alternate their call to fit that of the adoptive circle of relatives.

Assuming the kid is given wealth/land from the genetic own family unit, adopted parents are instructed to take attention and now not combination that belongings, wealth in conjunction along with their personal. These Islamic recommendations emphasize to the adopted family unit that they're no longer taking the vicinity of organic own family unit. Adoption makes a mother-infant dating perceived for everything felony functions - together with infant assist responsibilities, inheritance human rights and detention.<sup>15</sup>

#### **Adoptive parent:**

A character who finishes each of the stipulations to legitimately adopt a infant which is not their genetic toddler. An adopted discern has all the duties of a genetic figure. Many states also pressure toddler guide obligations on mother and father for a touch even as past this point assuming that the kid is a full-time understudy. Usually, the discern who has custody meets their assist duty via looking after the child continually, while the opposite figure need to make up expenses to the custodial person on behalf of the kid - normally money but once in a while one of a kind styles of commitments. Whenever dad and mom' separation, the court docket nearly constantly demands the non-custodial parental to pay the custodial discern an extent of infant help constant with the aid of state law. Occasionally, notwithstanding, assuming that the dad and mom percentage bodily custody equally, the court docket will arrange the better-pay determine to get bills to the lesser pay parent. <sup>16</sup>

**Custody (of a child):**

The felony ability to do choices involving a toddler's benefits and the obligation of taking treatment of the kid. The maximum well-known association is for single person to have detention bodily whilst the opposite parental has a right only to visit. In any case, it's far totally expected for the mother and father to proportion felony custody, despite the fact that any parental has substantial custody.<sup>17</sup>

**Legal Custody:**

The sense of duty and right to do picks about a toddler's adolescence, which include tutoring and health care. Various territories generally get the 2 mother and father proportion felony custody of a baby. <sup>18</sup>

**Physical custody:**

The proper and responsibility of a determine to get his child living with him.

**Visitation right:**

Just to see a kid frequently, usually offered by means of the courtroom to the determine who doesn't have forceful guardianship of the kid. <sup>19</sup>

**Wellbeing (of a toddler):**

The assessment that high court uses even as concluding who will cope with a kid.

**Adoption law in Non-Muslim nations:**

Laws regulating adoption are deliberate to protect the health of the person being adopted by way of limiting who is allowed to adopt and developing certain prerequisites for adoptive dad and mom. The adoption cycle may be legally mind boggling, which include numerous trials and quite a few paperwork, and an lawyer should possibly assist you with know-how the regulation and what your legal requirements as adoptive dad and mom.<sup>20</sup> West Virginia has indicated adoption courts that hear adoption processes and make choices to protect the wellbeing of the adoptee. As an instance, whilst unmarried adults and married couples are allowed to undertake in West Virginia, a married man or woman cannot adopt without their existence companion's assent. The regulation of adoption in the West obliges him to provide the kid his family call, however Islam disallows that a man or woman should associate himself to everyone aside from his very own father. West Virginia law permits any man or woman to be followed, yet after the age of 12, the coming near adoptee need to deliver their assent.<sup>21</sup>

When wouldn't it be an awesome idea for you report: If you want to undertake a child who is staying with you because the beginning parents aren't being concerned for the kid, it is also high-quality to wait until the child lives with you for pretty a while? You must have the choice to say that neither one of the births mother and father can care for the child because one in all developing subsequent is valid for every beginning parent:

If you want custody of a now not live child with you due to the fact you accept the kid is not secure, you can petition for a guardianship to get

custody, and pick out later if you want to undertake. For example: when the kid turns 10, while the kid begins school, or when the child's mom completes drug remedy. You need to ship a duplicate of your request to the kid's introduction to the sector mom and everyone who claims to be the daddy (except if a Judge reduce off each birth dad and mom' rights in an abuse and dismiss case).

Guardianship is the factor at which somebody aside from the birth determine asks a Judge to present them prison custody of a infant temporarily. The start figure uninhibitedly surrenders rights to the kid, OR

. On the off chance which you undertake a toddler, then again, the Judge gives you everlasting prison rights over the child. The beginning figure "abandoned" the kid, OR

To be a infant's criminal mother or father, you can ask for the guardianship to stop at a fixed date, or while a positive occasion occurs. (Team I. A., 2021<sup>22</sup>)

### **Conclusion:**

The commonly held belief that "Islam prohibits adoption" must be reexamined in light of Islamic Legal precedents cited above, as well as the emphasis on orphan welfare in Islam's basic teachings. Some aspects of Islamic adoption principles are semantically controversial, as traditional scholars of Islam regarded acceptance today differently. Furthermore, there are several adoption procedures and laws in place around the world, many of which are compatible with Islamic beliefs.

Public interest (*Maslaha*) is a major determining aspect in *Shariah* according to widely acknowledged Islamic legal maxims from established precedents which are used to explain deviations. Non-sharia rules have frequently been incorporated into Islamic law if they serve the public interest. In addition, scholars have long agreed that the laws of the land, including national and international laws, constitute a deciding factor in *Shariah*. "Common use and

custom, whether broad or special, is made the arbitrator for the establishment of a decision," according to Mujalla al-Ahkam al- Adliyya, a comprehensive body of Islamic civil law. This is true as long as the legislation is not harmful to individuals or society. As a result, favourable international and Western adoption laws can be considered Islamic.

As a result, orphaned infants can be adopted in line with Islamic law in nations where adoption is permitted if certain ethical standards are met. The Quran makes it clear that the child's best interests come first when it comes to orphans. Families considering adoption should aim for a balance of compassion, fairness, and honesty. Adoptive parents must avoid concealing their adopted child's biological history and strive to help the child prosper in all parts of life. A equitable distribution of wealth among adopted and biological family members must be achieved in the case of adoptions.

When it comes to orphaned children's adoption and placement, UNICEF recommends that parents consider the best favour of the child should be the guiding premise." This is in line with the Quran's wide admonition for orphans: "It is better to make things straight for them." All matters are to be judged based on intentions according to a major premise of Islamic law.

The basic ideals contained in Islamic texts encourage open, ethical, and lawful adoptions, according to the Muslim Women's *Shura* Council, and are an appropriate means to ameliorate the situation of orphans. The word "Islam" means "to make entire, sound, safe, and tranquil." As a result, Islam considers it essential to keep orphans healthy, safe, entire, and at peace.

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