

ADOPTION, GUARDIANSHIP AND FOSTERING: PRACTICE AND
PROCEDURE – ISLAMIC LAW PERSPECTIVE

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Bismillahir Rahmanir Rahim

1.0 Preamble:

I must start this paper by giving praise to Allah, the most Beneficent, the most Merciful. We thank Him for showing us the right way without whose blessings we would have been lost. We thank Him for His countless blessings and mercy on us and we vow that our lives shall continue to be devoted and dedicated to Him in worship so that in the end, we shall all have cause to say we thank You O! Allah, the Lord of the worlds-known and unknown to us.

We supplicate to Allah to continue to shower His blessings on Prophet Muhammad (s.a.w) who is sent as MERCY to the whole universe. May such blessings be on his household, his companions and on all those who follow his way until eternity. May the peace and blessings of Allah be with us all, Ameen.

My lord, Chairman of session sir, my other noble lords, I wish to most humbly state here that under Islamic Law, a Muslim must continue to appreciate honour done him by human beings like him. The Islamic Law Principle states that: whoever is not grateful to people who accord him honour and privilege will never be grateful to Allah. Another principle says: whoever is ungrateful for honour and privilege done him by Allah, and by extension, by human beings like him, shall be severely punished by Allah.

For these two reasons and in the bid to comply with the divine directives, I most sincerely express my gratitude to the Administrator of this great institute the NJI, Hon. Justice R.P.I. Bozimo, OFR for this unique opportunity accorded me to deliver a paper titled: Adoption, Guardianship and Fostering: Principle and Procedure - Islamic Law Perspective at this National Workshop for Area/ Sharia/ Customary court Judges with the theme: Improving the quality of Justice Delivery in the lower Courts. Similar gratitude is expressed to the hardworking management staff and to those other officers who make up the greatness of this institute. I am indeed very grateful.

Chairman of session Mylord sir, I must also use this opportunity to salute all my brother/ sister Judges of the Lower Courts for whom this National Workshop is organized. Please kindly accept my regards and high esteem to you all, Your Honours.

I say: *Assalam Alaekum Warahmatullahi Ta'ala Wabarakatuhu.*

2.0 Introduction

When the word Shari'ah is used anywhere in the world, it connotes the technical meaning of Islamic Law. This nomenclature distinguishes it from all other forms of Law like English (Common) Law, French Law, Hindu Law and what have you. Islamic Law is divine, meaning that it was decreed by Allah (the Beneficent, the Merciful), for the purpose of guiding both the mundane and the spiritual conduct of Muslim life. It must be obeyed and above all, it must be accorded utmost sacredness it deserves¹. The Law makes adequate provisions to safeguard proper upbringing of children from birth to age of puberty or majority. Some of these provisions include but not limited to children's antenatal and postnatal rights; the rights to be protected from harm, to be properly educated and to be cared for in its entirety². Specifically and by the tone of this paper therefore, we are to focus on the practice and procedure of three out of the various forms of child-care under Islamic Law. They are: Adoption, Guardianship and fostering.

3.0 Adoption (Attabanni)

The 8th Edition of the Black's Law dictionary defines Adoption as follows:

The creation of a parent-child relationship by judicial order between two parties who usually are unrelated..... this relationship is brought about only after a determination that the child is an orphan, or has been abandoned, or that the parent's parental rights have been terminated by Court order³.

In the African Human Rights Law Journal, Adoption is defined as:

.....the creation of a legal and permanent parent-child relationship through a child's acquisition of a new family ties which are equivalent to biological ties and extinguish (completely or partially) a pre-existing (biological) parent-child relationship⁴.

Another comprehensive definition of Adoption is contained at page 7 of "Journal of Law, Policy and Globalization" An Islamic scholar contributor to the Journal defines Adoption as.....

A procedure by which people legally assume the role of parents in respect of a person who is not their biological child. It is a legal process pursuant to state statute in which a child's legal rights and duties towards its natural parents are terminated and similar rights and duties towards his adoptive parents are substituted⁵.

Consequent upon these similar definitions, The Child's Rights Act (2003) takes adequate care of all Nigerian children and it generally and specifically protected their rights⁶.

Adoption, Guardianship and Fostering are some of such rights. Part 12 of the Act in particular does not only make adoption lawful, it is also permissible⁷.

The consequence, the effect and/ or the result of child adoption in Nigeria is also provided as follows:

(1) on adoption order being made:

(a) all rights, duties and liabilities including any other order under the personal Law applicable to the parents of the child or any other person in relation to the future

custody, maintenance, supervision and education of the child, including all religious right, right to appoint guardian and to consent or give notice of dissent to marriage, shall be extinguished⁸.

So far, some states have domesticated the Child's Rights Act (CRA). Kwara and Jigawa States in the Northern part of this country are examples. In Kwara State, the Kwara State Child's Right Law (CRL) was enacted in 2007 while part XII SS125 – 148 contain details with respect to the issues of child's adoption. Some of the issues are as follows:

S.125 "Establishment of adoption services etc"

S.126 Application for adoption

S.127 Religious upbringing of adopted child

S.128 Persons who may be adopted

S.129 persons who may adopt

The Jigawa State Child's Right Law (CRL) also came into effect from 2007. The Law also makes provision for adoption under part XII (sections 117-140). However, section 117 of the Law, in particular, excluded the application of adoption Law on the Muslims in the State⁹.

The reason for this is not far fetched and Your Honours will understand why when in the next paragraph we discuss adoption under Islamic Law.

The technical word for adoption under Islamic Law is "Attabanni"¹⁰. This practice was common in the Jahiliyyah or pre-Islamic period. Infact it was a recognized custom. For instance, Abu Hudhaifah Bn Utbah, one of those who participated in the battle of *Badr*¹¹ adopted Salim as his son. Prophet Muhammad (saw) also adopted Zayd Bn Haritha as his son. During the period under reference, if one adopted a son, the society would call such adopted son by the name of the adopted father. Thus, Salim was being addressed as Salim,

the son of Abu Hudhaifah while Zayd was being addressed as Zayd Bn Muhammad¹².

The Islamic Law prohibited this practice outright when Allah revealed the following instructive verses in the Holy Qur'an:

1. "Call them (adopted sons) by (the names of) their fathers"¹³
2. God did not make those whom you call your sons, your sons (in reality). That is no more than an expression from your mouths and God speaks the truth and He guides to the (correct) way. Attribute them to their fathers: That is more just in the eyes of God, but if you know not the names of their fathers, then they are your brothers in faith and your dependants¹⁴.

This is the position of Islamic Law on adoption. However, before we leave this part of this lecture, it is necessary we briefly discuss, Kafalah, compassionate care, which is alternative care to tabanni (adoption). By way of definition:

Kafalah is the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way as a father would do it for his son¹⁵

It is a situation where a family takes full care of particularly, an abandoned child or a child whose parents are too poor to fend for him, or a child who, due to some circumstances, is deprived of a family environment. Such a child, however, will not entitle to family name nor will he entitle to the inheritance of the family that takes care of him. A readily example of a beneficiary of this situation of child's care is an orphan. Therefore, Kafalah is a necessary option or alternative care of a child without changing the original status of the

kinship of the child.... Kafalah is highly recommended and encouraged by Islamic Law but not adoption.

A lot of works (both in Arabic and English) have been written on this pattern of child's care but since this paper is restricted, there is no need for us to digress but to remain focused.

Chairman of this session Sir, and Your Honours, we can now, at this juncture, move to discuss guardianship, *al-wilayah*.

4.0 Guardianship - Al-Wilayah

Guardianship is defined as the fiduciary relationship between a guardian and a ward or other incapacitated person whereby the guardian assumes the power to make decisions about the ward's person or property¹⁷.

A guardian therefore is one who has the legal authority and duty to care for another's person or property, especially because of the other's infancy, incapacity, or disability¹⁸.

By the above comprehensive definitions, a guardian, simpliciter, is the person, who, by appointment or otherwise, looks after, protects, or defends another person's interest as a result of the latter's infancy (Sagir), incapacity (Ma'atuhu) or disability (Majnun)¹⁹. Focusing the scope of our discussion today, guardianship shall be restricted to how far it has affected the interest of a child who is an orphan. Therefore, we shall regard guardianship as the management of an orphan's property by an adult person when the former's parents are no more or, particularly when the father is dead and the child inherits a lot of property from him. In other words, this paper will address only, guardianship of an orphan's property giving a little emphasis on the orphan's right to property he acquired through succession (inheritance) and the guardianship over such property throughout his minority age.

Meanwhile, The Child's Right's Act (2003) makes adequate provisions for guardianship of a child. These elaborate provisions are contained in Part IX of the Act. In the same vein, Kwara State Child's Rights Law (CRL) makes similar provisions in Part IX also of the Law.

During the period of ignorance (Jahiliyyah) orphans, insane persons as well as minor children were often maltreated. Their property too were either misappropriated or embezzled out right. There was no Law to regulate this irrational behaviour while might was always right. The self imposed guardians devoured the orphan's property at will while it was only the law of jungle that was prevailing then.

With the introduction of Islam and Islamic Law by 610AD, the situation changed for good. The law paid "special attention to the protection of the interest of these unfortunate (persons)..... in order to minimize risks to which the person and property of these people were generally exposed"²⁰.

Under Shariah there is no need of any formal appointment of a competent person to act as a guardian. One should be a sane and a matured person having fear of Allah (Taqwah) and sense of justice to act as a good guardian²¹.

This is the position of the Islamic Law as it affects guardianship of a child. As far as the orphans are concerned, the guardian (self imposed or appointed) has the duty of protecting the interest of the orphan. This is adequately emphasized by the Holy Qur'an as follows:

.....And they ask you concerning orphans. Say: The best thing is to work honestly in their property and if you mix your affairs with theirs, then they are your brothers. And Allah knows him who means mischief (e.g to swallow their property) from him who means good (e.g to save their property). And

if Allah had wished, he could have put you into difficulties. Truly, Allah is Almighty, All-wise²².

The Almighty Allah also guides the guardian as what he should do when the orphan reaches the age of majority. The Holy Qur'an says:

And give to the orphans their property (when they reach age of puberty) and do not exchange (your) bad things for (their) good ones; and devour not their substance (by adding it) to your substance. Surely, this is a great sin²³.

The Holy Qur'an says further:

To those of weak-understanding (orphans and others) make not over your property, which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. Make trials of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up²⁴.

Yours sincerely had a rare privilege with another friend, a retired permanent secretary (Ministry of Justice) in my State. A friend, the Late Hon. Commissioner for Information²⁵, died in active service and the guardianship of his children (sons, daughters and a pregnant wife) fell on both of us. That was in March 1989. Allah assisted us both to go through this herculean task of guardianship and we successfully delivered the property of these children to them when they came of age in the presence of their mothers (two (2) in number), other relatives and friends of the deceased Hon. Commissioner who

happened to be a lawyer of Common and Islamic Law from Ahmadu Bello University (ABU) Zaria. May his soul rest in peace.

Chairman sir, your Honours, one of these children is now a respected senior member of Ilorin Nigerian Bar Association (NBA) while the child in the womb of his mother when his father died is now a family man with masters degree in Agric Science. Alhamdulillah (Glory be to Allah). This short story is to illustrate practically the verses just quoted. With the fear of Allah, sincerity and competence to operate, the property of an orphan can be managed and administered without any hitch.

5.0 Fosterage (Rada'ah)

Four related definitions are given for fosterage in the dictionary consulted. They are:

1. The act of caring for another's child
2. The entrusting of a child to another
3. The condition of being in the care of another, and
4. The act of encouraging or promoting (the act of fosterage)²⁶

These definitions tally with the concept of fosterage under Islamic Law. Protection of people in general and children in particular is one of the main objectives of the Islamic Law. The law, therefore recognizes foster-care as one of the means children can be protected. For emphasis, foster-care is aimed at offering a supportive family environment to children (male or female) whose biological parents cannot raise for a number of reasons which may include but not limited to:

- (a) Custom and tradition of the natural parents.
- (b) Parents' poor disposition.
- (c) Child's behavioural difficulties.
- (d) Problems within the family environment.
- (e) Express request by a single parent to raise the child²⁷.

However, under Islamic Law, fosterage is meant to provide an assistance to the children in need of that help for protection without affecting, in any way, the biological status of the child. This system of child's care is comparable to adoption (Tabanni). The clear similarity of the two systems of child care is that the natural status of the child is not altered in any way. He or she is addressed by his biological parent's name. This system is also closely related to suckling. This is a situation whereby the natural parents hire a woman to breastfeed their newly born baby up to certain period of time.

Prophet Muhammad (saw) in Islamic history, is a perfect example of a child who was foster-cared in his childhood. The history has it that this had been the practice of the Arabs long before Islam. The first woman who suckled the Prophet (saw) was Thuwaibah who had earlier suckled Hamzah (the prophet's uncle) and Abu Salamah Al-Makhzumi²⁸.

Fosterage thereafter became seriously encouraged. Infact it is reported in history (Sirah) that there was a period of time when the Quraysh suffered severe economic difficulties which included hunger and drought. During this period, Abu Talib, the uncle of the prophet (saw) had a lot of child dependants he was fostering. Noting this scenario, the prophet (saw) was reported to have consulted another uncle of his, Abbas, who was a rich man in Mecca among the members of Banu-Hashim. He requested this uncle to assist by easing the burden of fosterage on Abu Talib. He suggested that himself (saw) and Abbas (ra) should take a child each under Abu Talib's care. Uncle Abbas agreed. Thus, Abbas took Ja'afar (ra) into his care while Prophet Muhammad (saw) took Ali (ra) into his care too²⁹.

The Holy Qur'an, as the primary source of Islamic Law lays down rules in respect of suckling (Rada'ah). The rules are clearly set to safeguard the welfare and protection of a child when there is substance of marriage between his parents and, even, after they have divorced each other. If the marriage subsists it is the duty of both parents to take proper care of their child/children. They are even allowed under Islamic Law to engage the service of a wet-nurse to breast feed their child for a period prescribed by Law. But in a situation where there is break-up of marriage and the marriage is blessed

with a child/ children, the Law of *Hadanah*, custody, will then apply. This mode of child's care is outside the scope of this paper. Therefore, we have to skip it.

With regards to our subject of fosterage, the Holy Qur'an provides as follows:

The mothers should suckle their children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid down on him greater than he can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child..... And if you decide on a foster suckling mother for your children, there is no sin on you, provided you pay (the mother) what you agreed (to give her) on reasonable basis. And fear Allah and know that Allah knows well what you do³⁰.

There are some vital points relating to our discussion here which can be deduced from the above verse. They are, in summary, as follows:

1. The period allowed for suckling of a child is two years³¹.
2. That father should be responsible for providing maintenance for both the mother and the child being suckled.
3. Father of the child (husband) should not maltreat the mother (wife) suckling his child.
4. Foster-mother's engagement in suckling of the child is allowed by Islamic Law.
5. The fostering mother has the right of being remunerated as per the agreement between the employer (the family) and the employee (the foster-mother)

Breastfeeding by foster-mother will certainly create blood relationship with the foster family. In this circumstance, there are certain rules which must be noted and applied appropriately being the legal effect of suckling. The Holy Qur'an states as follows:

Forbidden to you (for marriage) are; your mothers, your daughters, your sisters, your mother's sisters, your brother's daughters, your sister's daughters, your foster mother who suckled you, your foster milk suckling sisters, your wives' mothers³².

The salient point we need to know from this Qur'anic provision is that everything that is unlawful by reason of blood relationship (nasab) (Consanguinity) is also unlawful by reason of fosterage (Rada'ah). Thus as the mother of a child is prohibited to marry by reason of consanguinity, the foster-mother too is forbidden by reason of fosterage. The Holy prophet Muhammad (saw) who was sent to the whole world as Rahmah, Mercy, corroborated Allah's warning in several Ahadith. For time and space, these two will satisfy our need for now. He said (saw):

Fosterage makes unlawful what consanguinity makes unlawful³³.

In another hadith reported by same reporters, the prophet (saw) said:

What is unlawful by reason of consanguinity is unlawful by reason of fosterage³⁴.

Chairman, sir and Your Honours, Part XI of the Child's Rights Act (2003) covers the rights of the Nigerian Child vulnerable to abandonment or negligence etc. The part spreads from S.100 – S124 and it is very very comprehensive. Its comprehensiveness is to the fact that they agree very much with the provisions of the Islamic Law to a large extent. S.101 in particular identifies a child who can be fostered and this tallies with the provision of Islamic Law. The section provides:

S.101. A child who may be fostered under this Act includes a child who

- a) is abandoned by his parents; or
- b) is an orphan and is –
 - (i) deserted by his relatives, or
 - (ii) voluntarily presented by his relatives for fostering, or
 - (iii) voluntarily presents himself for fostering, when no relatives of his can be found; or
- c) has been abused, neglected or ill-treated by the person having care and custody of him; or
- d) has a parent or guardian who does not or cannot exercise proper guidance over him; or
- e) is found destitute; or
- f) is found wandering, has no home or settled place of abode, is on the streets or other public place, or has no visible means of subsistence; or
- g) is voluntarily presented by his parents for fostering

I therefore commend to your honours to see the act and go through it thoroughly. Doing so will certainly assist you a lot to know how to handle cases before you in this respect especially when you compare it and contrast with the provisions of the Islamic Law.

6.0 Conclusion:

There are so many provisions of the Islamic Law which provide for the welfare, maintenance and protection for children. Some of these provisions include: Guardianship, Fostering, Wardship, Custody, Kafalah, care for the orphan etc. Adoption is out of the consideration because it has been specifically prohibited by Allah³⁵. What therefore we have been able to discuss in this paper is the scope of guardianship and fostering in particular. We only merely mentioned adoption just to let you know that it used to be the practice before Islam and at the early stage of Islam but prohibited henceforth.

Guardianship and fostering on the other hand are still operative with express provisions to guide its operation. Your Honours too may wish to be encouraged to embark on guardianship and fostering of children who are orphaned (yatim) neglected (Laqit) and others who are deserted by their parents or relatives due to economic realities of this time. Your Honours may wish to encourage others too. I wish you all a happy workshop.

Assalamun Alaekum Warahmatullahi Ta'ala Wabarakatuhu

NOTES AND REFERENCES

1. See (Q33:36 and Q45:18)
2. Page 91 and 95 of Al-Maslaha (Journal of Law and Religion) Vol. 3 2004 – 2006. “Islamic Perspective of Child Rights” – an article contributed by Balkisu Saidu – a lecturer in the Department of Public Law and Jurisprudence, Faculty of Law, Usman Danfodiyo University, Sokoto
3. The Black’s Law Dictionary (8th Edition)
4. African Human Rights Law Journal (2014) 14 AHRL/ 322-345 at P.335
5. Journal of Law, Policy and Globalization Vol. 19, 2013 (online).
“Adoption Practice in Nigeria – an overview. An article written by Tajudeen, Ojo Ibrahim, Lecturer, Faculty of Law, Adekunle Ajasin University Akungba Akoko, Ondo State.
6. S.277 of the Child’s Rights Act also defines a child as “a person under the age of 18 years”.
7. See P.269 of the “National Conference on the Rights of Women and Children under Sharia” organized in 2008 by the Centre for Islamic Legal Studies Institute of Administration Ahmadu Bello University, Zaria.
8. See S141(1)(a) of the Child’s Rights Act (2003)
9. Ibid, P.279
10. *Al-Fiqhu Al-Wadih* by Dr. Muhammad Bikt Ismail Vol. II P.183
11. The Battle of Badr was the first battle in the history of Islam and it took place in 623A.D
12. This fact is a common knowledge of Islamic historians and jurisprudence.
13. Q33:5
14. Q33: 4-5.
15. See “African Human Rights Journal”. Ibid, P.329
16. See Vol. III P.284 of *Fiqhus-Sunnah* by Sayyid Sabiq.
17. Black’s Law Dictionary, Ibid

18. Op.cit
19. See *Al-Fiqhu Al-Wadiah*, Ibid Vol. II P.169
20. See P.209 of “Shariah: The Islamic Law” by Prof. Abdur-Rahman Doi (RIP) formerly of Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria.
21. Ibid
22. See Q2:220
23. See Q4:2
24. See Q4: 5-6
25. His full names are: Alhaji Saad Abdulkarim Alawaye (RIP)
26. Black’s Law Dictionary, Op.cit
27. “Protection of Children through foster-care under Islamic Law: Sustaining Foster Children Protection Through Breastfeeding” By Azizah Mohd, International Islamic University, Malaysia (December, 2011) online P.2232
28. Ibid P2232
29. The American Fiqhu Academy P.2 (Online)
30. Q2:233
31. Q31:14 also prescribes two years for weaning the child.
32. See Q4:23.
33. The Hadith was reported by Bukhari, Muslim, Annasai, Bn Majah and Tirmidhi.
34. Ibid
35. See Q33: 4-5