

# WISE UP ADOPTION AND CARE OF ORPHANS

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## **Global Muslim Women's Shura Council**

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Women's Islamic  
Initiative in  
Spirituality &  
Equality

# Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child

## GLOBAL MUSLIM WOMEN'S SHURA COUNCIL

The Global Muslim Women's Shura Council is a global and inclusive council of Muslim women scholars, activists, and specialists. The Council endeavors to connect Islamic principles to society's most pressing issues and develop holistic strategies for creating positive social change. In the following statement, the Shura Council finds that adoption can be acceptable under Islamic law and its principle objectives.

### EXECUTIVE SUMMARY

A common conception is that Islamic law forbids adoptions. However, this belief misses the complexity of Islamic law, the scope of adoption laws and practices across the world, and the overwhelming emphasis on taking care of orphans and foundlings found within Islamic sources. Contemporary adoption practices are immensely complex issues, overlapping with children's rights, international and national laws, human psychology, economic, social, and religious concerns, and the ethics of lineage, identity, property and inheritance rights. In this position paper, the Muslim Women's Shura Council considers whether adoption can be possible within an Islamic framework.

After examining Islamic texts and history alongside social science research and the international consensus on children's rights, the Council finds that adoption can be acceptable under Islamic law and its principle objectives, as long as important ethical guidelines are followed. This statement consults the Quran, the example of the Prophet Muhammad (*sunna*), the objectives and principles of Islamic law (*maqasid al-sharia*), Islamic Jurisprudence (*fiqh*), and social science data. The Shura Council finds that, instead of banning adoption, Islamic sources have brought various ethical restrictions to the process, condemning dissimulation and foregrounding compassion, transparency, and justice. These restrictions closely resemble what is known today as the

practice of open adoption. Therefore, when all efforts to place orphaned children with their extended family have been exhausted, open, legal, Islamically-grounded, ethical adoptions can be a preferable alternative to institutional care and other unstable arrangements.

According to Islamic and universal standards of children's rights, all children have the right to grow up in a nurturing, loving environment where their physiological, psychological, and intellectual needs are met. All children have the right to know their lineage and to celebrate their unique national, cultural, linguistic, and spiritual identity. All children have the right to a safe, supportive environment where their rights to dignity, education, and the development of their talents are well respected. The best interests of the child should be the primary consideration in all decisions relating to children, including adoption.

### OBJECTIVES

This statement has three primary objectives:

1. To address the concerns of Muslims interested in adopting children.
2. To serve as a resource for activists, law-makers, specialists, agencies, and organizations working on adoption.
3. To identify what it means to serve "the best interest of the child" according to Islamic principles.

## DEFINITION OF TERMS

### Orphan:

Different states and international institutions have different criteria for determining whether a child is an orphan. UNICEF classifies any child that has lost one parent as an orphan and estimates that approximately 143 million children are currently orphans<sup>1</sup>. For the purposes of this document, an orphan is a minor who is bereft of parental care due to death, disappearance, or abandonment by either the mother or the father, as well as situations where the parent voluntarily or involuntarily terminates the parental relationship. This definition combines several concepts in classical Arabic, including *yatim* (fatherless child) and *laqit* (foundling).

### 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. 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.

"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.

However, the categories of closed and open are better understood as idealized types, as most families experience a hybrid form of adoption that comprises elements of both open and closed adoption practices. The empirical data on the risks and benefits of each type of adoption has shown mixed results, with some adopted children embracing the opportunity to contact their birth families and others experiencing confusion and insecurity.<sup>2</sup> Generally, however, open adoptions are associated with better psychological and behavioral outcomes for the child.<sup>3</sup> Additionally, more recent studies have shown that both birth-mothers and adoptive parents find open adoptions increasingly favorable and satisfying.<sup>4</sup>

### Kafala (Guardianship):

With the exception of Indonesia, Malaysia, Somalia, Tunisia, and Turkey, the laws of most Muslim-majority states do not currently permit legal adoption. Instead, laws permit a system of guardianship (*kafala*), which resembles foster-parenting, but is more stable.

*Kafala* is defined as "the 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 for a child."<sup>5</sup> According to Jamila Bargach, *kafala* is seen as "primarily a gift of care and not a substitute for lineal descent." In other words, *kafala* involves the obligations of guardianship and maintenance without the creation of legal ties,

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1 UNICEF, "Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework of Action," July 2004. Available online at [http://www.unicef.org/publications/index\\_22212.html](http://www.unicef.org/publications/index_22212.html).

2 Marianne Berry, "Risks and Benefits of Open Adoption," *The Future of Children: A Collaboration of The Woodrow Wilson School of Public and International Affairs at Princeton University and The Brookings Institution*, Adoption Issue, 3.1 (1993): 125- 138. 133.

3 Ibid.

4 Xiaojia Ge, et. al, "Bridging the Divide: Openness in Adoption and Post-adoption Psychosocial Adjustment among Birth and Adoptive Parents," *Journal of Family Psychology*, 2008 Aug, 22(4):529-40.

5 International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), "Specific Case: Kafalah," Fact Sheet No51, (Geneva: ISS, 2007).

which would produce specific personal status legal entitlements. This type of guardianship does not sever the biological family bonds of the child or alter the descent lines for the adopting family. **Unlike foster-parenting, kafala is intended to be a permanent arrangement for a minor.** Like foster- parenting and adoption, kafala is mediated by the state, in contrast to informal or “customary” adoptions which take place within families or through secret agreements.

### Convergences Between Kafala and Adoption:

Whereas this statement focuses on adoption and not kafala, in some cases kafala may lead to adoption. Countries with strict application of “non-international kafala,” like Iran, Mauritania, and Egypt, reject any legal recognition between kafala and adoption. Citizens of these countries who reside in other countries, where adoption is the law of the land, cannot gain guardianship of a child with the intention of adopting that child in their state of residency. Other states, like Morocco, Algeria, Jordan and Pakistan, allow for placements of kafala children abroad, particularly with nationals living in foreign countries, with certain stipulations. Tunisia and Indonesia allow for a full convergence of kafala and adoption, limiting adoptions to national applicants, whether living in the country or abroad.<sup>6</sup>

### Islamic Law:

The term “Islamic law” refers to two related, yet distinct concepts, which are often conflated: *Sharia* and *Fiqh*. **Sharia literally means “the way” and is a transcendental ideal** that embodies the justice and compassion inherent in the totality of God’s will. **Fiqh, which literally means “understanding,” is Islamic jurisprudence and juristic law,** which has developed from the

eighth century onwards **as a human effort to interpret the Sharia.** Fiqh has been developed by Muslim legal scholars through analysis of the Quran and the example (*sunna*) of the Prophet Muhammad, with the aim of securing justice according to the context of each society, time (*zaman*), and place (*makan*).<sup>7</sup>

Whereas Sharia is the divine and ethical ideal of justice and mercy, fiqh is human interpretation and thus fallible.<sup>8</sup> In other words, despite the singular and transcendent ideal of “justice” embodied in the concept of Sharia, there is no single “Islamic law.” In addition, during the nineteenth and twentieth centuries, most Muslim-majority countries codified certain fiqh rulings, customary laws, and international laws into their constitutions as national laws.<sup>9</sup> Thus, classical fiqh has been superseded in many ways by a constellation of state laws that have precedence over the lives of twenty-first century Muslims.

### UNDERSTANDING AND RE-CONSIDERING THE FIQH OF ADOPTION

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*).<sup>10</sup>

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.

6 International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), “Specific Case: Kafalah,” Fact Sheet No51, (Geneva: ISS, 2007).

7 For more on the critical distinction between Sharia and fiqh, see Ziba Mir-Hosseini, “Towards Gender Equality: Muslim Family Laws and the Shari’ah,” <http://www.musawah.org/docs/pubs/wanted/Wanted-ZMH-EN.pdf>

8 Muhammad Khalid Masud, “Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction,” <http://www.musawah.org/docs/pubs/wanted/Wanted-MKM-EN.pdf>.

9 Jan Michiel Otto, ed. Introduction to Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present (Leiden: Leiden University Press, 2010), 25-6.

10 David Pearl, Textbook on Muslim Family Law (Croom Helm, 1987), 91.

### Adoption in pre-Islamic Arabia:

During the pre-Islamic period in Arabia, adoption (*al-tabanni*) into a tribe often took place for socioeconomic and patriarchal reasons. *Al-tabanni* is derived from the Arabic word *ibn*, meaning “son.” In keeping with the patriarchal norms of the era, adoptees were usually, if not always, male.<sup>11</sup> People adopted mainly to secure an heir and/or additional warriors for the tribe. Adoption could take place at any time in a person’s life, from childhood to adulthood, even if the adoptee’s biological parents were alive.<sup>12</sup> The adoptee automatically earned full rights and the responsibilities of a biological child and was given the adoptive father’s name. Since male children were considered a source of wealth and prestige, this benefited the adoptive father.<sup>13</sup> **Often adoption was undertaken in self-interest with the intention of usurping an orphan’s property,** as the adoptive parents would end up managing an orphaned child’s property. In addition, adoption was closely linked to enslavement; captors held the power to strip captives of their birth identities and appropriate them into their families.<sup>14</sup> For these reasons, **pre-Islamic adoption entailed a complete “erasure of natal identity.”**<sup>15</sup>

One of the first restrictions the Quran brought to the pre-Islamic adoption practices was on the issue of dissimulation through naming:

*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. (Q 33:4-5)*

### The Adoption and Repudiation of Zayd:

Prophet Muhammad’s adoption of Zayd Ibn Haritha and the eventual dissolution of this relationship can help us understand the practice of adoption in pre-Islamic Arabia. However, as a case involving the Prophet, this incident involves special conditions that cannot be expanded to the rest of the Muslim community.

Zayd ibn Haritha, an enslaved Bedouin, was approximately 10 years younger than the Prophet at the time of his adoption. Zayd chose to stay in the Prophet’s household instead of returning to his father, who had come to claim him.<sup>16</sup> Upon this decision, the Prophet agreed to adopt him according to the common practice at the time. Zayd’s adoption, in other words, was a consensual agreement between two grown men regarding filial rights and duties. It is therefore not equivalent to a conventional case of adoption which typically deals with a minor child and the safeguarding of his or her best interests.<sup>17</sup>

Zayd was married to Zaynab bint Jahsh, whom he later divorced. Following the divorce, Zaynab and the Prophet were married. The Quran describes this marriage as a precedent:

*So when Zayd had satisfied the necessary formality [of divorce], we gave her to you in marriage so that there be no fault for ones who believe in respect of the spouses of their adopted sons when they have satisfied the necessary formality. (Q 33:37)*

This precedent made it legal for a man to marry the divorced wife of his adopted son, which would have been a taboo in pre-Islamic Arabia. It has also been interpreted to mean that marriage restrictions do not apply in the case of adoptions. Alongside verse Q 33:4, this verse confirmed the dissolution of the adoptive relationship between Zayd and the Prophet,

11 In a study of the pre-Islamic literature, Ella Landau-Tasseron has not encountered any cases of adopted daughters.

12 M. S. Sujimon, “The Treatment of the Foundling (*al-Laṭī*) According to the Ḥanafīs,” *Islamic Law and Society* 9.3 (2002): 358- 370.

13 Sonbol, “Adoption in Islamic Society,” 46.

14 Ingrid Matison, “Adoption and Fostering,” in *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, ed. Suad Joseph, Afsaneh Najmabadi (BRILL, 2005), 1.

15 Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Rowman & Littlefield, 2002), 27.

16 See the authoritative biography of Zayd ibn Haritha in Ibn Sa’d, *al-Tabaqat al-kubra* (Beirut: Dar Sadir, 1998), 3:40-47.

17 Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr., Mohammad Fadel, “Classical Religious Perspectives of Adoption Law,” *Notre Dame Law Review* 79.2 (2004): 101-158. 156.



and of the pre-Islamic practice of adoption (*al-tabanni*).

### Adoptions in Islamic History:

For centuries, Muslim legal scholars have virtually unanimously agreed that the pre-Islamic type of adoption is forbidden, citing the Quran (Q 33:4-5) and Zayd Ibn Haritha's repudiation. Classical Islamic law books did not even discuss *tabanni*.<sup>18</sup> Scholars, however, also believed that all Muslims had a communal obligation to ensure that homeless and parentless children had a guardian and family to care for them.<sup>19</sup> *Kafala* developed as an alternative system that provided orphans with a family environment and the financial protection of a guardian without the risk of obliterating lineage (*nasab*).

However, even jurists who considered adoption to be against Islamic law made exceptions in certain cases. Interestingly, some of these exceptions were made when women were the adopters. Others were made when adoptions took place within the context of local customs. In addition, admissions of paternity were often used as a legal device (*hila*) to bypass the restrictions on adoption and fully incorporate foundlings into a family.

### Women as Adopters:

The fiqh restrictions on adoption, especially regarding naming, were conceived in a patriarchal framework. The emphasis on calling adoptees by the names of their biological fathers made the legal implications of adoption by women unclear. According to some scholars, the patriarchal nature of pre-Islamic adoption created a loophole, allowing women to adopt and give their last names to their adopted children in some instances.<sup>20</sup>

### Exceptions Made Due to Local Customs:

As Islam spread outside Arabia, jurists and lawmakers were faced with the need to accommodate customs (*'urf*) hitherto unknown to them. Thus began the fiqh practice of giving local and national customs a legal effect.<sup>21</sup> According to fiqh consensus, the laws of the land, including national and international laws, constitute a deciding factor in Islamic law: custom is the basis of judgment (*al-'ada muhakkama*).<sup>22</sup> This is true as long as the law does not cause harm and is compatible with the public good.

### Foundlings and Admissions of Paternity:

Muslim jurists point out that humans were not made for the Sharia; rather, the Sharia was made for humans.<sup>23</sup> Public interest (*maslaha*) is a central determining factor in Islamic law and has closely influenced the fiqh practice governing orphans and foundlings.<sup>24</sup> **Although classical Islamic law generally restricted adoption, even early jurists recognized times that a complete parental relationship was in the best interest of the child and society.** This is evident in the way that Hanbalis and the Hanafis dealt with admissions of paternity in the case of foundlings.

In the classical Islamic law texts of all four Sunni schools, there is a chapter which dictates the proper conduct for someone who finds an abandoned child and wishes to care for him or her. This chapter is entitled "The Foundling" (*al-Laquit*). In it, the merits and rules of caring for the foundling, along with the treatment of any wealth and property found with him or her, are explicated. For instance, in the Hanafi fiqh manual *al-Hidaya*, this section reads:

*Removing a foundling from the street is strongly recommended because saving*

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18 Ella Landau-Tasseron in her, "Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies," *Bulletin of the School of Oriental and African Studies, University of London* 66. 2 (2003): 169-192, cites five recorded examples in which an adoptive mother gave her name to an adopted child.

19 Wahbat al-Zuhayli, *al-Wajiz fi Fiqh al-Islami*, vol 2 (Damascus, 2007), 347.

20 Ibid., 186-7.

21 Faisal Abdul Rauf, *Islam: A Sacred Law* (Qiblah Books, 2000), 82-5.

22 Mohammad Hashim Kamali, "Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law," *The Association of Muslim Lawyers*, [http://www.sunnah.org/fiqh/usul/Kamali\\_Qawaid\\_al-Fiqh.pdf](http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf).

23 Faisal Abdul Rauf, *Islam: A Sacred Law* (Qiblah Books, 2000).

24 Ibid., 78.

*its [i.e. the child's] life is involved. If one has strong suspicions that the child will perish, removing the child then becomes obligatory.*<sup>25</sup>

Hanafi jurists also believed it was a failure of duty and forbidden for a believer to discover and remove a foundling and then return that foundling to the place where he or she was found.<sup>26</sup>

In the Shafi'i fiqh manual Minhaj, the section on foundlings reads:

*Caring for abandoned children is a communal obligation. (According to some scholars) If the child is found in one land she may not be carried to another. However the reliable position is that she may be carried to another land.*<sup>27</sup>

Foundlings of unknown parentage could gain a genealogical parentage via an admission of paternity (*istilhaq* or *iqrar bi al-nasab*).<sup>28</sup> Historically, Hanafi and Hanbali jurists considered the best interests of the child when faced with claims of paternity and tended to accept the claim by any man that he was the father of the foundling, "but only to the extent that such a claim benefits the foundling."<sup>29</sup> According to Hanbali scholar al-Bahitti, false acknowledgements of paternity for a foundling can be accepted for "the welfare of the child who needs care, shelter and pedigree."<sup>30</sup> Thus, as Mohammad Fadel affirms, the Law of Foundlings under Islam has been functioning as "a Substitute Law of Adoption" for centuries.<sup>31</sup>

In the contemporary world, children of unknown

parentage can be considered foundlings. In contemporary Egypt, for example, declarations of paternity are accepted as long as the child does not have a known father and the declaration will benefit the foundling. This allows the orphan to become a legitimate member of a family, with the state-recognized protection against sexual harassment and inheritance rights.<sup>32</sup>

### Adoption in the Twenty-First Century:

In the twenty-first century, many national and international laws have brought adoption more in line with Islamic principles. Secrecy is no longer a standard practice; adopted children often have the legal right to know about their origins and are encouraged to embrace their cultural, ethnic, and biological heritage. In the New South Wales province of Australia, for example, children are allowed to retain the last name of their birth family, inheritance can be decided by a will, and continuing communication between the birth family and the adoptive family is made possible by a mutually agreed "Adoption Plan."<sup>33</sup> The notion of an adoption absorbing an adopted child's identity is no longer the ruling paradigm. In many countries with large Muslim populations, such as Sudan, Tanzania, and India, different laws regulate adoption and *kafala* for non-Muslim than for Muslim children. In a number of Muslim-majority countries, such as Jordan, Algeria, and Morocco, regulations governing foreign adoption have been modified to allow for, under certain conditions, transfer of guardianship (*kafala*) of the child to Muslims. The Treatment of the parents, with the option of later adopting the child under the law of their

25 Burhan al-Din al-Farghani al-Marghinani; *Al-Hidaya*, vol. 2 (Lebanon: Dar al-Arqam, n.d.), 466-467.

26 M. S. Sujimon, "The Treatment of the Foundling (al-Laḡīṭ) According to the Ḥanafīs," *Islamic Law and Society* 9.3 (2002): 358-385.359. 27 Yahya ibn Sharaf al-Nawawi, *Minhaj al-Talibeen* (Lebanon: al-Maktaba al-Asriyyah, n.d.), 294-295.

27 Yahya ibn Sharaf al-Nawawi, *Minhaj al-Talibeen* (Lebanon: al-Maktaba al-Asriyyah, n.d.), 294-295.

28 M. S. Sujimon, "Istilhaq and Its Role in Islamic Law," *Arab Law Quarterly* 18.2 (2003): 117-143.

29 Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr., Mohammad Fadel, "Classical Religious Perspectives of Adoption Law," *Notre Law Review* 79.2 (2004): 693-753.

30 Quoted by Landau-Tasseron, "Adoption, Acknowledgement of Paternity and False Genealogical Claims," 187.

31 *Ibid.*, 141.

32 Sonbol, "Adoption in Islamic Society: A Historical Survey," 63.

33 "Adoption in NSW: Information for the Muslim Community," [http://www.community.nsw.gov.au/docswr/\\_assets/main/documents/adoption\\_muslim\\_broch.pdf](http://www.community.nsw.gov.au/docswr/_assets/main/documents/adoption_muslim_broch.pdf).

own country, once the child comes to the new community.<sup>34</sup>

Adoption is practiced in various forms in many Muslim-majority countries. For example, unofficial adoptions within families, as well as secret adoptions, occur alongside the kafala system.<sup>35</sup> In the five **Muslim-majority countries of Indonesia, Malaysia, Somalia, Tunisia, and Turkey, adoption is legal.**

Turkey is a particularly noteworthy example, because the Republican civil code allows full legal adoptions; however, several provisions have been put in place to prevent friction with the tradition of kafala in the country; they are:

1. To protect the adoptee's rights of identity, the government links the official records of the adoptive family and the biological family. All official developments and changes in status regarding the adopted child are registered in both records.
2. Adoption gives full inheritance rights to the child from the adoptive family. In addition, the adopted child can also inherit from the biological family. However the adoptive parents cannot inherit from the adopted child.
3. Adoption leads to a ban in marriage within the adoptive family. However, if marriage takes place despite the ban, the government allows the adoption to be revoked and the marriage to stand.<sup>36</sup>

In addition, adoptive parents in Turkey must care and provide education for the child for at least one year before an adoption can be finalized. This allows the government to monitor whether the adoption is indeed in the best interest of the child before the status is legalized.

## MUSLIM WOMEN'S SHURA COUNCIL ANALYSIS

*And they ask you about orphans. Say: Making things right for them (islah) is better. (Q 2:220)*<sup>37</sup>

This is the primary verse regarding orphans in the Quran and acts as the foundation for the Shura Council's 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*). By examining Islamic texts and history, as well as social science research and the international consensus on children's rights, this Shura Council statement seeks to uncover what **islah means according to Islamic principles and today's contexts.**

### Orphans in the Quran:

Taking care of orphans is an act of piety in Islamic thought. The Quran, the primary source of guidance for Muslims worldwide, repeatedly emphasizes the importance of taking care of orphans and those in need (Q 2:67; Q 2:147; Q 4:36). The Quran tells believers that it is a duty to treat orphans with equity (Q 4:127) and a sin to wrong them (Q 93:9). The rejection of orphans is considered a sign of rejection of all moral law, as expressed by Sura Al-Ma'un (Q 107:1-7). In fact, God is depicted as the ultimate caretaker of orphans in the Quran:

*Found He you not an orphan and He gave you refuge? (Q 93:5-6)*

34 "Adoption of Children from Countries in which Islamic Shari'a law is Observed," Intercountry Adoption, Office of Children's Issues, US Department of State, <http://www.adoption.state.gov/pdf/Adoption-%20of%20Children%20Countries%20Islamic%20Sharia%20Observed.pdf> (Aug 15, 2010).

35 Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Rowman & Littlefield, 2002).

36 "Evlat Edinme" \*Adoption+, Adalet Hukuk, [http://www.adalet-hukuk.com/yeni\\_sayfa\\_7.htm](http://www.adalet-hukuk.com/yeni_sayfa_7.htm).

37 This and all other quotations are from *The Sublime Qur'an*, trans. Laleh Bakhtiar (Chicago: KAZI Publications, Library of Islam, 2009).



## Orphans in the Sunnah:

The Prophet Muhammad himself was orphaned at a young age and always paid special attention to the needs of children and orphans. The Prophet was very critical of individuals who were not compassionate towards children: "Anyone who does not show mercy to our children nor acknowledge the right of our old people is not one of us."<sup>38</sup>

The Prophet asked believers to provide for orphans, regardless of the child's circumstances, lineage, and heritage.<sup>39</sup> According to a hadith, heavenly rewards await those who take care of orphans. The Prophet is said to have noted,

*"I and the kafil [supporter, one who cares for] of an orphan will be together in heaven like this"*

and placed his middle and index fingers side by side.<sup>40</sup> Thus, as an orphan himself, the Prophet described taking care of orphans as an important act of piety that would reap heavenly rewards.

## Adoption and the Principles of Islamic Law (Maqasid al-Sharia):

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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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. (Q 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.<sup>44</sup> Poor development caused by inadequate touch, stimulation, and bonding is a serious medical condition called "failure to thrive".<sup>45</sup>

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38 Bukhari, *Al-Adab al-Mufrad*, Vol. 8, Book 18, Number 353. Available at <http://www.sunnipath.com/library/Hadith/H0003P0018.aspx>.

39 Amira Al-Azhary Sonbol, "Adoption in Islamic Society: A Historical Survey" in *Children in the Muslim Middle East*, ed. Elizabeth W. Fernea (Austin, Tex. 1995), 45–67. 55.

40 Bukhari, *Sahih Buhkari*, Book 73, Hadith 34.

41 Ziba Mir-Hosseini, "Towards Gender Equality: Muslim Family Laws and the Shari'ah," <http://www.musawah.org/docs/pubs/wanted/Wanted-ZMH-EN.pdf>

42 Muhammad Khalid Masud, "Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction," <http://www.musawah.org/docs/pubs/wanted/Wanted-MKM-EN.pdf>.

43 Khaled Abou El-Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperCollins Publishers, 2007), 130.

44 Harry F. Harlow, "The Nature of Love," *American Psychologist* 13 (1958): 673–685.

45 Elizabeth J. Palumbo, ed. "Failure to Thrive," *The Merck Manuals Online Medical Library*, <http://www.merckmanuals.com/professional/sec19/ch286/ch286b.html>

### **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.<sup>46</sup> A study of Romanian state orphanages found that early neglect in institutional settings often led to severe disabilities, resulting in lifelong institutionalization.<sup>47</sup> 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.<sup>48</sup>

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."<sup>49</sup>

### **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."<sup>50</sup>

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.<sup>51</sup>

This is because substandard care-taking arrangements can result in serious attachment disorders with lifelong consequences.<sup>52</sup>

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

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46 Better Care Network, Save the Children, and UNICEF, *The Neglected Agenda: Protecting Children without Adequate Parental Care*, November 2009, [http://bettercarenetwork.org/docs/Wilton%20Park%20Background%20Paper\\_FINAL.pdf](http://bettercarenetwork.org/docs/Wilton%20Park%20Background%20Paper_FINAL.pdf)

47 Craig S. Smith, "Romania's Orphans Face Widespread Abuse, Group Says," *NY Times*, May 10, 2006, <http://www.nytimes.com/2006/05/10/world/europe/10romania.html>.

48 John Triseliotis and Malcolm Hill, "Contrasting Adoption, Foster Care, and Residential Rearing," in *The Psychology of Adoption*, eds. D. Brodzinsky and M. Schechter. New York: Oxford University Press, 1990, 107.

49 Article 11, Organization of the Islamic Conference, *Covenant on the Rights of the Child in Islam*, June 2005, OIC/9- IGGE/ HRI/2004/ Rep.Final, available at: <http://www.unhcr.org/refworld/docid/44eaf0e4a.html>.

50 International Islamic Center for Population Studies and Research, Al-Azhar University and Unicef, "Children in Islam: Their Care, Development and Protection," 2005. Available in Arabic and English summary at [http://www.unicef.org/egypt/media\\_2369.html](http://www.unicef.org/egypt/media_2369.html).

51 EveryChild, *Why do Separated Children Matter?: A Policy Brief*, November 2008.

52 Jude Cassidy and Phillip R. Shaver, eds. *Handbook of Attachment: Theory, Research, and Clinical Applications* (New York: The Guildford Press, 2008).

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.<sup>53</sup>

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.<sup>54</sup>

### **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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

### **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.<sup>59</sup> 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.<sup>60</sup> 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.”<sup>61</sup>

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

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53 Richard Carter, *Family Matters: A Study of Institutional Childcare in Central and Eastern Europe and the Former Soviet Union* (London: Everychild, 2005).

54 Ibid., 413.

55 “Myths about Orphans & Orphanages,” *Global Children*, [http://globalchildren.3cdn.net/ee441ba39e2bf67743\\_gcm6b9s6b.pdf](http://globalchildren.3cdn.net/ee441ba39e2bf67743_gcm6b9s6b.pdf)

56 Jude Cassidy and Phillip R. Shaver, eds. *Handbook of Attachment: Theory, Research, and Clinical Applications* (New York: The Guildford Press, 2008).

57 Kim Chisholm et al., “Attachment Security and Indiscriminately Friendly Behavior in Children Adopted from Romanian Orphanages,” *Development and Psychopathology* 7 (1995): 283-294.

58 For contemporary examples, see Bargach, *Orphans of Islam*, 98. For historical data, see Ferhunde Ozbay, “Turkey,” *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, eds. Suad Joseph, Afsaneh Najmabadi (BRILL, 2005), 6.

59 “Taliban,” in the *New Encyclopedia of Islam*, ed. Cyril Glassé, Huston Smith (Rowman Altamira, 2003), 447.

60 Robert D. Kaplan, “The Lawless Frontier,” *The Atlantic* (September 2000), <http://www.theatlantic.com/magazine/archive/2000/09/the-lawless-frontier/5296/>.

61 “Somalia: Looking After the Unwanted,” UN Office for the Coordination of Humanitarian Affairs, <http://www.mbali.info/doc51.htm>, 2001.

peoples.”<sup>62</sup> 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.<sup>63</sup>

The Shura Council recognizes the desirability of ethnic, cultural, and religious continuity in a child’s life, as dictated by international conventions and state laws. However, **the Council 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 (Q 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.

### **SPECIAL CONCERNS ABOUT ADOPTION**

Muslim scholars who argue against adoptions often bring up specific concerns regarding lineage and naming, inheritance, consanguinity (*mahramiyya*), and concerns about privacy and boundaries. In this addendum, the Shura Councils explore commonly raised concerns regarding adoption and gives recommendations on how potential adoptive parents might approach them.

#### **Lineage and Naming:**

The first restriction frequently cited from Islamic sources is on the issue of dissimulation through naming. 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. (Q 33:4-5)*

These verses have generally been interpreted as a ban on adoption. However, the Council 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.<sup>64</sup> 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.<sup>65</sup>

Naming practices differ across the world in terms of adoptions. Frequently, in situations where the lineage of the adopted child is unknown, the surname of the adoptive family has not been attributed to the child. However many Muslim- majority countries allow for the transference of the family name of the guardian to the child if the child is of unknown heritage. According to article 92 the by laws of the Child Law No 12 (1996) in Egypt, for example, “an orphan or a child of unknown parentage, male or female, carries the surname of the guardian family to be attached at the end of his/her first name. This action should be documented in the child’s file, and it does not lead to any effects related to adoption.”

#### **Recommendations:**

In order to protect the sanctity of the adopted child’s connection to their biological family,

62 Article 11, Organization of the Islamic Conference, Covenant on the Rights of the Child in Islam, June 2005, OIC/9- IGGE/ HRI/2004/ Rep.Final, available at: <http://www.unhcr.org/refworld/docid/44eaf0e4a.html> [accessed 13 January 2011]

63 Ibid., Article 9.

64 “The Adopted Child,” Facts for [www?name=The+Adopted+Child&section=Facts+for+Families](http://www2.ohchr.org/english/law/crc.htm)

65 The United Nations, Convention on the Rights of the Child, 1989, <http://www2.ohchr.org/english/law/crc.htm>.

and the natural rights that follow, the Shura Council advises against hiding the adopted child's familial background. Withholding this information from the child could lead to identity crisis and confusion. The adoptive parent(s) should inform adopted children of their status with due consideration. The knowledge of biological lineage is also important in protecting the child's right to inherit from his or her biological parents' estate. In cases where the child's background is not known, parents should adhere as closely to open adoption practices as possible under the circumstances, integrating the child to the fullest extent into the adoptive family.

### **Inheritance:**

Children raised under the kafala system do not automatically gain inheritance rights from their guardians. Historically, upon the death of their caregiver, the child under the deceased's guardianship received an inheritance share from the state treasury. The fiqh reasoning behind this was twofold: 1) the whole society is responsible for the well-being of orphaned children<sup>66</sup> and 2) biological relatives (and spouses) are primary in matters of inheritance.<sup>67</sup> These principles contrast with most secular laws of adoption in which the adopted child has the same inheritance rights as a biological child.

However, laws regarding financial boundaries were intended to protect the orphan, not their guardians.<sup>68</sup> Indeed, specific verses involving orphans in the Quran are usually tied to financial matters and admonish believers not to rob orphans (e.g. Q 17:34, 4:9-10). For example Surat An-Nisa states,

*And give the orphans their property. And take not in exchange the bad of yours for what is good of theirs. And consume not their property with your own property. Truly this has been criminal, a hateful sin. (Q 4:2)*

*Truly those who consume the wealth of orphans with injustice, consume only fire into their bellies. (Q 4:10)*

In contrast, there are no verses in the Quran which prohibit guardians from giving money to orphans. Quite the contrary, while blood-relations are considered primary, spending on one's dependents is highly praised in Islam (Q 2:215). According to both Sunni and Shi'i fiqh, a person can bequeath a maximum of one-third of their property to anyone who is not related to them by blood. This exact proportion is not listed in the Quran; however, it has generally been accepted by fiqh scholars.<sup>69</sup>

Yet, the testator can bequeath more than one-third to the adopted child and the adopted child can inherit whatever amount is bequeathed, if the mandatory heirs consent after the testator's death (according to Sunni and Shi'i law) or before the testator's death (in only Shi'i law). The laws also do not prevent a person from making a gift from their assets to anyone during his or her lifetime. There are no restrictions on the size of the gift, unless the intention is to harm legal heirs. Adoptive parents can also set up a trust for the purpose of maintaining a dependent.<sup>70</sup> Under all Sunni fiqh schools, the child raised through kafala also retains the right to inherit from his or her biological parents.

The Quran recommends all believers maintain up-to-date and accurate wills and remember the rights of their parents and close relatives:

*It is prescribed for you when death attends anyone of you if one left goods, to bequeath to the ones who are one's parents and the nearest kin as one who is honorable. (Q 2:180).*

The utilization of the two sister principles of consultation (*shura*) and mutual consent (*rida*) should be the guiding principle for developing the content of the will as well as for the

66 Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr., Mohammad Fadel, "Classical Religious Perspectives of Adoption Law," Notre Dame Law Review 79.2 (2004): 693-753.

67 Ishaque, "Islamic Principles on Adoption," 407.

68 Sonbol, "Adoption in Islamic Society," 54.

69 See also al-'Asqalani, Fath al-Bari bi-Sharh Sahih al-Bukhari, Kitab al-Jana'iz (23), Bab Ritha' al-Nabiy Sala Allahu 'Alyhi wa- Sallam Sa'd ibn Khawla (36), no. 1295.

70 Ishaque, "Islamic Principles on Adoption," 407.



distribution of the estate for these adoptive families. The importance of consultation with all family members is sanctioned in a Quranic verse: "And consult them in affairs" (Q 3:159). Wills are also subject to the principles of contract law in Islam. The primary governing principle of Islamic contract law is mutual consent (*rida*).

### **Recommendations:**

The Shura Council recommends that Muslims keep up-to-date wills in order to ensure that their property is distributed according to their wishes and to make provisions for all their children (biological and adopted). Adoptive families can also choose to use alms (*zakat*) and charity (*sadaqah*) as instruments for the transfer of wealth in favor of the adopted child. The dues of *zakat*, in cases where adopting parents are liable to pay it, could be accumulated year after year along with *sadaqah* that the adopting family might want to make in a year. This amount could also be added to the will and gifts made in favor of the adopted child and help in balancing the interests of the biological family and the adopted child. The Council enjoins all adoptive parents to consider the laws of their countries and consult with their family members in order to reach a just and compassionate solution.

### **Consanguinity and Marriage Prohibitions (Mahramiyya):**

It is well-known that the Quran specifies those relatives who are forbidden in marriage (Q 4:23). In Islamic law, those that one is prohibited to marry are known as unmarriageable kin. The status of unmarriageable kin occurs by one of three means: marriage, kinship, or milk-foster relationship (having been breast-fed).

Adopted children, unless they have been breast-fed by the adoptive mother, have historically been considered marriageable (non-*mahram*) to the adopted family. Therefore marriage between a child reared through *kafala* and biological children of the family is legal

under Islamic law. In contrast, Western states consider marriages between adopted siblings and adoptive parents and adopted offspring as incestuous and prohibited. Some scholars have recommended breastfeeding by the adoptive mother as a way of bridging this divide.<sup>71</sup> The mother does not have to be a nursing woman, as breast milk can be induced medically and technologically.<sup>72</sup>

### **Recommendations:**

There is no reason to avoid adoption due to varying marriage restrictions. Muslims scholars have historically not considered *kafala* as a barrier to marriage; however, no ruling recommends marriage between biological and non-biological family members either. Adoptive parents are advised to follow the law of their countries on this matter.

### **Privacy and Boundaries:**

Some scholars suggest that since the adopted child is not biologically related to the adoptive family, he or she may experience sexual feelings towards other members of the family and vice versa, upon reaching puberty. These scholars recommend that certain practices such as segregation and veiling be practiced to prevent the development of such feelings. Usually verse Q 24:31 is cited to argue for veiling/segregation. A closer reading of Islamic texts and important social science data, however, do not support this conclusion.

First, veiling and gender segregation are practiced in varying degrees and are not universally accepted as edicts of Islamic law; many Muslims do not adhere to these views and do not consider them a requirement. Practices regarding privacy and boundaries differ from household to household and must be determined according to the dynamics within each.

Second, as we know from the many cases of incest and child abuse across the world, regardless of ethnicity or religion, blood-ties

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71 Ingrid Mattson, "Adoption and Fostering," in *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, ed. Suad Joseph, Afsaneh Najmabadi (BRILL, 2005).

72 Elizabeth Hormann, "Breastfeeding an Adopted Baby and Relactation," La Leche League International, 2007.

and segregation are no guarantee against sexual abuse and incest. Such abuses happen because of psychiatric disorders, not due to a lack of veiling/segregation.

However, more on point, scientific research suggests that the human repulsion towards incest is related not to blood ties, but to social ties. It is the experience of growing up together in a household that create the ties we then perceive as biological. Sharing someone's life, not blood-ties, makes them family:

There is a remarkable absence of erotic feelings between people who live together and play together before age ten. The absence is particularly marked among couples brought together before age three, and, for any given couple, largely depends on the age of the younger partner when they first meet.<sup>73</sup>

In fact, marriages between individuals raised together from an early age, even if they are not biologically-related, are scientifically linked to low fertility, divorce, and adultery.<sup>74</sup> The lack of sexual feelings between genetically-diverse individuals who have shared a household at an early age is scientifically recognized as "the Westermarck effect" or "reverse sexual imprinting." Reverse sexual imprinting has been documented in many cultural contexts, including in China, Taiwan, Israel, Lebanon, Indonesia, and northeastern India.<sup>75</sup>

The Quran recognizes that sharing a life and intermixing are important to the establishment of family ties:

*And they ask you about orphans. Say: Making things right for them is better. And*

*if you intermix with them, then they are your brothers/sisters. (Q 2:220)*

While this verse has traditionally been understood to apply in cases of intermixing the orphan's property with the property of the guardian, it might be viewed in a larger sense.

Particularly, the word used in this verse for "intermixing" in the Quran is *tukhalituhum*, from the word *ikhtilat*, which is the exact same term used by proponents of gender segregation to refer to the intermixing of sexes. Clearly, the Quran suggests that orphans within the household be treated as brothers/sisters, when intermixing. Segregating an adopted child upon puberty based upon his or her gender does not qualify as treating the child as a brother/sister, as directed by the sacred text. This practice may cause severe emotional and psychological damage, both to the adopted child and to the other members of the household.

Two hadiths may be cited to support the promotion of intermixing, as opposed to gender segregation:

- "Mix with people (*khalit al-nas*), do not hurt your religion (*wa dinaka la taklimannah*) and flirtation is with the spouse (*al-du'aba ma' al-ahl*)."<sup>76</sup>
- "The believer who intermixes with people (*yukhalit al-nas*) and has patience with harm coming from them is of a higher reward than a believer who does not intermix with people and does not have patience with harm coming from them."<sup>77</sup>

Adopted children can be considered

73 Arthur P. Wold, "Explaining the Westermarck Effect, Or, What Did Natural Selection Select For," in *Inbreeding, Incest, and the Incest Taboo: The State of Knowledge at the Turn of the Century* (Stanford: Stanford University Press, 2005), 76-92. 86.

74 Ibid., 77.

75 Joseph Shepher, *Incest: A Biosocial View*, 1983. For Lebanon, see Justin McCabe, "FBD Marriage: Further Support for the Westermarck Hypothesis of the Incest Taboo?" *American Anthropologist* 85 (1983):50-69. For Indonesia, see Daniel M.T. Fessler, "Neglected Natural Experiments Germane to the Westermarck Hypothesis: The Karo Batak and the Oneida Community," <http://www.sscnet.ucla.edu/anthro/faculty/fessler/pubs/FesslerNaturalExperimentsHN.pdf>, 2007. For India, see Robbins Burling, "Garó Marriage to Wife's Daughter: Further Support for the Westermarck Hypothesis for the Origin of Incest Taboo," *American Anthropologist* 87. 1 (1985): 130-133.

76 This hadith is a type of report technically known as an *athar* and it appears in alternate versions. See al-'Asqalani's discussion in Ibn Hajar al-'Asqalani, *Fath al-Bari bi-Sharh Sahih al-Bukhari*. *Kitab al-Adab* (78), *Bab al-Inbisat ila al-Nas* (81).

77 See, for example, Ibn Majah, *Sunan ibn Majah*, *Kitab al-Fitan*, *Bab al-Sabr 'ala al-Bala'*, no. 4032; Abu 'Isa, *Muhammad ibn 'Isa ibn Sura*, *Sunan al-Tirmidhi*, *Kitab Sifat al-Qiyama wa-l-riqaaq wa-l-wara'*, no. 55.

as belonging to one of three categories mentioned in verse Q 24:31: pre-adolescent children, women, or male adherents who do not have the urge [for sex with the women of the household] “*ghayr uli al-irba*.” The word *irba* can mean “need” (*haja*) or “cunning (*makr, hila, daha’, khubth, sharr*).” In the context of Q 24:31 it is usually interpreted as “sexual urge.”

### Recommendations:

Members of each household can determine bounds of modesty and privacy to be observed among adopted and biological relatives, based on their specific contexts, the dictates of their conscience, and their understanding of what the Qur’an and the Sunnah prescribe. Muslims who practice gender segregation/ veiling, for example, may want to consider adopted children as *ghayr uli al-irba*. Adoption cannot be categorically banned based on such worries. It is essential that the family be a safe haven for all members.

### CONCLUSIONS AND RECOMMENDATIONS

Given the fiqh precedents cited above and the emphasis on the well-being of orphans in Islam’s primary texts, the general belief that “Islam forbids adoption” must be reconsidered. Indeed, some aspects of the Islamic adoption principles are a matter of semantics, as the classical Islamic scholars defined adoption differently than we define it today. Moreover, there are currently a variety of adoption practices and laws across the world and many are compatible with Islamic ethics.

According to generally accepted maxims of Islamic law, public interest (*maslaha*) is a central determining factor in Islamic law and can be used to justify departures from established precedents.<sup>78</sup> Islamic law has often integrated non-sharia norms whenever these would further public interest. Additionally, scholarly consensus has long held that the laws of the land, including national and international laws,

constitute a deciding factor in Islamic law. As put forth in Majalla al-Ahkam al- Adliyya, a complete code of Islamic civil law, “Common use and custom, whether it be general or special, is made the arbitrator for the establishment of a judgment.”<sup>79</sup> This is true as long as the law does not harm an individual or the society. Thus, beneficial international and Western laws on adoption can be regarded as “Islamic.”

As such, the adoption of orphaned children in countries where adoption is permitted can be consistent with Islamic law, as long as vital ethical guidelines are followed. Regarding orphans, the Quran clearly states that the best interests of the child are primary. Families considering adoption must strive for a balanced combination of transparency, justice, and compassion. Adoptive parents must refrain from obscuring the adoptive child’s biological lineage and they must strive to help the child flourish in all areas of life. The just division of wealth among biological and adoptive family members of each family must be ensured in the case of adoptions.

According to UNICEF, “**the best interests of the individual child must be the guiding principle**” in making any decision on the adoption and placement of orphaned children. This is in accordance with the **broad recommendation in the Quran regarding orphans: “Making things right for them is better.”** According to a central principle of Islamic law, all matters are to be judged according to intentions.<sup>80</sup>

The Muslim Women’s Shura Council **unanimously believes that open, ethical, and legal adoptions are supported by the core beliefs expressed in Islamic sources and act as an acceptable way to improve the condition of orphans.** “Islam” literally means making whole, sound, safe, and peaceful. Therefore making orphans well, safe, whole, and at peace is absolutely integral to Islam.

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78 Ibid., 78.

79 The Mejelle, Being an English Translation of Majallah el-Ahkam-l-Adliya, and a Complete Code on Islamic Civil Law, trans C.R. Tyser, B.A.L. et al. (Kuala Lumpur: Malaysia, 2001), 7.

80 See Bukhari, Book 1, Hadith 1



As part of our ongoing efforts to end gender-based discrimination and champion women's rights, WISE builds the capacity of women by partnering with in-country women led NGO's to pilot innovative projects aimed at transforming behaviors and patriarchal attitudes toward women.

We have implemented impactful projects to address region-specific women's issues. In Afghanistan, WISE partnered with a local NGO to develop an Imam training program over three years on the five rights of women – education, inheritance, child marriage, forced marriage, mobility. In Pakistan, WISE developed a domestic violence awareness campaign for law enforcement. In Egypt, WISE created a model to incentivize practitioners of Female Genital Mutilation to end the practice. In Gambia, WISE developed a long-term educational awareness campaign on the harm of Female Genital Mutilation resulting in a country-wide ban. Contact us if you would like to partner with WISE.

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