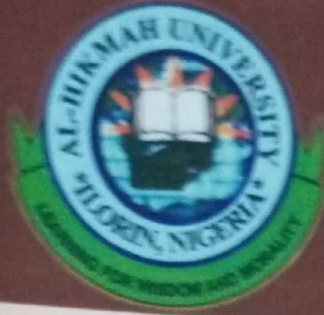


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TANGLE OF LINEAGE IN ADOPTION PRACTICE: BETWEEN SHARIAH AND NIGERIAN LAW

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ABSTRACT

The issue of lineage by its nature is genetic and establishes consanguinity between two or more people. Islamic law greatly emphasizes and safeguards lineage and this is why it is considered as one of the basics human and inalienable rights inherited upon birth into a family. The view of Islamic law is that an adopted child cannot be disconnected from his lineage notwithstanding the fact that the child has been abandoned, necessitating adoption by another family. Whereas, the Common law position is that, an adopted child is seeing as part of his new family, entitling to everything including right of inheritance like biological child. This is premised on the view that an adopted child has been disconnected from his lineage. This paper examines the trend whereby after adoption, the adopted child takes the name of the family that adopts them. The majority of these children has no contact with their real parents and do not know who they are. It is argued in this paper that an adopted child may, unknowingly, come in contact with his birth families and, in some cases, can end up marrying a sibling because he is unaware of their true heritage. It is found that the danger is prevented in Islam by placing great significance on the name of a child and thus ensuring that lineage is traceable. It is in the light of this dysphoria that this article attempt to unknot the question of lineage as well as legal implication of adoption under Nigerian law and Shari'ah and make recommendations on how best the interest of the adopted child can be protected. This research has been achieved through doctrinal research method, which includes the academic journal, legal provisions and classical Islamic textbooks.

Key Words: Tangle, Lineage, Adopter, Adopted Child, Bloodline, Shari'ah

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INTRODUCTION

The issue of lineage is crucial that both Islamic law and conventional law have given wider recognition to it. In fact, it has been categorized as one of the basic human rights of each individual as far as Islamic law is concerned. It is the genetic and lawful relationship existing between two people wherein one of them is born from him/her.⁴ It is an affair established by conception. Besides, it is the relation between two people born from one person or one born from the other,⁵ a lawful consanguinity relates a father and mother to their children.⁶ It is the established relation wrest from the coming into existence of a person from others.⁷ Therefore, it suffices to explain that the issue of lineage is common phenomenal in one society, nation and country particularly, Nigeria.

Under the *Shari'ah*, lineage is one of the objectives of *Shari'ah* needs to be protected and it is the fundamental right of child in the family affair. The preservation of lineage is greatly emphasized by the Islamic law. It is one of the most basic human rights each individual inherits from his family. The concept is important in Islam as many laws relate to blood relationships, marriage, custody and inheritance, among others. It is the base of other child's rights, which prevents bringing shame on one when the father denies paternity. The Prophet was reported to have said, "One of child's rights is that his/her father would not deny his/her paternity"⁸.

Humans as social beings cannot live apart from other human beings, because it has become their nature to co-exist with other fellow human beings to form families through marriage. Due to the existence

⁴Imami A, Safaie H. 'Family law'. 9th ed. Tehran: Mizan, Persian [2006]. p. 2.

⁵Boroujerdi M. 'Islamic law whole works'. 1st ed. Tehran: Roham, Persian, [2002] p. 198.

⁶Katooziyan N. 'Family law'. 4th ed. Tehran: Mizan, Persian, [2006] p. 322.

⁷Shahidi M., 'Human Artificial Insemination, sets of articles about new human reproductive technologies in Islamic law' 1st ed. Tehran: Samet, Persian [2003] p.114,

of marriage, there is a relationship among parent with children and their properties. Relationship conducted among the subject of the law is in order to meet the needs of his or her life. The relationship between parent and children will arise if a child was born. Without the presence of a child in general there will be problems for the continuity of the household and become and become a concern for the married couple. The solution for the married couple that has no offspring is usually to adopt a child. The reason of a couple adopt a child is because they have no biological child, or have a biological child but only daughters or sons so they want more child with different gender.⁹

DEFINITION AND MEANING OF ADOPTION

The word "adoption" is the noun form of the verb "adopt". It may mean different things to different people depending largely on the context within which it is used. Whichever context the word is used, one thing is generic about it, and that is the fact that for there to be a valid adoption in whatever form, there must be a person who is the adoptee and another, the adopter. It has been described as a situation where a child has been legally taken care of as their own child.¹⁰ Therefore, it is a process of adopting another parent's child-taking into one's custody, typically in a formal, legal way in order to permanently act as the parent.

In the context of conventional law, it means the taking of a child or young person into the family of a spouse whereby there is transferred to the spouse all the rights duties, obligations and liabilities of the natural parents in relation to the child or young person, as a result of which transfer the spouse stands to the child or young person in the position of his lawful parents.¹¹ Child adoption inaugurates the

⁹ Yulies Tiena Masriani, 'Granting of Will for adopted child based on Islamic Law' [2017] International Journal of Business, Economics and Law. Vol.14.Issues 4.p.190.

¹⁰ Aniebue, P.N, Aniebue, U. U, 'Adoption practices in Enugu, Nigeria' [2008] Vol. 11, No. 1, Nigerian Journal of Clinical Practice, p 5.

¹¹ Laws of Edo State of Nigeria 2008, section 2, Cap4. See also, Laws of Kwara State of Nigeria, (2007) S. 274, Cap K6.,

relationship of parent and child between persons not related by nature. It is a universal concept that provides legal rights for adopter and adoptee to become a family.¹² It is a unique form of childcare because it does provide permanent care and parenting for the adopted child as compared to other childcare institutions that provide substitute family/home to a child.¹³ This is to say that, adoption could be said to mean a process by which persons who are not related by blood becomes a family. Of course, this is a paradigm shift from what family generally entails. However, the above definition has its shortcomings and one of such is the fact there are instances where a family member may adopt another family member. This will be explained in the later part of this work.

In Islam, what can be termed adoption is at best an alternative care arrangement for a child whose parents has died or is unable to provide the necessary physical care, love and protection. Such children are then cared for by a set of parents or guardians, who act as caregivers with the consent, whether written or verbal, from the natural parents or next of kin.¹⁴ Biological parents do not give up their parental rights. Instead, by mutual agreement, they make arrangements with each other for the upbringing of their child.¹⁵ The fiqh of adoption developed from the need to balance the strong emphasis the Qur'an and the Sunnah place on the wellbeing of orphans with Islamic restrictions on pre-Islamic Arabian adoption practices. Hence, according to Islamic law, adopting a child essentially entails treating him/her as one's own and offering them love, protection, food, clothing and education, but without changing the child's lineal identity and denying parenthood to the natural parents.¹⁶

¹² Leavy, M, Weinberg, R. 'Laws of Adoption' (Occana Publications, New York, 1979).

¹³ Aniebue, P.N, Aniebue, U. U, 'Adoption practices in Enugu, Nigeria' [2008] Vol. 11, No. 1, Nigerian Journal of Clinical Practice, p 5.

¹⁴ Surah al-Baqara v 177 and 215

¹⁵ Zafar Iqbal Kalanauri "Islamic Law And Adoption In Pakistan" Advocate Supreme Court of Pakistan p.1

¹⁶ Amira Al-Azhary Sonbol, 'Adoption in Islamic Society: A Historical Survey' in *Children in the Muslim Middle East* [1995] p.46

TANGLE OF LINEAGE AS LEGAL IMPLICATION OF ADOPTION UNDER NIGERIAN LAW

Adoption establishes legal relationship of parents and legitimate child between the adopter and the adopted juvenile. The adoptee becomes a full member of the adoptive family.¹⁷ All rights, duties, obligation and liabilities, including any arising under customary law of the parents of the juvenile or any other person in relation to the future custody, maintenance and education of the juvenile, as if the juvenile were a child born to the adopter in lawful marriage, are vested in and exercisable by and enforceable against the adopter.¹⁸ It also gives the adopted child all the rights of a biological child.¹⁹ There is a deemed relationship of consanguinity between the adopter and the adopted child. Such a relationship is equally created between an adoptee and a natural child of the adopter. Accordingly, marriage between the adopter or between his natural child and the adoptee is absolutely prohibited and rendered null and void.²⁰ If after an adoption order has been made and an adopter dies intestate, his estate shall devolve as if the adopted person were his lawful child.²¹ In any disposition of property made by instrument *inter vivos*²² or by will after the date of adoption order, any reference to the 'child', or children of the adopter, includes the adopted person. A person adopted jointly by two spouses will be regarded as a brother or sister to the natural or adopted children of the adopters for the purposes of administration of estates.²³ Moreover a person related to the adopted person in any degree shall unless a contrary intention appears, be regarded as if he

¹⁷ Child Rights Act 2003, s, 141(2).

¹⁸ Child Rights Act of Kwara State, 2007, S, 141(1) p.312.

¹⁹ Kendall, D. Sociology in our Times: 'The Essentials Belmont', [2002], p.2

²⁰ Child Rights Act, 2003. s, 147, See also Kwara State Child Right Act; 2007, S.148, Child Right Law Oyo state' 2006..

²¹ Child Rights Act, 2003 s, 141(3) . See also Kwara State Child Right Act 2007, S, 142(3).. See also. *Aduba v. Aduba* 2018 LPELR 4575 (CA)

²² The word *inter vivos* means while alive or between the living children.

²³ Child Rights' Act 2003, S, 141 (2)b, See also Section 141(2)b of Kwara State Child Right Act 2007, s, 141(2)b and Oyo State Child Right Law 2006; s., 142b'

would be related to him in that degree if he were of the adopter.²⁴ It is necessary to note that disposition by will or codicil takes effect from the date of the testator's death rather than on the day it was made.²⁵ Perhaps the most obvious legal effect of an adoption order is that it severs all parental rights and obligations between the juvenile and his biological parents. The adoption order transfers the legal responsibilities of parenthood from the natural parents to the adoptive parents.²⁶ An adopted person has no right to succeed to property of his natural parents die intestate since all legal connections with them have been severed by adoption order.

POSITION OF ISLAMIC LAW ON ADOPTION OF A CHILD

Shari'ah categorically rejects the notion that a mere declaration of adoption can, through a legal fiction, distort facts in such a way as to make a stranger a relative or an adopted individual a son. They demonstrate that a mere verbal expression or figure of speech cannot make the blood of a man run in the veins of his adopted son or daughter, produce feelings of fatherly affection in the man's heart or filial emotions in the heart of the adopted child, or transfer either the genetic characteristics or physical, mental, or psychological traits of the adopting parents to the child. Allah says:

'Their mothers are only those who have given birth to them,'²⁷

²⁴ Child Rights' Act 2003. s 141 (4)b , Kwara State Child Right Act 2007, section 141(4)b and Oyo State Child Right Law 2006, s.142 (b).

²⁵ Ibid.

²⁶ Cole, E Adoption: History, Policy and Program cited in Laird and Hartman (Eds) A Handbook of child Welfare, (Free Press, New York, 1985) cited in 'the challenges of child adoption and the emergence of baby Factory in southeastern, Nigeria by Omeire, Charles obioma. International Journal of Education and Research Vol. 3 No. 8 August 2015, p. 64

²⁷ Surah Mujadila v 2 states: "If any men among you divorce their wives by Zihar (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is one that blots out (sins), and forgives (again and again)."

'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 dependents.'²⁸

Allah specifically reminds adoptive parents that they are not the child's biological parents, and He prohibits an adopted child from taking the name of his or her adopting father. Also, the Holy Prophet's adopted son, who was previously known as Zaid ibn Muhammad, reverts to his original name of Zaid ibn Harithah. This means that child's pedigree must be traced back to the biological father.²⁹ However where their father is unknown, Allah says they are (still) your brother in religion and those entrusted to you.³⁰ In such situation, it is legally permissible to give 'only' the family name of his adopted family to the adopted child which must have no connotation of inheritance, lineage, rules of modesty etc.³¹ or in alternative, a name, other than the name of the adopted father can be formed as surname for them, such as; Abdullah, Abdurrahman, Abdur-Raheem etc.

Adoption does not change the relationship of a person: adoption does not end the blood relationship between the child and his real parents and siblings, nor does it create a real relationship between him and his

Though as we discuss later, a maternal bond can be established through breastfeeding

²⁸ Surah Ahzab 4-5. Abdullah Yusuf Ali a translator and commentator on the Qur'an, notes with respect to this verse: "Adoption in the technical sense is not allowed in Muslim Law." Abdullah Yusuf Ali (trans.), *The Holy Qur'an (USA: Muslim Students' Association of the United States and Canada, 1975)*, p. 1103, note 3671.

²⁹ Surah Ahzab v 4-5

³⁰ Surah Ahzab v 5

³¹ Dar Al-ifta Al-Missriyyah "can my daughter takes the name of my current husband who is not her father" available on www.dar-alifta.org/foreign/viewfatwa.aspx?id=6021 last accessed on 21st of January, 3:33pm

adoptive parents and their children.³² The rules that apply between non-related persons are still valid. For example, adoption would not create the *mahramiyyat* between the child and the new family. An adopted girl will have to observe hijab in presence of her adoptive father and brothers. Similarly, the mother and sisters will have to observe hijab in presence of the adopted son. The adopted child can even marry the child of the adoptive parents, as they are not *mahram* for the adoptive family. It is also permissible for adopter to marry the divorced wife of an adopted son or the divorced husband of the adopted daughter as the case may be.³³ The proclamation in *Surah Nisaa v 23* which only prohibited a person from marrying "the wives of your sons proceeding from your loins..." made it very clear that the Holy Prophet could even marry Zainab, the divorced wife of his adopted son Zaid. Naturally, the Prophet came under heavy attack from those who thought this was against prevalent custom and those who thought this violated the *Qur'anic* prohibition on marrying a son's divorcee. Both classical/pre-modern and contemporary jurists are in agreement that *Surah Al-Ahzab* v 4-5 and v 37-40 were revealed to defend the Prophet and to clarify the Islamic position vis-a-vis marriage to an adopted son's divorced wife. Allah says:

'...Then when Zaid had dissolved (his marriage) with her, with the necessary (formality), we joined her in marriage to thee: in order that (in future) there may be no difficulty to the Believers in (the matter of) marriage with the wives of their adopted sons, when the latter have dissolved with the necessary (formality) (their marriage) with them. And Allah's command must be fulfilled.'³⁴

One of the most fundamental rules contained in the Holy Qur'an is that adoption does not sever the ties the adopted child had with its natural or biological parents and other relations, and that the child's biological family should never be hidden or shrouded in secrecy. The practical implications of this view is that all the rules which apply between

³² Surah Ahzab v. 40 'Muhammad is not the father of any of your men...'

³³ Surah Ahzab v 37-40

³⁴ Surah Al Ahzab v 37.

blood relatives are still valid: for example, the child will still be *mahram*; that is, an adopted child cannot marry his real siblings; he or she is also eligible for inheritance from the real parents; and there is no need for *hijab* between the child and his or her real family.

Under the *Shari'ah*, the right of inheritance is based on blood and marriage relationship³⁵ or master-servant relationship. A master who freed a slave can inherit the slave if the slave has no heir.³⁶ The adopted child cannot partake in inheritance of the adoptee parents, just as the adoptee parents cannot inherit the property of the adopted. However, the adoptive parents can always use their discretion to write up to one-third of their estate for their adopted child, as it is permissible to bequeath up to one-third of property to any stranger.³⁷

'Mus'ab b. Sa'd reported on the authority of his father. I was ailing. I sent message to Allah's Apostle (may peace be upon him) saying: permit me to give away my property as I like. He refused. I (again) said: (permit me) to give away half. He (again refused). I (again said); then one-third. He (the prophet) observed silence after (I had asked permission to give away) one-third. He (the narrator) said; it was then that endowment of one-third became permissible³⁸

They can also, during their lifetime, gift all his property to their adopted child *inter vivos*. This is because gift is also a contract under Islamic law;

'Jabir b. 'Abdullah al-Ansari (Allah be pleased with him) said; Allah's messenger (May peace be upon him) said; whenever a person confer life grant upon a person and he says; I confer upon you this and upon your descendants

³⁵ Surah Nisa v 11-12

³⁶ See Mas'ud Adebayo Oniye, 'The Distribution of estate in Islam', [2015], p16

³⁷ Surah Maidah verse 106

³⁸ Muslim Ibn al-Hajjaj, 'Sahih Muslim' book 13 '*Kitab al-Wasiyya*' (the book of bequest)" number 3994.

and anyone who survives you, and that become his possession and that of his posterity. It would become (a permanent possession) of those who were conferred upon the gift, and it will not return to the owner (donor), for he gave that as a gift in which accrued the right of inheritance'.³⁹

He or she can inherit property from their natural parents and their rights will subsist even after adoption by the other family. Allah says;

'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 dependents'.⁴⁰

CONCLUSION

From the general study of this research work, it is quite evident that the paramount purpose of both Nigeria law on adoption and the Islamic provisions on adoption is the welfare of the child in need by putting in place, institute, practices and mechanisms for the care and custody of such children by those deemed fit to do so. However, the social and legal regime on adoption in Nigeria has far-reaching consequences that negatively affect child welfare and may in fact be encouraging or facilitating the predicament many orphan and abandoned children find themselves in. An adopted child does not ceased to be a human and by effect has the fundamental right of private and family life which include right to know his biological

³⁹ Muslim Ibn al-Hajjaj, 'Sahih Muslim' book 12 '*Kitab al-Hibat*' (the book of gifts)" number 397.

⁴⁰ Surah Ahzab 4-5. Abdullah Yusuf Ali a translator and commentator on the Qur'an, notes with respect to this verse: "Adoption in the technical sense is not allowed in Muslim Law." Abdullah Yusuf Ali (trans.), The Holy Qur'an (USA: Muslim Students' Association of the United States and Canada, 1975), p. 1103, note 3671.

parent,⁴¹ He should not lose his right of identification and lineage; a child should be identified by the name of his biological father or where the name of the his biological father is unknown, another name that will recognize his right to know his biological lineage. How more can infringement of fundamental human right be when an adopted child is cut off all ties with his biological parents and replacing same with a fictional parentage by the adoptive parent? Consequently, he will be deprived of inheriting the property of his natural parents that die intestate. As if that was not enough, marriage between the adopter and the adopted child or between adopter's natural child and the adoptee is prohibited but there is probability of the adopted child to marry his biological sisters or his mother or anyone from his biological family because their prior legal relationship has been severed. It is quite sardonic that adoption under Nigerian Law is taken to be a commitment for life that most often cannot be revoked or terminated by either of the parties. This, most time, leave the adopted child in a continuous maltreatment with little or no remedy and it may happen vice versa. The traps set in laws governing adoption in Nigeria has been exposed by principle governing adoption in Islam. Putting the welfare of a child as priority, these loopholes of Nigeria laws on adoption must be remedied by considering and drawing lessons from Islamic law principle of adoption.

RECOMMENDATIONS

From the array of issues that has been crisscrossed in this long essay in an attempt to examine Nigeria laws and practice of adoption and drawing lessons from the Islamic rules on adoption, recommendations have been generated;

1. A revisit to some laws governing the rules of adoption in Nigeria by redrafting the applicable laws on adoption and reevaluating them in light of the fundamental right of an orphan guaranteed by the constitution.

⁴¹ Section 37 of the Constitution of the Federal Republic of Nigeria 1999 as amended

2. Government and NGOs should work with community leaders in the area of public enlightenment campaigns, through cultural sensitive community awareness and social media, as a vital weapon for full acceptability of child adoption in Nigeria and to minimize the socio-cultural implications associated with child adoption such as stigmatization and poor family and community support.
3. Establish a commission to oversee the adoption system in Nigeria for the purpose of ensuring that the adopted child's rights are not infringed upon.
4. Establish an orphanage reporting scheme applicable in all Nigeria orphanage house to enable the orphans and the adopted child air their grievances and recommend appropriate steps to be taken for redress.
5. In order to protect the sanctity of the adopted child's connection to their biological family and the natural rights that follow, the research work condemn hiding the adopted child's family background. Withholding this information from the child could lead to identity crisis and confusion. The adoptive parents 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.
6. Keeping up-to-date wills of not more than one-third of the adoptive family in order to ensure that their property is distributed according to their wishes and to make provisions for all adopted child.
7. Parents should provide accommodative, democratic, intellectually stimulating and creative home environments that would help to bring out the best potentials in children, particularly the adopted ones.