

AURAH AND CUSTODIANSHIP OF ADOPTED CHILD: GUIDED DECISIONS ACCORDING TO SHARIAH

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ABSTRACT

Adoption of children happens because of a marriage from spouses that are not blessed by any offspring even they have gone through series of treatment and numbers of procedures to get child, or it also happens due to the soul that love children so much, as well as to help the orphans or neglected children. This article mainly to give exposure and solution regarding to the aurah and guardianship of the child and his or her adopted family, which is known by public, they do not have any blood relation between one another. This study conducted based on the analysis of the library books, legal references and other sources from the internet and also the Malaysian Children adoption act. The result from this study shows that the Malaysian aurah and custodianship is an issue regarding the general laws that could change according to certain cases and situation that are faced by the involved parties. The actions taken needed to be considered upon the general implication that are about to be issued later.

Keywords: aurah, custodian, adopted children, siasah syariyyah

INTRODUCTION

Children are the gems of the eyes of every husband and wife; however, not all married spouses are able to have their own offsprings like every one of them dreamed off although they have been through many modern treatment processes. Other than not being blessed by the young, child adoption also can be caused by the urge and feeling to adore children dearly eventhough they have already have their biological children, or perhaps it is caused by the responsibility of a Muslim to take care, cure and give new hope of life to the poor children that they found or the neglected ones.

Regarding this subject, children adoption phenomena arose from within the Community Welfare Foundation or private party or even the neglected babies that are found out of the baby dumping cases that are increasingly occurring due to decreasing moral exemplary of nowadays youth. Therefore, to adopt, according to Islam is encouraged however an adopted child will remain as an adopted child and can never be their own child thence, "the outsider" rule still applies regarding aurah and custodianship.

Adopted children are considered as an outsider and they are not a 'mahram' to. In certain situation, adopting children can be compulsory when they afraid that if they do not take action the children will be given to a Non-Muslim family. While in the property and possession distributions, Islam has lined that the adopted children can never share any portions of their custodian's property and possessions. However, they are allowed to received possessions and property from their custodians while the custodians are still alive. The issues on the needs or encouragement to adopt actually reflected on the spouses or person to decide regarding their conditions such as loneliness and etc.

There are several reasons and excuses that can be appealed in order to adopt children. Adoption happens because of the three main reasons which include the physical factor, health and also the social environment. The combination of these three factors usually influenced every couple in making decision to take children to be adopted. However, the questions regarding the relationship of adopted children with the parents arose; it is clearly known about the boundaries among them in various aspects such as the aurah, father or family names, property and possessions distributions and custodianship decision in their marriage later on.

The issue to be discussed regarding the subject is that, does the granted boundaries for the adopted child provides them with comfort or less burdening life later? To be within the other family members since child and to grow up whilst burdened with the thoughts of worrisome towards aurah and more could cause an uncertainty, and could it not be less burdening in Islam regarding this issue? Thence, the author would like to clear the smoke and find the key to answer such issues to lessen the burden of the adopted child for the good of Islam understandings and the believers.

DEFINITION OF ADOPTED CHILD

According to the fourth Kamus Dewan definition, adopted child is other people's children that are taken in by another parents or person, or child that is being cared and be treated like their own.

"Anak angkat juga boleh dikenali dengan nama anak pungut, anak piara, dan adopsi (Dewan Bahasa dan Pustaka. 2007). Sahal Mahfudh mendefinisikan anak angkat ialah mengangkat anak orang lain untuk diakui, dijadikan dan diperakui sebagai anak sendiri (Sahal Mahfurd. 2005), manakala menurut H.K Bevan bahawa anak angkat ialah satu cara yang dibuat oleh undang-undang untuk mengaitkan pertalian kekeluargaan di antara seorang anak dengan orang yang bukan dari keluarganya yang sebenar (H.K Bevan.1973)"

Translation:

"Adopted child is also known as "anak pungut", "anak piara" and "adopsi" (Dewan Bahasa dan Pustaka. 20017). Sahal Mahfudh defined adopted child as to take in another spouse's child into their care to be affirmed, became and confirmed as child of their own (Sahal Mahfurd. 2005), while according to H.K Bevan adopted child is a way produced by the law to relate a kinship in between a child with a person whom is not a blood related family (H.K Bevan. 1973)

According to Mahmud Syaltut whom suggested two situations of child adoption that correspond to the Islamic Shariah, that is firstly, one whom adopted a child to nurture them with love, education, life supports and everything that encourages the child's growth is allowed by the syara'. Also, another situation is one whom taken in a child to be adopted and give them the family name and make them their own, is said as Haram by Allah SWT and some ulama' corresponded to the sayings and figured it is a huge sin to do as such (Mahmud Syaltut. 1967). Therefore, in Islam, to adopt children is encourage however in a decision to give the child name of the male custodian is Haram. (Harun Din et al, 2007)

There's a clear difference between the Civil Laws and Shariah Laws. This is because in the Shariah Laws the adopted child roots are clear and known, in contradiction; in Civil Laws the child roots are not considered.

HISTORY OF CHILD ADOPTION DURING THE DARK AGES

The history marked the Prophet Muhammad PBUH before prophecies; he had adopted Zaid ibn Harithah whom was one of his slaves and given him his family name to Zaid ibn Muhammad. Other than him, Salim ibn 'Atabah also raised as a child of his own by one of the prophet's companions; Abu Huzaifah and the child is also called as Salim ibn Huzaifah. Thence, the tradition of adoption in that era was so common and the adopted child is considered as their own biological child in status, boundaries and responsibilities.

Then, Islam descends and banish al – Tabanni and Allah says,

Meaning: *“Allah does not create the children in adoption as the children of your own, and the later, the sayings from your own mouths, whilst Allah is saying only the truth and He is the one whom will lead you to the straight path. Call them (the children) by their own father's name, because it's on the right path to Allah. If you know not of their fathers, therefore they are your kins of the same religion and friends.”* (Al-Ahzab: 4-5).

MALAYSIAN CHILD ADOPTION ACTS 1952 (ACT 257)

The written law that is corresponding to adoption in Malaysia has not yet been fully standardized until now. The Adoption Acts 1952 (Act 257) is firstly known as F.M. Ordinance No.41 of 1952 that was later revised at 13th October 1981 and is named as Adoption Acts 1952 (257). This act outlined subjects regarding the adoptions in the west Malaysia such as authority and the authority's court ruling area to enforce adoption commands, terms, agreements, procedures, registration consequences and adoption commands consequences under this Act.

This Act has been amended for the first time through Act 11098 (Adoption Act (amendment) 2001 (A 1098)) and has been executed on 2nd May 2001. The amendment has included section 25A that stands on the motion to have the original copy of the birth and death certificate according to this Act. The amendment as if it is meant to equalize the status of the adopted child with the child of their own. It does not differentiate the children statuses and cannot adoption entitlement that could differentiate the both (Shamsuddin Suhor. 1961).

THE CASES OF CHILD ADOPTION IN MALAYSIA

Usually, adoption leads to cutting the cord completely with their biological parents after taken in to care by the adopting parents, the custodian rights upon the child are solely on their no other but alive adopting parents. As for an example, the case of Jainah bt Seman against Mansur bin Iman Mat and another related cases regarding the custom and common practice of the Malays of Pahangites to adopt a newborn baby girl. The head of the village stated that it's a custom and it's a tradition to the Pahangites Malay.

Child adoption can happen within the relatives or from anyone even without biological relations. This case does not represent any detailed adoption process regarding adopting executions. The only thing that are clearly stated includes, children assignment, change hands upon children, custody, caretaking and responsibility assignment with the underlying consequences that are needed to be fully understood.

Nor Aziah Mohd Awal, 1995, said that child adoption 1952 and the registration of the adoption 1952 also needed to be revised. The adopted children of Malaysia are facing troubles regarding identities because their rights to trace their roots are completely denied. Many issues arose from the adoption cases and needed to be revised in scrutiny in the light of justice and the future of the children and later the development of the nation. There are increasing cases of baby dumping caused by the children whom are born as children out of wedlock. This issue needs to be taken seriously because the children; they are innocent, however victimized by the adults. A unwedded single mother rights are denied especially to have custody on the out of wedlock children. The out of wedlock children rights is also denied when they are adults and when it comes to tracing back their biological parents. These subjects needed to be discussed and decided.

THE PATERNAL CUSTODY (PERWALIAN) OF AN ADOPTED CHILD ACCORDING TO SHARIAH.

The paternal custody (wali) is the person whom are given the power to decide or act in representative or to represent the one under his custody. However, the paternal custody (wali) in marriage is the person whom has the right to decide a female under his custody to wed. According to Syafi'iyah, Malikiyyah and Hanabillah agrees wali only for underage children, metally challenged adults, however, adult and sane whom are still unmarried or a divorcee have the rights to permit themselves to wed as long as they are equal in status, and if they are inequally matched, thence the wali can break off the marriage (al Jaziri. 1928).

Among the terms of being the paternal custodian (wali) in Islam are; just, baligh, wise, mentally sane, is not economically stuck out of overspending and not in Ihram. Wali is divided into two categories; wali ijbar in which only consists of the

grandfather and the father only. Wali ikhtiyar includes the father, grandfather, the sons of the male relatives of the same parents, son of the same father, the uncles from the maternal side, uncles from the paternal sides, sons of the uncles of the paternal and maternal sides, all male that held the rights to possess the Asbah property and possessions, and qady in sequence (Zulkifli. 2010).

Looking from the marriage aspect the adopting parents can not be the adopted child's wali, in turn, the wali of the adopted child responsibility falls on the biological paternal parent and those who are stated and must abide by the laws of Islam, (Wan Asma'. 2010)

For the adopted child's wali is nowhere to be found, thence the adopted child can ask for wali hakim as for they are assigned to enforce Islamic laws for the Muslims advantages. To custody a Muslim women's marriage while they could not find their wali is an issue that needs attention and is a must to represent and settle the issue. As cited by Saidina Aisyah RA in which it means; "The Sultans can be the wali for those who doesn't have one". (Riwayat Abu Daud dan al-Tarmizi)

Regarding marriage, the adopted child can actually marry the adopting parents, siblings and also the adopting relatives, even so their interactions and behavior boundaries are as ajnabi (outsiders) because they are not biologically related to one another.

In this problem, we could see that Umar Al-Khattab also decided not to turn away from Al-Quran or As-Sunnah, however to drop the trivial subject for a moment just because he feels it is not relevant at that particular period of time. Umar Al-Khattab knows that for every hukum (rules) there must be a valid reason for it. The Ulama' after him decided that it is a method in which a hukum happens because of a founded justification, and if there are justifications, thence the hukum is acceptable (Muhammad Baltaji. 2003).

In one example, a three divorce (Talaq) in one pronouncement during the time of Rasulullah, Abu Bakar and two years under the Umar Al Khattab's rule considered as one Talaq. But after the time, Umar has made his own ruling that a three divorce in one pronouncement is considered as three divorce (Talaq), it is because there are lot of people have gathered in one pronouncement of divorce, according to Umar, this is due to they take the pronouncement of divorce lightly. According to Umar, it is due to protect their own benefits. The Islamic scholars also had agreed with the view of Umar, as stated by Ibnu Qayyim, "This fatwa changed as the situation or circumstances change, the companions also understand the accurate method that Umar took in order to educate his people, thus they agreed with the view and expressed it to the public" (Muhammad Baltaji.2003)

Therefore, Umar's ruling in deciding three Talaq in one pronouncement as a matter of Ta'zir and as a punishment for those who disobey Allah SWT and his Rule regarding the problem of Talaq. This is because the Qur'an has prescribed divorce by fragmentary, that this law holds onto by some scholars. Thence, we can evaluate where Umar had done one ruling (Ijtihad) with the view regarding the situation and condition of the current period. For the reason, the ruling (Ijtihad) to make the adopted child as level as their own child is regard to the specific benefit and illah (cause) that included in this matter.

Regarding this matter, it is clear for us when it comes to any problem in correspondence with Illah (cause) and take consideration to the benefit (Maslahah), thus it is an obligation for us to make Ijtihad in order to protect the benefit (Maslahah) together. Nowadays, in the world without boundaries has misplaced the world in chaos. The social problem among the teenagers is critical, newly built marriage was destroyed, defamatory and slander spreading drastically, and baby dumping occurred. The children were innocent abandoned, discarded, abused, and discriminated against, and so on. Since then, it is highly desirable to maintain the security and prosperity by providing privileges of the adopted child the same as the biological children.

In some cases, Islam simplify to give status to the offspring of a person, such as in the case of foster child (laqit) of unknown descent his (her parents). If someone has claimed that the foster child (laqit) was his, thus his allegations were accepted based on the concept of istihsan, where to give the descent was better than leaving it without, as giving the descent will make him to be noble and reprehensible than if he did not have his own descent. Thus, the ruling which is based on the Istihsan prioritized from the Qiyas which requiring the proof of descent indictment (Al-Zuhaily,1997).

Based on the issue of the custody of the adopted child, according to the Siyasaht Syariyyah, it is based on the level of Hajiyyat in terms of to protect the dignity of the adopted child herself, from any shameful because of the fact that she does not have her own father to become the custodian (Wali) for her marriage soon. But, this is not a light matter regarding the giving of a custodian (Wali) to the adoptive father but must be considered and filtered first with a view to certain cases to cases.

AURAT OF ADOPTED CHILD ACCORDING TO SIYASAH SYARIYYAH

Aurah is a self-dignity for a person to protect and preserve at all the time, regardless the situation it is an obligation for the Muslims to cover their Aurah. To cover the Aurah according to Kamus Dewan is a part of the body that cannot be seen or obligatory to cover it, nevertheless, it is also can be defined as "kemaluan atau telanjang secara umum" – "naked publicly" (Dewan Bahasa dan Pustaka.2007). In related definition, Aurah literally defined as deficiency, meanwhile in terms it is a matter that obligatory to cover from what is haram to see. In the first definition according to Syara' is related with the Prayer (Solah). According to majority of Islamic scholars it is required to cover it approximately even though in the dark and alone. But according to Hanafi School, it is an obligation to cover the Aurah when being in the public. (al-Zulaily,1989).

Allah SWT said in surah al-A'raaf 7:31:

(يَا بَنِي آدَمَ خُذُوا زِينَتَكُمْ عِنْدَ كُلِّ مَسْجِدٍ وَكُلُوا وَاشْرَبُوا وَلَا تُسْرِفُوا إِنَّهُ لَا يُحِبُّ الْمُسْرِفِينَ)

"O children of Adam, take your adornment at every masjid, and eat and drink, but be not excessive. Indeed, He likes not those who commit excess."

Aurah is an important matter that need to be protect by every individual Muslim his or her in front of their Muhrim. Hence, it will become a major problem if the adopted child reached his or her puberty and it is a must to keep the boundaries between the adopted family. Therefore, if the speciality of the adopted child is the same level as the biological child, so the benefit of the adoptive parents will be more secured from the matter of the issue of Aurah, descents, properties and also the adopted child custodian (Wali).

However, from the aspect of *Siyasah Syariyyah* sees the issue of the child adoption from different perspectives. If the adopted child considered as different and restricted from any behaviour, unconsciously will lead to uncomfortable feeling where we understand that a child of a family is special and there is no restriction in communicate and touch among them where it would create discomfort, lower their self-esteem and to be treat as stranger among his other siblings.

If there is an adopted child living with his adopted family where they did not have other descent and face health issues of the family or any other matters which the adopted child cannot be irresponsible as a child even though he is not the biological child. Therefore, there will be in contact with each other because there is major necessity to do so for the health of the adopted parents.

There are two *Hukum* when it comes to in contact (shake hands) between the *Muhrim*, the first one: shaking hands with Women can be *Haram* if it is concern will lead to lust or create suspicion among them or fear it will cause lust temptation. This view is based on the General Fatwa (*Maqasid Shariah*) that it is an obligation to restrain the ways that may lead to evil deeds, especially where there are clear signs. This Fatwa has been approved by the *Feqah Scholars* where a man who touch his *Muhrim* or being alone with each other is leading to *Haram* matters if there is a lust temptation even though at first generally it is not *Haram* to make contact between *Muhrim*.

Secondly: it is not *Haram* for a man to shake hand with old woman because there is no apprehension of lust temptation among them (*al-Zuhaily*.1997). This Fatwa is based on the narrated story where *Abu Bakar Al-Siddiq r.a* always shaking his hand with old woman. There is also a narrated story where *Abdullah ibn Zubair* once hired an old woman to take care of him when he is sick including grooming his hair (*Daud Baharom*. 2006). The author *Daud Baharom*.2006 concluded based on the view from *Al-Qaradhawi*.

Therefore, there should no issue of evil deeds such as incest and rape because naturally a child and parents does not have any lust temptation among each other even though he or she is not their biological child but they are together since his or her childhood instead the main purpose of child adoption is because the parents cannot have their own biological child from their marriage, therefore any need and temptation against their adopted child should not exist.

Thus, in the issue of the *Aurah* of adopted child, according to *Siyasah Syariyyah* it can be considered as a matter of *Hajiyyat* (necessity) in terms of to protect the dignity and mind of the adopted child own self, from feeling isolated and restricted in making touch, affection between the siblings and other related matters. But, this is not a light matter regarding the giving of a custodian (*Wali*) to the adoptive father but must be considered and filtered first with a view to certain cases to cases.

FATWA OF ADOPTED CHILD

Fatwa on child adoptions has been submitted by the High Court of Bahrain mentioned that "adopted child" by asserting that "ones should call them adopt as their own children with their obligations, whether in relation to the rights or duties of the child ". Here it can be mentioned that the fatwa published by the daily "*Akhbar Al-Khalij*" as in response to Bahrain's Ministry of Justice with regards to the petition filed by one of the newspapers about the validation process of birth of the adopted child. In addition, there are several numbers of agencies states that the adoption was approved as 'its own', even without inheritance rights.

The court has provided the answer reads as follows: "In answer to your letter numbered: 10/169/83. Dated: 23 Ramadhan 1403 H equivalent of 3 July 1983. In respect of the application of the babies have been found and we propose the following:

With all due respect and gratitude for his proposal to keep the honor of adopted children, that Islam is peaceful gave laws fairly, including the issue of foster children, children of fornication, and children of unknown descent. Islam is very concerned about these children and treated them fairly among the Muslim community. In this issue the court has given its decision, namely that the adopted child, foster child, child of fornication, and children who do not know who the parents, not only can be confirmed as a legitimate child but can also acquire consanguinity complete with the name and call even will get the right of inheritance ". In fact, Bahrain Islamic high court's decision was not only just sent a letter but also attached together a number of recommendations that the court had previously received the same application and to determine the decision that had to call them to lift, and given privileges such as biological children. Decisions and rulings submitted to relieve the crisis and provide a great benefit to the Muslim community. This is one of the reasons that required by the *Shariah*.

But there is also a ruling which are contrary issued by *al-Qaradawi* numbered 108 050, which states that "the adopted child who descended with the adoptive father, dividing the estate, mixed with children of another is illegal because it can invite and lead to damage and inviting danger "(www.islamnet.com)

In this matter, some scholars have also noted that the adoption and provide shelter which mingled with his family will cause problems such as rape, incest and incest and other immoral acts may occur unnoticed. If this thing is happening, what about the answer to the problems that arise among the biological child that we know the inner relationship inherent in their body since birth. Child adoption is something that cannot be used as a basis to put a sentence on account of that which is rooted to the desires which anyone named man can get stuck into it stemming from their social life varied manner. This is evident when a study was conducted with the following statement:

"In recent years frequent cases of rape were reported in the country. Statistics released by the police show that it is not only rape is increased even incest cases also increased. The study found that the number of incest is almost 20% of rape cases in peninsular Malaysia. It also noted that the main perpetrators of this crime is the biological father (48.8%) and followed by a stepfather (24.4%), and otherwise consists of an uncle, the brother-in-law and grandfather (Abdul Hadi. 1996).

Here, there is no such immoral activities appeared such as incest and rape because naturally a child or parent does not have the desire to their own 'flesh' although they are not the biological child but their shared since the childhood even the main purpose of the enactment of adoptions is because they are unable to obtain offspring of their own relationship, Thus, the nature of desire or temptation to the 'child' are not supposed to exist.

WILL OF ADOPTED CHILD

Will is a gift after the death and it can be executed after the death of the testator (Al zuhaily, 1997). The will also resemble as the connector of his good deeds from his worldly affairs to the hereafter. On the other hand, a bequest of the property can be defined as the disposition of property after the death (Mohd Zamro et al 2008).

There are few quranic verses and hadith which supports the importance of making a will ie. al baqarah verse 180 :

“ Prescribed for you when death approaches (any) one of you if he leaves wealth (is that he should make) a bequest for the parents and near relatives according to what is acceptable-a duty upon he righteous”

According to the Companion and Imam Shafie, the custom of making a will or a bequest should be abolished based on al Mawarith's verses. Nonetheless, the custom was encouraged to make a bequest upon the poor, an orphan or any close family members who is not entitled to inherit from him. Among the condition of a bequest is the testator can bequest only 1/3 of the testator's property.

In Islam, an adopted child is not entitled to inherit. However, they still can be benefitted by way of will in order to sustain their life if they solely depending on the adoptive parents without any biological heirs. The will also will help the adopted child to avoid the feeling of isolated and the feeling of loss due to the death of the adoptive parents.

A will to an adopted child is not a must. However, due to some circumstances and looking into the importance of a will, it will help to maintain the relationship between the adopted parents and the adopted child even though the adoptive parents were no longer alive.

CONCLUSION

Islam is a religion of ease and does not burden its followers based on the said of Allah SWT in surah al-Baqarah verse 185 "Allah intends for you ease and does not want to make things difficult." It aims to provide ease and convenience to people. These include the matter of child adoption of Aurah and custodianship. This is because Islam regards to a specific benefit, same goes for the desire and lust temptation that should not be something that needs to be debated because the relationship between the child and the parents do not allow excessive boundary to exist.

It is also essential to detailed further in the issue of Aurah and the custodianship where it will affect their daily social values. In Siyasaah Syariyyah with regards to the Aurah and custodianship of adopted child also emphasizes on La Ifrad (not excessive) and La Tafriid (not careless). The flexibilities provided does not mean that then religion did not take the matter of Aurah and custodianship seriously in the life of Muslim community in particular, but by allowing the disclosure of Aurah and the flexibility of guardian custodianship and this is what is meant by La Ifrad.

In addition, the approach of Siyasaah Syariyyah of La Tafriid (not careless) where the issue of Aurah and custodianship taken lightly without any supervise and proper attention. In this case, the responsible party must be concerned regarding the problems that arise from the aforesaid case.

The issue of will to the adopted child is not a foreign thing because will is a Muthlak where it depends on the testator itself against anyone who would like handed contributions. Will to the adopted child will create a sense of appreciation to his presence throughout his time with the adopted family.

This Hukum is based on *Tahqiq Manhaj Al-Khas* (Specific Necessity) and not *Tahqiq Manhaj Al-Am* (General Necessity), thus this can be seen through individual context where the matter that encountered by the Fatwa requester (al-Muftafti).

But, this approach is not something that can be taken lightly, as it is considered as Hajjiyyat which mean the people need to avoid hardship and difficulty, hence it needs to be examined and refine with the rules and regulations set by the authority. Each flexibility contained in the real teachings of Islam does not deviate from the nature of the creation which require the specific benefit (Maslahah) that cannot be strayed from the teaching of Islam since the days of the Anbiya'. However, this does not mean every Maslahah that arise disparaging the existing Islamic Shari'ah.

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