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Protection Of Children Through Foster Care Under Islamic Law: Sustaining Foster Children Protection Through Breastfeeding

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ABSTRACT

Islamic law has one of its objectives, the protection of people in general and children in particular. Foster care is one of the ways in which this objective is realized. The paper argues that Islamic law recognizes foster care as one of the means of protection to children who are in need of care and protection. The paper therefore distinguishes between foster care in Islamic law and adoption and the position of Islam on the two seeming but contradictory concepts. It also discusses the relationship between foster care and suckling of a child not biologically related and submits that foster care in relation with breastfeeding of the foster children would promote and offer an adequate protection to the children who are in need of it.

Key words: Tabanni, Foster Care, rada’a, Quran, Hadith

Introduction

Foster Care in general refers to taking a child of another into somebody’s care temporarily or permanently. It is a kind of protection particularly to the children who have no family or have problems in their family life. Based on the discussion by some Muslim scholars like Atiyyah Saqar and Mahmud Shaltut, it is comparable to adoption (tabanni), but, in this kind of adoption, the status of the adopted child is not affected. It therefore, differs with a real adoption(tabanni), as in tabanni, the adopted child is ascribed to the adoptive father and he will stand in the same footing with other children of the adoptive parents, once adoption has taken place. Protection of children in foster relationship can be achieved through placing the child without family into a family environment or by providing a safe family life to a child who has problems in family life. Under Islamic law, foster care is recognized as to provide a helping hand and assistance to the children in need of protection and family, without affecting the biological status of a child. In addition, Islamic law also recognizes breastfeeding of a child who is non-biologically related to the suckling mother. For this purpose, foster mother will breastfeed her foster baby for certain period of time. Such breastfeeding will not only assist the baby to grow healthily but will also give rise to blood relationship between suckling mother and her family, with the suckled child. This paper seeks to examine the extent to which breastfeeding sustains protection of the foster children and the extent to which it preserves the social relationship between the foster family and the foster child. Examination will extend to the significant effect of breastfeeding in a foster relationship, so as to further guarantee protection over foster children’s rights in total.

Definition of Foster Care:

According to Gale Encyclopedia, foster care refers to full-time substitute care of children outside their own home by people other than their biological or adoptive parents or legal guardians. Children, who are removed from their biological or adoptive parents, or other legal guardians, are placed in foster care in a variety of settings. They may be placed in the care of relatives other than the family members involved in the neglect or abuse (kin placement), non-relatives, therapeutic or treatment foster care, or in an institution or group home (Franz and Woodward, 2006).

Meanwhile, Columbia Encyclopedia has generally defined foster care as care of children on a full-time or temporary basis by persons other than their own parents. It is also known as boarding-home care. Foster care is intended to offer a supportive family environment to children whose natural parents cannot raise them because of the parents' physical or mental illness, the child's behavioural difficulties, or problems within the family environment, e.g., child abuse, alcoholism, extreme poverty, or crime. Such children are usually wards of the state (Columbia Encyclopedia, 2004).

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Concept of Foster Care in Islamic law as Alternative to Adoption:

Basically, there is no specific discussion by the classical Muslim jurists on the concept of foster care as defined above. Nevertheless, Muslim contemporary scholars have identified such a concept in the nature of adoption but different and an alternative to it. Adoption (tabanni) in its real sense refers to making the child of another as his own child, and the child will stand in the same footing with other children of the adoptive parents in terms of family relationship, rights to custody, guardianship, maintenance, inheritance, lineage etc (Mahmud, 2001). This practice is illegal and strongly prohibited in Islam (Atiyyah 2002).

This is based on the Quranic ruling which states to the effect:

Allah has not made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the (right) way. Call them (adopted sons) by (the names of) their fathers; that is more just with Allah. But if you know not their father’s (names, call them) you brothers in faith and Mawalikum (your freed slaves)

And also from the Prophet (s.a.w) was reported as saying to the effect (Sahih Bukhari):

Whoever claims to be the son of a person other than his father, and he knows that person is not his father, then paradise will be forbidden for him

Adoption is prohibited since it destroys the Islamic family system which has been laid down to us by the Almighty Allah. For example, Islamic law of inheritance which provides for explicit specified portion in the Quran (An-Nisa: 11, 12 and 176), and prohibited degree of marriage as clearly list down the woman of whom is prohibited to marry (An-Nisa: 23 and Al-Maidah: 87). It also contradicts with the truth (Al-Zuhayli, 1998) since adoption changes the natural status of an adopted child from being the child to his or her natural parent to the child of the adoptive parent. Accordingly, adoption serves the relationship between the adopted child and his or her natural parents. This clearly contradicts the teaching of Islam, which forbids the Muslim from severing relationship among them. (Muhammad: 22)

Islam advises its followers to help each other in doing righteousness and piety. Lending a helping hand on bringing up others children is a way to help a Muslim brother. The Qur’an states to the effect:

‘Help you one another in Al-Birr and At-Taqwa (virtue, righteousness and piety); but do not help one another in sin and transgression. (Al-Maidah: 2)

And the Prophet (s.a.w) also says:

He who helped in alleviating suffering of a believer from the distress of the world, Allah would relief him from distress of the day of Resurrection. He who makes things easy for one who is hard pressed, Allah will make things easy for him in both in this world and the hereafter, and he covers (the failing of) a Muslim, Allah would provide him covering in this world and in the hereafter. Allah would come to help of a servant as the servant had been coming to help his brother …… (Sahih Muslim)

Based on the above verse that promotes welfare towards orphans and helping hand of one another, the concept of foster care was established. In this case, fostering is applicable when a person takes a child into his care and custody without affecting the biological status of the child. This second kind of adoption is recognized in Islam as Islamic law has never prohibited Muslims from helping one another. Instead, they are encouraged to do so as highlighted by the above quoted verse (Al-Maidah: 2), as it is also enjoined by the Prophet (s.a.w) (Mahmud 2001, Atiyyah and Azizah 1998). Islamic law recognizes fostering in terms of fulfilling the responsibility of humanity of the society towards another especially those who are in need of help like foundlings, orphans, children of poor family etc (Hammudah, 1997). Islam also tolerates another reason of fostering children such as for childless couples or to help poor people who have many children (Mohd Hashim, 1995). Such a practice however must be in line with Islamic law, for example the adopter should not have changed the adoptee’s natural father and must observe the Islamic rule on interaction. (Mahmud, 2001)

Therefore, foster care in general refers to the taking of a child into one’s custody (hadanah) without being a legal guardian. (Longman dictionary, 1978 and Oxford dictionary, 1999) The nature of fostering is that a child is taken temporarily or permanently into somebody’s custody. The child will grow in his family as one of his family member but it will not affect his biological family root. He will have a foster relationship with all the members of the family (Ahmad, 1991). This concept can also be based on the verse of the Qur’an which states to the effect:

‘But if you know not their father’s (names, call them) you brothers in faith and Mawalikum (your freed slaves)’ (Al-Ahzab: 4-5)

The above verse shows that if we don’t know the natural father of any child, we can call him or her our ‘brother’ or our ‘sister’ if they are Muslims (Al-Zuhayli, 1998).
Foster Care and Suckling of a Child Who is not Biologically Related:

If we trace back the Islamic legal history, foster care is also a system that is closely related to suckling. It involves a situation whereby, the natural parent hires a mother to breastfeed their newly born baby up to a certain period of time. It was previously the practice of the Arab people before the coming of Islam, and the rule was not banned after the coming of Islam, as the Qur’an says to the effect:

And the mother shall give suck to their offspring for two whole years, If the father desires to complete the term… (Al-Baqarah: 233)

If the father desires to complete the term above, indicates that the father can always hire a woman to breastfeed their baby or continue with artificial feeding (bottle-feeding) (Yusuf Ali, 1989).

In Islamic history, the Prophet Muhammad (s.a.w.) was subject to foster care in relation to suckling during his childhood. As this was prevalent during the period of the Arab, there might be other cases of suckling as well but was not well recorded in history. In the Prophet Muhammad (s.a.w) history, her mother Aminah suckled him for only seven days (Shawq and Muhammad, 1986) and after that, the first woman who suckled him after his mother was Thuwaibah, the concubine of Abu Lahab, with her son, Masrouh for several days. She had suckled Hamzah bin ’Abdul-Muttalib before and later Abu Salamah bin ‘Abd al- Asad al-Makhzumi. It was the general custom of the Arabs living in towns to send their children away to bedouin wet nurses so that they might grow up in the free and healthy surroundings of the desert whereby they would develop a robust frame and acquire the pure speech and manners of the Bedouins, who were noted both for chastity of their language and for being free from those vices which usually develop in sedentary societies. The Prophet (s.a.w.) was later entrusted to Haleemah bint Abi Dhuaib from Bani Sa’d bin Bakr. Her husband was al-Harith bin ‘Abdul ’Uzza called Abi Kabshah, from the same tribe (Sofiyur-Rahman, 1979). The Prophet (s.a.w.) was sent to suckle from Halimah al-Sa’diah during his infant up to two years and then he continued staying with her as her foster child for another two years (Sofiyur-Rahman, 1979).

Reasons why Prophet’s maternal grandfather (Abdul Muttalib) asked for a ‘wet-nurse’ to feed the Prophet (s.a.w.) (Muhammad Abu Zahrah, 1998):

a. After the death of her beloved husband, Aminah feels a great sadness and lost causing her milk insufficient to feed her son. Though her loss is shared among the Quraisy especially his father and siblings and they tried to lessen her burden, still the pain is yet to vanish;

b. The tradition and custom among Arabs people especially from the high rank, they will find Bedouin woman to feed their baby instead of their wives;

c. The environment where the Bedouin people lives is a suitable place for a child growth especially during early stage of the growth since they are living in rural area where the air is clean and fresh with a safety environment. Furthermore, the ethics of Bedouin people are well-known as reasonable and sincere. They have enough food supply and their environment is not polluted as in Makkah. The Arab people believe that living in countryside among the Bedouin will protect their children from any negative effect and will strengthen their physical. Living with them also will teach the children on how to depend on themselves since childhood. Apart from that, it is also to teach them the pure Arabic language (Mahdi 1994, Markaz 1992, Abu Al-Hassan, 1989 and Shawqi 2003).

Definition of Suckling (Rada’ah):

Rada’ah is an Arabic word rooted from Radaña. It is a noun that literally means ‘sucking breast and drink its milk’ (Ibn Manzur 1990). Generally, it is an act of suckling milk from the breast (Kamal-ad-Din, et al 1995). According to Ibn Abidin, it is an act of drinking milk from the udder or (human) breast (Ar-Razi and Muhammad 1995).

Legally, suckling is affected when woman’s milk or anything that originates from human’s milk reached the infant’s stomach or his/her brain by means of mouth or nose, with certain condition (Ibn al-Hamam and Kamal-ad-din, 1995, Muhammad 2003, Mahammad and Mughni, 1997 and Mansur 1997).

Legal Effect of Suckling:

Suckling that fulfills its condition would result to a prohibited degree of marriage. This was clearly mentioned in the Qur’an to the effect:

Prohibited to you (for marriage) are:- your mothers, daughters, sisters; father's sisters, Mother's sisters; brother's daughters, sister's daughters; foster-mothers (Who gave you suck), foster-sisters… (An-Nisa: 23)

Similarly, this rule was supported and emphasized by several hadith of the Prophet (s.a.w.). Two of the hadith state to the effect:

What is unlawful by reason of consanguinity is unlawful by reason of fosterage (Sahih Bukhari, Sahih Muslim, An-Nasaie, Ibn-Majah 1996 and Tirmidzi).

The above hadith of the Prophet (s.a.w.) provides the same ruling that relationship out of suckling will create marriage prohibition. These hadith also show that prohibition by means of suckling and fosterage is similar to prohibition by consanguinity. Therefore, everything that is unlawful by reason of consanguinity is unlawful by reason of fosterage. Thus, as the mother is prohibited to marry by reason of consanguinity, the foster mother is prohibited by reason of fosterage. Similarly, foster sisters, maternal and paternal aunts and nieces. (Ala-ad-Din, 2003 and Ash-Shawkani, 1998)

**Conditions of Suckling that Creates Marriage Prohibition:**

The basic elements of suckling is wet-nurse, the nursling and the milk. Each of these three elements of suckling consist some condition in order to construct one suckling process and session that will take effect on marriage prohibition and other effect.

**Wet-nurse:**

There are some criteria that should be looked into when choosing wet-nurse. According to the majority of the ulama, the marriage prohibition only takes place if the wet-nurse is female. Hence, no prohibition of marriage takes place if the wet-nurse is a male as it is extremely scarce to happen and brings no good for the infant’s health. (Rawdah 1986, al-Qalyubi 1976, Nihayah 1987, Ibn ‘Abidin 1993 and Hashiyah 2001)

According to the Hanafis and the Shafiis, the wet nurse must have reached the age of puberty; the least of which is nine years old. However, the Malikis did not put the age of puberty as a condition upon the wet nurse. According to them, as long as the female minor is able to perform her duty as a wife in marriage, then the milk she bears will affect the marriage prohibition (Nihayah 1987, Ibn ‘Abidin 1993 and Hashiyah 2001).

**The Milk:**

The Muslim jurists are in agreement that to constitute a suckling session, the milk must reach the infant’s belly (jawf) (Lexicon 1968) through throat or sniffing whether the milk is pure or mixed a little with other liquid. As long as the character of the milk is remaining, and reaches the infant’s stomach, it creates marriage prohibition (Al-Qalyubi, al-Mughni, Hashiyah, Asna, Ibn ‘Abidin, Kashshaf al-Qana and Badai’ as-Sanai).

On the other hand, if the mixed milk contains more water or other liquid than milk, there are various opinions among the ulama. The Hanafis and Malikis view that no prohibition took place since the new mixture is not called milk anymore. Their opinion are on the contrary with the Shafiis when they said the marriage prohibition took place even if the milk is only a few drops, as long as the infant drank it all or half of it and reaches the stomach. They argue that provided that the milkremains even in a small amount, marriage prohibition still takes place. At the same time, the Hanbalis opine that if the colour of the milk remains even after it has been mixed with other liquid, the prohibition of marriage takes effect since it can raise bones and grows flesh provided that the milk reaches the infant’s stomach. However, if the colour had changed, the mixture is no longer called milk and no prohibition there.

**Milk mixed with food and changes the substance:**

For the milk that has been mixed with food and changes its appearance like cheese and buttermilk, the Muslim jurists differ as to whether such food would result to marriage prohibition. The majority of them are of the opinion that it also creates marriage prohibition since the substance of the milk reaches the infant’s jawf and becomes food. On the other hand, the Hanafis tend to say that there is no marriage prohibition took place with mixed milk or with food originated from milk since no act of suckling there.

**The minimal number of suckling:**

There is no dispute among the Muslim jurists that five sessions suckling or more will create marriage prohibition. However, their opinion varied if the session is less than five.

The majority of them which include the Hanafis, the Malikis, and one opinion of Imam Ahmad and many Companions and the Followers are of the opinion that even one single session creates milk relationship provided that the milk reaches the infant’s jawf. They rely on Quranic verse in Surah al- Nisa’: 23, ‘foster-mothers (Who gave you suck)’, as the verse relates to the prohibition through suckling in general, the prohibition will take effect if suckling process takes place. Furthermore, the hadith ‘fosterage makes unlawful what consanguinity makes unlawful’ (Sahih Bukhari, Sahih Muslim, An-Nasaie, Ibn-Majah 1996 and Tirmidzi)
corresponds with the Quranic verse as the hadith only mentions about suckling and not the number of the session.

The Hanbalis and the Shafiis are of the opinion that if the session is less than five; it will not result to prohibition in marriage. They rely on what had been reported by ‘Aishah when she said:

“From what has been revealed in the Qur’an, it is ten known suckling session, after that this was abrogated and replaced with five suckling session…” (Sahih Muslim)

The Minimal number of suckling depends on customary practice since no manual has been set up by Shara’.

**The Infant:**

**The milk must reach the infant’s stomach:**

In order to constitute a valid suckling session, the milk must reach the infant’s stomach either through suckling or sniffing and flows through the throat even if the infant is sleeping. This is because the marriage prohibition only arises when milk becomes food that raises bone, grows flesh and stilling hunger. This can only be achieved when the milk reaches the stomach.

**The infant has not reached two years old:**

The Muslim jurists are in agreement that suckling of an infant who has not reached two years old creates marriage prohibition. According to the Shafiis, Hanbalis, Abu Yusuf, Muhammad and an opinion from the Hanafis, suckling period that creates marriage prohibition is two years. They rely on the Quranic verse to the effect:

The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term (Al-Baqarah: 233)

This group of Muslim jurists argues that the Quran rules two years as a completion period of suckling and not more than that. They further base on another verse of the Qur’an to the effect:

.... and in years twain was His weaning.... (Luqman: 14)

And the verse:

“... the carrying of the (child) to His weaning is (A period of) thirty months at length....” (Al-Ahqaf: 15)

The verse clearly states that the period of pregnancy and suckling is thirty months. According to them, the least period for pregnancy is six month, which left 24 months or two years as the weaning period.

They also based on the hadith of the Prophet (pbuh) to the effect:

“There is no suckling unless within two years (from birth)”

On the other hand, the Malikis are of the view that to constitute marriage prohibition, the infant must be suckled for two years period with addition of one or two months.

Meanwhile, according to Imam Abu Hanifah, suckling period that creates marriage prohibition is two years and a half, and no more than that whether the infant’s weans during that period or not. They argue that the Quranic verse in surah al-Nisa: 23, ‘foster-mothers (who gave you suck), establishes an absolute prohibition of marriage by suckling regardless the period. However, the proof comes from another verse that stated that the period two years and an half is the suckling period that creates prohibition of marriage. This is provided by the Qur’an to the effect:

“the carrying of the (child) to His weaning is (a period of) thirty months at length....” (Al-Ahqaf: 15)

**Sustaining Protection of Children Who are Subject To Foster Care Through Breastfeeding (Rada’ah):**

The Islamic legal history on the practice of suckling a child who is not biologically related by a wet nurse reveals a principle that a child can be suckled by a person who is not biologically related to him. This principle seems to be relevant in the case of a child who is subject to foster care, especially a long term or a permanent foster care. The idea behind this practice is that suckling may strengthen the relationship between foster family and the foster children as they share the same blood through the process of suckling.

Basically, due to Islamic restriction on interaction between unrelated members of the opposite sex, it is less common for Muslim to assume custody of unrelated children than related children. Islamic law prohibits man from being alone with a woman unless he is her blood relative (mahram), and requires women to wear head cover (hijab) in front of men who are non blood relatives (non-mahram). These regulations are also applicable to children who are subject to foster care with their foster families as in reality they are strangers even though they live under one roof or in the same home.

Breastfeeding of unrelated children in particular by foster mother in a foster relationship will remove this barrier, since suckling establishes a biological relationship that results in the same marriage prohibitions that entail from a birth relationship. Such relationship may work successfully if the child is suckled by the adopted
mother so as to create a legal relationship through suckling. Nowadays, modern technology is introduced to solve the problem where the foster mother might not have the breast milk. According to this new invention, a mother can stimulate production of breast milk through injection or medication. In a meeting by the Syariah Research Committee of the Islamic Development Department Malaysia, a decision statement was made that this method of producing breast milk is permissible provided that the woman is a woman and that she is of the age of majority (JAKIM 2002). Thus, the child will be treated as if he is related by blood.

It is also worth mentioning that, even though breastfeeding will establish blood relationship between foster family and foster children, it does not establish any maintenance and inheritance right upon the foster children. Similarly, the foster family will legally owe no duty to maintain the foster children and have no right to inherit their property. Nevertheless, they may benefit from the property of one another through will or gift where the foster family or vice versa may bequeath their property up to one third before his death (Muhammad Mahy, 2001). As regards gift, both foster family and foster children may voluntarily dispose their property to one another through gift (Jamal-al-Din 1876 and Tanzil 1980).

Conclusion:

Islamic law is a divine law that was revealed with certain objectives among others to protect the interest of the people as a whole including the children. Assisting and helping the needy, in the case of children in need of protection, through foster care is one of the means to realize the objective. The above discussion proves that Islamic law recognizes foster care as one of the means of protection to children who are in need of care and protection. Apart from that, foster care will also provide a family care especially to those children who are deprived of family environment. On the other way around, foster care may also provide a solution to childless couple. In order to strengthen the relationship between the foster family and the foster children, Islamic law introduces breastfeeding (rada’ah). As breastfeeding would further enhance such a family relationship, it seems therefore that the act of breastfeeding may sustain protection of the children who are subject to foster care. Accordingly foster care that associates with breastfeeding of the foster children would promote and offer a complete protection to the children who are in need of care and protection.

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