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AN ANALYSIS OF ADOPTION IN THE UGANDAN LEGAL SYSTEM AND IN ISLAM

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Abstract

Many legal systems in the world emphasise the need for parents to take care of their children and children may only be separated from their parents when it is in their best interests. Adoption in Uganda is permitted under the Children Act but with restrictions and comes with permanent deprivation of parental rights over the adopted child thereby extinguishing parent-child relationships. Since lineage is emphasised under Islamic law, adoption would destroy the adopted child's blood relations with the parents and hence it is not permitted. This article seeks to examine the notion of adoption under Ugandan law and Islamic law and highlights the rationale for restrictions and prohibition of adoption in the respective legal systems. It is argued that alternative systems of care involving family relations need to be encouraged to ensure strengthen familial relations.

Introduction

It has been reported that an estimated number of children, about 260,000 are adopted each year with prevalence in the United States of America, China and Russia.¹ In addition, over 160 states recognise adoption yet some countries prefer informal adoption and fostering practices whereby children are put into the care of other people, normally relatives without necessarily severing ties between the parents and the children.² Therefore, the issue of adoption is of importance world over warranting further study and comparison with various legal systems which have also shaped the definition of adoption to suit the respective legal systems.

According to the Cambridge Dictionary, adoption means 'the act of legally taking a child to be taken care of as your own'.³ Legally, it is a kind of relationship whereby a child's familial status is transformed by persons permanently assuming major responsibilities of the birth parents.⁴ In other words, one takes on the care of a child as his or her own with full

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¹ The UN Report on 'Child Adoption: Trends and Policies' (2009) xv, available at http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf last visited, 30 April 2018.

² Ibid.

³ <https://dictionary.cambridge.org/dictionary/english/adoption>, last visited, 30 April 2018.

⁴ Rachael Stryker, 'Adoption and Fostering', Oxford Biographies, available at <http://www.oxfordbibliographies.com/view/document/obo-9780199791231/obo-9780199791231-0031.xml> last visited, 30th April 2018.

responsibilities. Under Ugandan law, the term adoption is not defined. Thus, for purposes of this article, adoption may be defined as the legal proceedings that create the relationship of parent-child between persons who are not related by blood. In this case, the adopted child may be entitled to all privileges belonging to a natural child of the adoptive parents (including the right to inherit).

According to the United Nations Report on Child Adoption Trend and Policies (2009), the different types of adoption include; intercountry adoption that is, ‘adoptions that involve a change of country of residence for the adopted person’.⁵ This means that the nationality of the adoptive parents is different from the nationality of the adopted child. In contrast, domestic adoptions ‘involve citizens or residents of the same country’⁶ and it normally happens between relatives. The definition seems to be based on the nationality or residence of the adoptive parents and the adopted child.

These types of adoption (domestic and intercountry) are the commonest and are prevalent in Uganda.⁷ Notably, it has been reported that over the years, Ugandan children have increasingly been adopted by US citizens. For instance from 1999 to 2010, only 311 children were adopted by US citizens yet in 2011 alone, 207 Ugandan children were adopted by US citizens and in 2012, the total number of adopted Ugandan children amounted to 23.⁸ It has been claimed that the major reason for this is because child adoption to US citizens is a ‘lucrative business’ whereby funds are extorted from prospective adoptive parents.⁹ For the case of domestic adoption, it has been claimed that Ugandans have reservations about adoption due to the emphasis on ‘blood’ that is, adoptive parents willingly adopt children who are related to them.¹⁰ This implies that domestic adoption in Uganda is not as prevalent as intercountry adoption.

The other types of adoption relate to the effect of adoption for instance, with full adoption the legal ties between the adopted persons and biological parents are permanently terminated and replaced with equivalent ties between the adopted person and his or her adoptive parents.¹¹ In contrast, with simple adoption the adopted person maintains some legal and financial

⁵ The UN Report entitled ‘Child Adoption: Trends and Policies’ (2009), above n1, xv.

⁶ Ibid, xvi.

⁷ See the Children Act as amended, sections 45 and 46 which provide for adoption and the prerequisites.

⁸ Kristen Cheney, ‘Blood Binds: Confronting the Moral and Political Economies of Orphan hood and Adoption in Uganda’ (2016) 23(2) *Childhood* 192-206, 195.

⁹ Ibid.

¹⁰ Ibid, 197-198.

¹¹ Ibid, 150

ties with his or her birth family including inheritance rights.¹² In Uganda, as will be discussed in section 4 of the article, the Children Act provides for full adoption.

This article therefore analyses the notion of adoption as per Ugandan law to make a comparative analysis with adoption under Islamic law. This is intended to establish whether each legal system could borrow from other the good practices. With this introduction, the section which follows, section 2 highlights the legal framework for adoption in Uganda and discusses the procedure for the same to establish the adequacy of the law in ensuring that the best interests of the child are taken into consideration before an adoption order is made. Section 3 examines the effect of adoption in Uganda in relation to the adopted children as well as the emerging rights and duties for the adoptive parents. This is followed by a discussion on the challenges faced in adoption as highlighted in section 4. For comparative purposes, section 5 discusses adoption in Islam and in section 6 the reasons why Islam prohibits adoption are examined which could be used to justify the restrictions on adoption in Uganda since it equally affects the children and parents involved. Lastly, section 7 is the conclusion to the effect that adoption in Uganda as in the Islamic legal system, affects the familial ties leading to destruction of blood relations. This exhibits that family relations will continue to be destructed in Uganda if adoption is not restricted to a few situations where the best interests of the child are at stake and in the absence of alternative systems of care.

The Legal Framework Regulating Adoption in Uganda

The 1995 Constitution of the Republic of Uganda provides for specific protection of children which includes the right to know and be cared for by their parents or other people.¹³ For that matter, orphans and other vulnerable children must be specially protected by the laws of Uganda. Uganda is one of the countries which signed and ratified the international instrument providing for protection of children that is, the Convention on the Rights of the Child (CRC).¹⁴ The Convention places great emphasis on the best interest of the child to be of primary consideration in all actions taken concerning children.¹⁵ Article 9(1) enjoins states to ensure that a child is not

¹² Judith Lind and Shruti Johansson, 'Preservation of Child's Background in In –and Intercountry Adoption', (2009) 17(2) *International Journal of Children Rights* 235-260, 248 250.

¹³ 1995 Constitution of Uganda, article 34.

¹⁴ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990. On 17 August 1990, Uganda signed and ratified the Convention on the Rights of the Child (CRC 1989), available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en>, last visited on 30 April 2018.

¹⁵ Ibid, art 3(1), see also art 9.

‘separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.’ The same provision was incorporated under Ugandan law in section 4 to the effect that a child is entitled to live with his or her parents except where upon determination by a competent authority that it is in the best interests of the child to separate him or her from the parents.¹⁶ This means that a decision must be taken by relevant authorities when separating the child from its parents.

Thus, under article 20(1) of the CRC, a child who is ‘temporarily or permanently deprived of his or her family environment’ is ‘entitled to special protection and assistance provided by the State.’ The state is to do that as per national law by ensuring alternative care for the child¹⁷ including ‘foster placement, *kafalah* of Islamic law, adoption’ with due regard ‘paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’¹⁸ For the case of Uganda, it is required that the ‘best substitute care available’¹⁹ should be provided to a child who has been separated from the parents. Notably, Uganda in its Children’s Act does not provide for *kafalah* of Islamic law²⁰ and thus, care may be extended to a child by virtue of ethnic, cultural and religious background of the child.

This implies that there is no general rule governing adoption or other alternative arrangements. Each country may draft its laws regulating adoption basing on social, economic and religious set up and such laws are not binding on any other country. What is material as the CRC emphasises is that any decision made to separate the child from the parents must be in the best interest of the child and such interests may not be understood in the same way by all countries. It is pertinent that each state relies on its laws and procedures to ensure the best protection of children.

For the case of Uganda, the Children Act clearly sets out the procedure for adoption. Where the child and the applicant (prospective adoptive parent) are Ugandan (national or domestic adoption) the application for adoption is heard in the Chief Magistrate’s Court.²¹ However, were the child or the applicant is a non-citizen (intercountry adoption) the application is heard in the High Court.²² This is elaborated in the case of Jjuuko and

¹⁶ Section 44(2) of the Children Act Cap 59.

¹⁷ Ibid, article 20(1).

¹⁸ Ibid, article 20(3).

¹⁹ Section 4(2) of the Children (Amendment) Act, 2016.

²⁰ See explanation of the term ‘*kafalah*’ in section 6 of this article.

²¹ Children Act, section 44(1).

²² Ibid.

Magezi where the petitioner was from New Zealand and the matter was heard in the High Court.²³

Concerning domestic adoption, there are certain restrictions which are set out under Ugandan law for an adoption order to be granted. One of the restrictions is the requirement that the applicant or at least of one of the joint applicants must have attained the age of 25 years and ‘is at least’ 21 years ‘older than the child.’²⁴ The issue of maturity of the applicant is of importance to ensure that the adopted child is placed into the care of persons who could ably exercise the role of parents. In addition, the applicant must have fostered the child for a period of not less than 12 months under the supervision of the Probation and Social Welfare Officer.²⁵ In this case, the Probation and Social Welfare Officer is required to submit ‘a report to assist the court in considering the application’²⁶ though the court may in addition require another ‘person or local authority to make a report’ concerning the application for adoption.²⁷

More so, the applicant must have obtained consent from the other spouse where the applicant is married.²⁸ This is evidenced in the matter of Kirabo in the High Court of Uganda where the wife of the petitioner consented to the adoption of the child.²⁹ Such consent may be dispensed with if the ‘spouse whose consent is required cannot be found or is incapable of giving consent’ or where the spouses are ‘separated and living apart and the separation is likely to be permanent.’³⁰ This is important because both spouses should exercise full responsibility over the child. It is notable that the adoption order may not be made ‘authorising one person to adopt a child at the same time’ except for a joint application made by spouses.³¹ In any case an adoption order may not be made in favour of a sole male applicant where the child is female and the same applies to a sole female applicant where the child concerned is male³² possibly to ensure that the child is protected from

²³ In the Matter of Jjuuko & Magezi (Infants) (Adoption Cause No. 200 of 2014) UGHCFD 5 (18 March 2015); see also In the Matter of Kirabo (Infant) (Adoption Cause No. 205 of 2014) UGHCFD 8 (2 April 2015) and in the Matter of Derrick Mugoya, Okola Willy, Edward Kabugo (Children) (Adoption Cause No. 69 of 2007) [2010] UGHC 37 (18 March 2010).

²⁴ Children Act, section 45(1).

²⁵ Children (Amendment) Act, 2016, section 13 which amended section 45(4) of the Children Act Cap 59.

²⁶ Children Act, section 45(5).

²⁷ Ibid.

²⁸ Ibid, section 45(2). This is also a requirement under the CRC, article 21(a) where states are obliged to ensure that adoption is authorised by competent authorities in accordance with the applicable law and procedures with the informed consent of concerned persons.

²⁹ In the Matter of Kirabo (Infant) (Adoption Cause No. 205 of 2014) UGHCFD 8 (2 April 2015).

³⁰ Children’s Act, section 45(2).

³¹ Ibid, section 45(6).

³² Ibid, section 45(3).

any abuse including sexual abuse. This restriction can only be departed from in a situation where there are special circumstances justifying the adoption order.³³

With respect to intercountry adoption, previously the Laws of Uganda allowed a non-Ugandan to adopt a Ugandan child if he or she has lived in Uganda for a period of 3 years and fostered the child for 3 years after recommendation from the Probation and Social Welfare Officer.³⁴ The same was decided in the Matter of Jjuuko Nicholas and Magezi Dennis's case³⁵ where the High Court granted adoption to non-Ugandans on fulfilment of these restrictions. However, on 2 March 2016, the 388-member unicameral Ugandan Parliament passed the Children (Amendment) Bill, 2015, aimed at amending the Children Act (Cap 59) to enhance protection of a child and provide for inter country adoption, among others.³⁶ The Act substituted the requirement of the prospective applicants' stay in Uganda for 3 years with only 1 year.³⁷ In addition, the requirement of fostering the child for at least 36 months was also substituted with 1 year period which is shorter than the 3 years originally required.³⁸ However, these requirements may be waived in exceptional circumstances³⁹ implying that the court may use its discretion to permit adoption even where the applicant has stayed in Uganda for less than 1 year which is currently required. It is arguable that such powers may be abused by court when adoption is granted where the applicant's stay in Uganda was for a short period of time without ascertaining whether the adoption order will serve the best interests of the child concerned.

That notwithstanding, the Act provides that intercountry adoption must be 'considered as the last option available to orphaned, abandoned or legally relinquished children, along the continuum of comprehensive child welfare services.'⁴⁰ This seems to be the same position under the CRC article 21(b) whereby intercountry adoption is recognised as an 'alternative means of child care' in situations where the 'child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'. This implies that intercountry adoption is only to be resorted to when domestic adoption or other alternative means of child

³³ Ibid.

³⁴ Ibid, 46(1)(a)-(b).

³⁵ In the Matter of Jjuuko & Magezi (Infants) (Adoption Cause No. 200 of 2014) UGHCFD 5 (18 March 2015).

³⁶ The Children (Amendment) (No. 2) Bill, 2015: Memorandum (Feb. 13, 2015), Parliament Watch Uganda; *Parliament Passes Children Bill; Restricts Guardianship to Nationals*, Parliament of the Republic of Uganda (Mar. 2, 2016).

³⁷ Section 14 of the Children (Amendment) Act, 2016 which amended section 46(1)-(2) of the Children Act

³⁸ Ibid.

³⁹ Ibid, section 14(4).

⁴⁰ Ibid, section 14(6).

care are not available. It is arguable that Ugandan law does not permit intercountry adoption outright for specific categories of children mentioned above. Perhaps this was aimed at limiting such adoptions to protect children who had been abandoned by their parents or those whose parents are deceased or unknown. Such children are in need of special care in all aspects of life.

However, the law seems to presume the existence of ‘comprehensive child welfare services’ in Uganda and these are ‘preventive services community-based family centred alternative care options’ such as kinship care, foster care.⁴¹ Such services may not be adequate thereby denying these children the care they would have received if adopted by non-nationals. What is crucial is for the state to ensure that such a child enjoys the equivalent safeguards and standards as those adopted domestically, as well as ensure that ‘the placement does not result in improper financial gain for those involved in it’.⁴² In effect, intercountry adoption should not be used for improper financial gain to the detriment of the child’s best interests.

Further protection for these children may be obtained from the Act which introduces a provision for rescission of adoption orders in certain circumstances.⁴³ This may occur if an order was obtained through fraud or misrepresentation or if doing so is in the best interests of the child.⁴⁴ More so, any person who is a grievd by the adoption order of the Chief Magistrate or High Court judge, he or she may appeal against the order in the relevant court.⁴⁵ Therefore, more needs to be done to ensure the protection of the children and mere legislative reforms may not be enough when institutions handling adoption orders are not supervised adequately to ensure that adoption orders are made on merit.

The Effect of Adoption

As already mentioned, adoption may create different effects depending on the laws of each country concerned, With respect to Uganda, under section 48(1) of the Children’s Act, it provides that the court must be satisfied that; ‘every person whose consent is required and is not dispensed with has consented and understands the nature and effects of the adoption, namely, that it will permanently deprive that person of parental rights over the adopted child.’ Any order thereby made is for the welfare of the child in consideration of the wishes of the child.⁴⁶ This implies that once the person willingly adopts the child, he or she should understand that the rights over the child are given up for the best interests of the child and has a right of appeal

⁴¹ Ibid, section 14(7).

⁴² Ibid, article 21(c)-(d).

⁴³ Ibid, section 15 which inserted section 46A(1) in the Children Act Cap 59.

⁴⁴ Ibid, section 46A(2) in the Children Act Cap 59.

⁴⁵ Children Act (Cap 59), section 50(1)-(2)

⁴⁶I bid, section 48(2).

against court's decision for adoption. This can be seen in the Matter of Mirembe Nansamba Claire where the petitioner claimed to have understood all the implications of adoption.⁴⁷ Thus, the law provides for the effect of adoption to the fact that the birth parents permanently give up their rights over their child and must not have consented to the adoption in view of obtaining a reward as indicated in section 48(3) of the Children Act.

More so, under section 51(1) of the Children Act it provides that 'all rights, duties, obligations and liabilities of the parents and guardians in relation to the future custody, maintenance and education of the child, including marriage, are extinguished'. In essence, the birth parents and guardians cease to have any rights and responsibilities over their children. It therefore follows that an adopted child is not entitled to inherit from his or her birth parents when they die intestate.⁴⁸

The rights, duties and liabilities over the adopted child are then 'exercised by, and enforceable against the adopter' as if 'the child were the natural child of the adopter born to him in lawful wedlock.'⁴⁹ This means that under Ugandan law, the adopted child is taken up by the adoptive parents and cared for as their biological child and this may include the right to inheritance⁵⁰ as discussed in the Matter of Angelica Agnes Corna and Nansamba Claire to the effect that the petitioners take the adopted children as their biological children.⁵¹ For that matter, if the adoptive parents die intestate, their property 'devolves in all respects' as if the adopted child were their natural child.⁵² In event of unfair disposition of such property, the court may make an order as it thinks equitable in accordance with the law.⁵³

Further still, section 55(1) of the Children Act provides for disclosure of adoption once the child attains 18 years of age or at an earlier age on the request of the child or at the discretion of the adopter. The child is to be informed by the adopter his or her birth parent's identity except where it is not within the best interests of the child to do so.⁵⁴ This implies that if an adopted child reaches the age of 18 years and requests to know about his or her birth parents, he or she may seek the information from the adoptive parents. This means that there is no secrecy about the adoption of the child once the age of majority is attained or when the adopter deems fit to inform

⁴⁷ Re: In The Matter Of Mirembe Nansamba Claire (a Minor) (Adoption Cause No.110 of 2009) (a Minor) [2009] UGHC 170 (10 September 2009).

⁴⁸ Children Act (Cap 59), section 53(3).

⁴⁹ Ibid, section 51(2).

⁵⁰ Ibid, sections 52-533.

⁵¹ In Re Angelica Agnes Corna (an Infant) (Family Cause No. 085/2013) [2014] UGHCFD 45 (26 September 2014) and In the Matter of Mirembe Nansamba Claire (a Minor) (Adoption Cause No.110 of 2009) (a Minor) [2009] UGHC 170 (10 September 2009).

⁵² Children Act (Cap 59), section 52(1).

⁵³ Ibid, section 52(2).

⁵⁴ Ibid, section 55(1).

the child of his or her birth parents. Any disclosure made should be in the best interests of the child.

Challenges of Adoption

Several challenges are experienced in the adoption processes which may ultimately impact on the children. This may occur where the process is tainted with fraud. This is evident in Uganda where information from documents, court data and a series of exclusive interviews with officials, whistle blowers, victims and prospective adoptive parents, has revealed that with corruption, children's birth histories are sometimes manipulated to make them appear as orphans when they are not.⁵⁵ It is also profitable for lawyers who represent foreign applicants by receiving large payments as well as the mushrooming church-backed orphanages and private child-care institutions.⁵⁶ This implies that adoption is deemed as a lucrative business in Uganda (especially intercountry adoption) and may not be done in the best interests of the adopted children.

Notably, the Children Act also requires the court, before making the adoption order to be satisfied that 'the applicant has not received or agreed to receive, and that no person has made or agreed to make to the applicant, any payment or other reward in consideration of the adoption'.⁵⁷ In effect, monetary motivations for adoption are ruled out by law and this could hamper persons who resort to adoption as a money-making venture. However, it may not be possible to obtain such information and with the rampant corruption especially in the law enforcement bodies, there is a possibility that many applications for adoption may not be genuine thereby relegating the welfare of adopted children at the secondary level.

In addition, some biological parents and relatives may give up their children in the belief that they would receive financial incentives from the adoptive parents and children's homes. It is also stated that some parents come to learn that their child's identity has been changed fraudulently without their knowledge.⁵⁸ This implies that adoption may be used to obtain money either by parents or the applicants when they take these children and they get paid. This will lead to abuse of the law and motivate other people to do the same as a source of income hence compromising the interests of the child.

Adoption also creates stigma among the adopted children when they come to realise that they have grown up with different people or communities and may not be comfortable living with children from other communities. For

⁵⁵ Tom Esslemont and Katy Migiro, 'Fraud and Deceit at the Heart of Uganda Adoptions to United States', Mail online, 29th May 2015, accessed on 12 July 2016.

⁵⁶ Ibid.

⁵⁷ Children Act (Cap 59), section 48(3); see also section 48(4).

⁵⁸ Tom Esslemont and Katy Migiro, 'Fraud and deceit at the heart of Uganda adoptions to United States', above n 55.

example, Sara Nordin, who was adopted from Ethiopia in 1969 stated that there were lots of race problems when she was 14 or 15 because she could neither decide whether she was an immigrant or Swedish as both parties thought she was of their origin and thus, she failed to decide where she belonged.⁵⁹This implies that adoption creates stigma among the adopted children who sometimes fail to have a sense of belonging.

Moreover, in most cases it becomes hard for them to access their true lineage which creates dishonour among themselves. For instance, one of the women, Katarina, who was born in Chile in the early 1980s, was adopted in Sweden explained that she had felt no desire to have children until she reunited with her birth mother in 2004.⁶⁰ After this reunion, she gave birth to a child but expressed her disappointment when there was failure of her baby to make her feel connected, either to her adoptive family or to her birth family.⁶¹This implies that much as adoption is resorted to by many people, it causes stigma to the adopted child due the change of lineage.

It is arguable that guardianship is a better option than adoption since lineage is maintained. The problem of child identity was addressed in the Hague conference on intercountry adoption in the early 1990s where the issue of child identity was discussed.⁶² In the final draft of the 1993 Hague Convention a provision was included to the effect that transnational adoption was preferable to only orphanage care and was to be the last option for abandoned children after efforts of reuniting them with their birth parents or placing them with adoptive parents in their birth nation.⁶³ This means that states are slow to permit inter-country adoption in their states and limit it in specific circumstances. This is the same case in Uganda as mentioned above whereby intercountry adoption is only resorted to when domestic adoption or other alternative means of child care are inadequate.

Adoption in Islam

This known as *kafala* an arrangement where vulnerable children are protected, cared for and assisted⁶⁴ and this could mean a practise similar to guardianship recognized under sharia. *Kafala* neither terminate legal ties between the person under guardianship with his or her birth parents, nor does it grant automatic inheritance rights with respect to the guardian's property.

⁵⁹Global Kinship, 'Refiguring Kinship in the Space of Adoption', Barbara Yngvesson Hampshire College, p. 567.

⁶⁰ Ibid, 562.

⁶¹ Ibid, 563.

⁶² Ibid, 568.

⁶³ Ibid.

⁶⁴ Shabnam Ishaque, Islamic principles on Adoption ; Examining the impact of illegitimacy and Inheritance Related concerns context of A child's Right to Identity, International journal of Law policy and the Family (2008)393-420, 397.

It has been reported that adoption in the pre-Islamic Arabia was rampant and the position of the adopted child was equal to that of the biological legitimate kin⁶⁵ which implies that there was no difference between the adopted child and biological children. Adoption in Arabia was important in building alliances with strong tribes and among themselves which is traced back to their common male ancestors.⁶⁶ This was also used to build their military force and to improve their resources and alliances among the tribes.⁶⁷ Adopted persons were often refugees, captives, runaways, freed slaves, or allies including persons from different tribes. Adoption was also important in binding offsprings of the adoptee to the tribe, and thereby securing new loyalties.⁶⁸ Single men of unknown descent who had shown great prowess and of age would be adopted in order to reinforce the strength of a particular clan. The adopted person and his clan would merely be associated with the new clan and would keep his father's original name.⁶⁹

Despite the fact that Muslim scholars did not dispute that children were adopted as part of military alliance to reinforce the strength of a particular clan,⁷⁰ it is not clear whether the adopted children could inherit property from their adoptive parents. However when Prophet Muhammed (SAW) adopted Zaid he declared that there would be inheritance rights between them and it was the custom of the Arabs at that time.⁷¹ It was narrated that 'We used not to call Zaid bin Haritha the freed slave and adopted son of Allah's Messenger (S.A.W) except Zaid bin Muhammad till the Quranic Verse was revealed'.⁷² At the time adoption was solely for adults and when the Prophet adopted Zaid he was an adult perhaps it was due to the essence of adoption which was mainly aimed at strengthening their tribes, Army and creating Alliances among themselves.⁷³

⁶⁵ See the Narration of Lady Aisha, Sahih Bukkhari, volume 7, Book No. 62.

⁶⁶ Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law', (2015) 63 *American Journal of Comparative Law* 933.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid 934.

⁷⁰ Ibid, 933.

⁷¹ It was narrated by Aisha the wife of the prophet that 'Abu Hudhaifa bin Utba bin Rabi'a bin Abdi Shams who had witnessed the battle of Badr along with the Prophet (SAW) adopted Salim as his son, to whom he married his niece, Hind bint Al-Walid bin 'Utba bin Rabi'a; and Salim was the freed slave of an Ansar woman, just as the Prophet (SAW) had adopted Zaid as his son. It was the custom in the Pre-Islamic period that if somebody adopted a boy, the people would call him the son of the adoptive father and he would be the latter's heir (Sahih Al-Bukhari Hadith 7.25).

⁷² Sahih Al-Bukhari Hadith 6.305.

⁷³ Shabnam Shafique, 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity,' (2008) 22(3) *International Journal of Law, Policy and the Family* 394-420, 394.

One major issue is that Prophet Muhammad's denial of Zaid and elimination of adoption was due to the introduction of a new law for protecting the family and preserving culture. Since Prophet Muhammed did not leave a son, he would have left Zaid as his rightful heir. Thus, it is arguable that abolition of adoption was essential for the integrity of the Prophet's family. The Shi'ites claim that the succession to Prophet Muhammad had to be settled within the *ahl al-bayt*, that is, among the direct blood relatives of the Prophet.⁷⁴ This implies that if adoption was not stopped it could cause confusion in Islamic religion and to shi'ites Zaid could be the successor of the prophet

Notably, the Quran provides for the prohibited degrees of marriage by laying down the categories of people a person is prohibited from marrying. For instance, mothers, daughters, sisters, father's sisters, brother's daughters, among others.⁷⁵ This means that such persons are related, and such marriage is not permitted. Since adoption is also not permitted, no issue arises at all regarding prohibition to marriage. See for example Prophet Muhammad's marriage to Zainab, a divorced wife to Zaid who was adopted by the Prophet.⁷⁶

The prohibition of adoption in Islamic law is traced back to the story of Zaid bin Harith, a freeman from the South of Syria, who was kidnapped by Arab tribes and sold off in the slave market in Mecca around 600 AD.⁷⁷ It was Prophet Muhammad (before obtaining prophet hood) who bought him. When Zaid's father came to Mecca to reclaim his son, Zaid chose to stay with Prophet Muhammad.⁷⁸ Moved by Zaid's affection, Prophet Muhammad released him from slavery and adopted him in a solemn ceremony, in which he declared: "Bear witness that Zayd is my son. I will inherit from him and he will inherit from me."⁷⁹ In 622 AD Prophet Muhammad started his mission of propagating Islam and the relationship with Zaid as his adopted son continued. Zaid married Zainab bint Jahsh, the cousin of the Prophet. However, they got misunderstandings in their marriage, ultimately Zaid wanted a divorce and sought advice from the Prophet.⁸⁰ He reconciled them, but unfortunately their relationship did not take long and Zaid divorced Zainab and Allah told the Prophet to marry Zainab which was a taboo, since

⁷⁴ Wilfred Medlung, *The Succession of the Prophet Muhammed: A Study of the Early Caliphate*, (University of Cambridge 1977), 13.

⁷⁵ Quran 4:23.

⁷⁶ Quran 33:37.

⁷⁷ Sahiih Abdalla, 'Biography of the Prophet', Daarul Salaam, vol 1 (2006), available at <http://idealmuslimah.com/personalities/sahaabah/1479-zaid-ibn-haarithah>, last visited, 30 April 2018.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Quran: 33:37.

under Islamic law, marriage between a parent-in-law and child in-law is strictly prohibited.⁸¹

It is in this context that the following verse from the Quran was revealed to the Prophet:

Behold thou didst say to one who had received the grace of Allah and thy favour Retain thou (in wedlock) thy wife and fear Allah but thou didst hide in their heart that Allah was about to manifest thou didst fear the people, but its more fitting that thou shouldst. Fear Allah then when Zaid had dissolved (his marriage) with her, 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 later have dissolved (their marriage) with them and Allah's command must be fulfilled.⁸²

This means that Zaid son of Harith one of the first to accept Islam was a freed man of the Holy Prophet, who loved him as a son and gave him in marriage to his own cousin Zainab. The marriage however turned out to be unhappy.⁸³ All facts are referred to Allah when the marriage is unhappy Islam permits the bond to be dissolved, provided that all interests concerned are safeguarded and she obtained the dearest wish of her heart in being raised to be a mother of the believers with all the dignity and responsibility of that position.⁸⁴ The pagan superstition and taboo about the adopted child had to be destroyed.⁸⁵ This implies that the Almighty Allah stopped adoption by ordering the Prophet to marry Zainab, the wife of his adopted son Zaid .

Allah also says:

Allah has not made for any man two hearts, in his breast: nor has he made your wives whom ye divorced by Zihar; your mothers; nor has he made your adopted sons such is (only) your (manner of) speech by your mouths. But Allah tells (you) the truth and he shows the right way.⁸⁶

Allah also says:

Call them by after their fathers: that is juster in the sight of Allah. But if ye know not their father's names (then they are) your Brothers in faith or your friends but there is no blame on you if ye make a mistake there in (what counts is) the intention of your hearts and Allah is oft -forgiving most merciful.⁸⁷

It implies that if a man called another person's son 'his son', it might create complications with natural and normal relationships if taken too literally. It is pointed out that it is only a *facon de parler* in men's mouths and should not be taken literally. The truth is the truth and cannot be altered by men adopting 'sons'. Adoption in the technical sense is not allowed in

⁸¹ Quran: 4:23.

⁸² Quran 33:37.

⁸³ See the Holy Quran English translation of the meanings and commentary, revised and edited by the presidency of Islamic researches, IFTA, call and guidance, p. 3722.

⁸⁴ Ibid, 3724.

⁸⁵ Ibid, 3726.

⁸⁶ Quran 33:4.

⁸⁷ Quran 33:4.

Muslim law. Those who have been ‘wives of your sons proceeding from your loins’ are within the prohibited degrees of marriage (Quran 4. 23) but this does not apply to ‘adopted’ sons.⁸⁸

It should be noted that freedmen most often were called after their master’s name as the ‘son of so and so’. When they were slaves, perhaps their father’s names were lost altogether. It is more correct to speak of them as the *Maula* of so and so. But *Maula* in Arabic might also imply a close relationship of friendship; in that case, too, it is better to use the right form instead of the term ‘son’. ‘Brother’ is not objectionable because “Brotherhood” is used in a wider sense than “fatherhood” and is not likely to be misunderstood.⁸⁹

The above verses imply that a person cannot have two parents (fathers) adopted sons do not have the same status as biological, legitimate sons. It was also interpreted that the root of each person, and names was part of his/her identity and could not be dissociated from her, emphasizing the importance of lineage.

Rationale for Prohibition of Adoption under Islamic Law

There is no legal adoption in Islamic law and it is prohibited for a person to legally adopt a child of whom he is not the biological parent. If a person adopts a child, Islamic law will not confer on the adopted child the status or rights of a biological child. According to the Quran, one cannot become a person's real son merely by virtue of a declaration; Allah says:

... And He [i.e., Allah] has not made your claimed (i.e., adopted) sons your (true) sons. That is (merely) your saying by your mouths, but Allah says the truth, and He guides to the (right) way. Call them (i.e., the adopted children) by (the names of) their fathers; it is more just in the sight of Allah. But if you do not know their fathers, they are your brothers in religion...⁹⁰

This implies that Adoption cannot change the lineage of a person it is just a mere expression which cannot change the blood relation of a person or transfer the inherited futures of person.

It is also based on the tradition of the Prophet where he says ‘*AL walad li-l-firash*⁹¹, which means ‘child of the marital bed’ which implies a child begotten in a valid marriage. The prohibition of legal adoption in Islam was ordained to protect the rights of the adopted, adopter, biological parents, other individuals affected by the adoption, and society as a whole.⁹² Thus

⁸⁸ See the Holy Quran English translation of the meanings and commentary, revised and edited by the presidency of Islamic researches, IFTA, call and guidance, 1239.

⁸⁹ Ibid, p. 1239 and p.1238.

⁹⁰ Quran 33: 4-5.

⁹¹ This Hadith was narrated Bukhaari, No. 2053 and was also narrated by Muslim in his Book No. 1457. See also Nadjma Yassari, ‘Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law’, (2015) 63 *American Journal of Comparative Law* 927-962, 938.

⁹² ‘Adopting a Child in Islam; Islamic Legal Rulings about Foster Parenting and Adoption’, available at www.islamweb.net last visited, 30 April 2017.

safeguarding the family is a strong mechanism in building society and is one of the specific objectives of Islamic law. More so, avoiding conflicts that may arise from adoption enhances stability among family members as evident in the law of inheritance whereby property of the deceased person is distributed amongst family members in various proportions as per the Quran.⁹³

a) Inheritance is Based on Blood Relation

Adoption may deprive the rightful heirs to the deceased's estate their property when the adopted child acquires inheritance rights. As mentioned above, adoption was prohibited in Islamic law to the extent that the Prophet was permitted to marry Zaynab the former wife of Zaid who had been adopted by the Prophet.⁹⁴ This means that the adopted child is not under the prohibited degrees of marriage. In matters of inheritance, the Quran does not recognise any claim except those based on relationship through blood and marriage. The Quran stipulates thus; 'and those who believed after [the initial emigration] and emigrated and fought with you – they are of you. But those of (blood) relationship are more entitled (to inheritance) in the decree of Allah. Indeed, Allah is knowing of all things.'⁹⁵ This implies that the adopted child is not among the heirs and cannot inherit since it is forbidden under Islamic law.

b) Marital Relations

It has been argued that taking a stranger into the family as one of its members and allowing him to be in privacy with women who are non-mahram (i.e., non-marriageable relatives) to him is a deception. Allah says "(O' Prophet!) Say to the believing men that they cast down their looks and guard their private parts - that is purer for them; surely Allah is aware of what they do. And say to the believing women that they cast down their looks..."⁹⁶

The Prophet said 'Allah will not look at the person who drags garments (behind him) out of conceit.'⁹⁷ This is because the adopter's wife is not the adopted son's real mother, nor is his daughter the boy's sister, nor is his sister the boy's aunt, since all of them are non-mahram to him and vice-versa for an adopted daughter.⁹⁸ The Quran has, thus, declared that only the wives of one's real sons, and not the wives of any sons under one's care, are permanently forbidden in marriage. This is according to the verse (which means): '...The wives of your sons who are from your (own) loins...'⁹⁹

⁹³ Quran 4;11-12.

⁹⁴ Quran; 33;37.

⁹⁵ Quran 8:75.

⁹⁶ Quran 24:31.

⁹⁷ Sahih Bukhar, volume 7, Book 72, No. 674.

⁹⁸ Quran 4:23.

⁹⁹ Ibid.

Conclusion

As noted already, adoption varies from country to country due to different circumstances that influence familial relationships across the globe. With respect to Uganda and as noted already, separation of the child from his or her parents should only be in the best interests of the child and in accordance with the law as stipulated in the various Acts mainly the Children Act as amended. It has been established that adoption should be resorted to as an alternative to other domestic arrangements that involve several stakeholders such as the family and kinship. This exhibits that blood relations in Uganda are emphasised owing to the importance of familial ties and other matters such as inheritance which is based on such relationships. Similarly, Islam also emphasises blood ties to the effect that only those who are related by blood can inherit from the deceased person's property. However, while an adopted child may inherit from the adoptive parents in Uganda where such an arrangement is made, for Islam that cannot happen as the adopted child has no inheritance rights and in fact such a person is not categorised under the prohibited degrees of marriage. This article thus exhibits that adoption affects blood relationships of the parties concerned and even impacts on their inheritance or proprietary rights. This means that states should as much as possible enact adequate national laws to regulate procedures for adoption to ensure that an adoption order is only permitted for deserving cases and in the best interests of the child concerned.

