ISSN - 2583-2344

INHERITANCE RIGHTS OF *MUSLIM* ORPHANED GRANDCHILDREN AND ADOPTED CHILDREN (ESPECIALLY FEMALES) AND THE INDIAN CONSTITUTION

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Best Citation - AMINA AMIN SULTANA, INHERITANCE RIGHTS OF *MUSLIM* ORPHANED GRANDCHILDREN AND ADOPTED CHILDREN (ESPECIALLY FEMALES) AND THE INDIAN CONSTITUTION, 3 IJLR 50, 2022

ABSTRACT

Indian constitution has guaranteed equality before law and equal protection of laws to its entire citizen and also has provided many rights to women and children for their safeguard in every aspect of life but still *Islamic* property related laws are facing huge complications in delivering justice in regards to *Muslim* women, particularly orphaned grandchildren and adopted children. The inheritance shares are already fixed by the injunctions of *Quran*. So, the *wasiyat* is not for those *Quranic* sharers but for those who are not legal heirs but anyone and the will cannot be made more than 1/3rd of the hereditary property. The law of gift and will is complimentary and supplementary to law of inheritance and *Muslim* countries translated the law into action in the name of obligatory bequest. Considering the orphaned grandchild (specially females) status among the law of inheritance of Indian *Muslims*, the legislature may also consider the reformative measures of *Muslim* countries. In order to remove the sufferings of orphan grandchildren, the state should consider the law of compulsory bequest. The two relations i.e., orphaned grandchild and adopted child (specially female) must be given the right to inheritance through a will or bequest which cannot be more than one-third of the complete property. The customary law applied to the inheritance relating orphaned grandchild and adopted child is to be abolished and *Islamic* canon must be enforced on them. Moreover, although *Islam* does not approve of adoption but it has a better system known as *kafala* under which the adopter will get a child of whom he can take care in every perspective and the child will also not lose his identity. The Indian law must modify the adoption of *Muslims* as per *kafala* system, which is now followed by various other *Muslims* countries. And regarding the inheritance, these adopted children may be given one-third of the property by way of will. This can only happen if the option to follow either customary law or true *Islamic* canon under section 3 of the Shariat Act of 1937 is eradicated. The option given under the 1937 Act is unconstitutional and hence, a great amount of injustice have been going on since its implementation against the females, particularly orphaned grandchildren and adopted children.

Keywords: Constitutional provisions; *Islamic* law; Shariat Act, 1937; position of orphaned grandchildren and adopted children, specially females.

INTRODUCTION

No other aspect of *Islamic* law is so distorted in India than its property law. Its reason has a long history of Mughal dominance and patriarchal society like pre-*Islamic* Arabs. Women were like a thing or an article which can itself be sold or purchased on the will of male relatives. This position was completely sidelined by Prophet Mohammad and he established his constitution. However, in India, the similar situation has now been coming down through the customary law even after enactment of Sharia Act, 1937. The Act passed for amelioration of women even then customary law sometimes over-ruled the written law and women are still deprived of their right from property whether it is inheritance or some other rights. Though the *Quran* explicitly provides the inheritance share of women as daughter, mother, sister and wife, but still *Muslim* women in India are deprived due to the corruptions

prevailing in the society and flaws in the canons. Moreover, the constitution of India has guaranteed equality before law and equal protection of laws to every citizen irrespective of any discrimination based on any ground but still the laws regarding female's inheritance, particularly orphaned grandchildren and adopted children are not yet made as per the guidelines of Indian Constitution. The Shariat Act is still under the dominance of customary law and the *Muslims* are reluctant to follow the *Quranic* law, which have given immense property rights to *Muslim* women. The focus of this article is primarily on the inheritance rights of orphaned grandchildren and adopted children, especially females.

BACKGROUND OF *ISLAMIC* CANON CONCERNING SUCCESSION

Prior to *Islam*, the Arabs were engaged in endless battles and considered the division of property as remuneration for intense involvement in battles. Therefore, children and females are denied access to inherit from property, making inheritance a straightforward criterion only for the male agnates. This also presented the reasoning in the instance of inheritance of the predeceased son, as a male child is refused portion in the paternal grandfather's estate merely due to the demise of his father. The custom of letting only the males to succeed the inheritance perhaps had originated from an intense unintentional want to prohibit the division and loss of hereditary estate, which would be certain if females were allowed to have her right in the estate. It is general human tendency, whether intended or unintended, to keep one's property completely as feasible and within the family premises, not just in one's lifespan but also after death. This craving has its root in the natural tendency of the people and it is noticeable in every orthodox communities. For example, the Indian society has derived the structure of the joint family arrangement and the Malaysian society has accepted the *adat* canon of joint estate. It is interesting to note that at times, the similar fundamental craving has showed the contrary course to the people, for instance, the cases of adoption. The age-old custom of adopting a child seems to have emerged out of the requirement to fulfill the absenteeism of a male connection that would extend the family and take care of its property. The period during which variant societies were adopting children to succeed hereditary property, as it gives a better justification to it, the Arabs, however, refused to give succession rights to adopted children, because of the uncertainty that the adopted children might walk off with their portions. As per the reasoning of the *Quranic ayat* (33:4), "Nor has He made those whom you assert (to be) your sons," a few authors have deduced that in the pre-*Islamic* Arabia, the adopted sons were considered as the actual sons. S.A. Ali does prefer to believe that such an outlook or custom was not usual**.** There might have been random instances of families obeying the Roman tradition of adopting children with an intention to inherit property. But, to a large extent, the theory of adoption is unknown to the Judeo-Christian*Islamic* practice. There is muteness in the Hebrew codified laws in regards to the adoption custom and the Greek Testament says about it only in the Pauline Epistles. However, through the adoption policy, in reality, the authentic tribe's theory concerning preserving hereditary estate would have come under thread. Among the Israelites the risk of the childlessness was met in the earlier period by polygamy and later, by facility of divorce.[277] The injunctions regarding inheritance which can be perceived in the fourth chapter of the *Quran*, has been unveiled because of the battle of Uhad in 3 A.H., which caused orphans as well as widows in huge numbers and they were in deprivation of complete aids of survival. The succession cannon granted permission to females to succeed and allotted definite portions concerning both women and men kindreds. The chapter has been rightly termed as "The Women", and considered the fact that males along with females were bought into existence from a solo being. This consideration guided the people mentally to acknowledge the rightness of females to inherit property. It then draws notice to orphans,[278] and returns to the entitlements of females, recommended to grant the bridal-present as a free gift and afterwards it again reverts to the orphans issue and promotes female's right in phases, states as below:

[277] S.A. Ali, '*Inheritance Among Indian Muslims'*, Vol. IV: 3, Islamic & Comparative Law Quartely, 129 (1984).
[278] *Ibid*.

> For men is a share of what the parents and the near relatives leave, and for women a share of what the parents and the near relatives leave, whether it be little or much—an appointed share (*Quran*, 4:7).

Through the above verse, even though the portion is not been fixed but the base for succession authorization of the female has been put down. Afterwards, it includes the succeeding three *ayats* which again refers towards the orphans, and then approach towards two fundamental *ayats* on which the *Islamic* cannon of succession focuses on:

> Allah enjoins you concerning your children: for the male is the equal of the portion of two females; but if there be more than two females, two-thirds of what the deceased leaves in theirs; and of there be one, for her is the half. And as for his parents, for each of them is the sixth of what he leaves; if he has a child; but if he has no child and (only) his two parents inherit him, for his mother is the sixth, after (payment of) a bequest he may have bequeathed, or a debt. Your parents and your children, you know not which of them is the nearer to you is benefit. This is an ordinance from Allah; Allah is surely everknowing, wise (*Quran*, 4:11).

> And yours is half of what your wives leave if they have no child; but if they have a child, your share is a fourth of what they leave after (payment of) any bequest they may have bequeathed or a debt; and theirs is the fourth of what you leave if you have no child, but if you have a child, their share is the eighth of what you leave after (payment of) a bequest you may have bequeathed, or a debt (*Quran*, 4:12).

Hence, it is the obligation of every *Muslim* to allot the hereditary estate rigidly as per with the above-mentioned commands.

INHERITANCE AMONG DIFFERENT *ISLAMIC* SCHOOLS OF LAW

As per the *Sunni* law, but not *Ithana 'Ashari* law, will or *wasiya* can be made only in support of those who are not legitimate successors, as because the portions for the legitimate successors are pre-determined. The customs also encourage the perspective that bequests or *wasiyat* concerns those who are not successors.

As proclaimed by Sa'd Ibn Abi Waqqas regarding one more Tradition of Bukhari in the *Sahih* consolidated the perspective that wills are not for relatives. A person can execute a will to anybody who is not authorized to any portion in his hereditary estate; either a believer or nonbeliever, this specific kind of *wasiyat* would be legal as per every sect's canon. Except *Shafi'i* school, the other schools acknowledge an apostate to be recipient of will. The sole requirement is that no person can grant higher than one-third of the hereditary estate in bequest.

Wasiyat is an ancient Arab custom (*Quran*, 36:50), appears to have been fading away during the period of the Prophet. Thus, for this reason, the Arabs are encouraged to grant will by the *Quran* and the *Hadith*. The *Hadith* in the *Sahih* of Bukhari appeals the folks to note down their will and retain them below the pillow during the period of their retirement. The *wasiya* in pre-Islamic Arabia was not so much concerned with the distribution of property as with instructions to survivors,[279] however, after *Islam*'s emergence, the *wasiyat* presumed the mode of commands regarding distribution of hereditary estate in recommended confines.

From this consideration, it shall be considered that *Islam* has given choice to an individual to choose someone whom he admires to bestow his estate's one-third, and if that individual is not any how authorized to a portion in the hereditary property; this is known as *khilafa ikhtiyariya* or optional succession i.e., a choice or option relying on both with the benefactor and with the beneficiary; the rest of the

[279] *Id* at 134.

two-third of the hereditary estate must be granted to the inheritors. This is called *khilafa jabariya* or compulsory succession as because the heirs are obligated to acknowledge their portions that bear no responsibility.

Thus, it has to be considering now that how compulsory succession has been effective in the *Hanafi* law and how it has been implemented in India.

THE INDIAN LAW OF *ISLAMIC* INHERITANCE

During the reign of *Muslim* administration, *Islamic* canon was in practice in India, even though not in its entirety, but covering crimes, slavery, evidence etc. When the British rule took place in India, they flung away the *Islamic* law into a great mess. All the significant issues were determined by the British judges and magistrates as per the English law or local customary canon; only the religious issues and scared rituals were entrusted upon the *qadis*, *muftis*, *sadramin* and *sadr al-sudur*. Moreover, the most unpleasant event was in regards to the implementation of personal as well as customary canon, as there was no regularity. But in 1937, such irregularity was abolished upto a certain level afterwards the sanctioning of the Muslim Personal law (Shariat) Application Act 1937 but not fully as because in section 3 of this Act, an option has been given to the *Muslims* of India to either follow strict *Sharia* law or continue with the old rites of customary canon, which is clearly an injustice done against the *Muslim* females of India. It might be possible that the initiator of this particular section had approved of such option to protect the shares of *Nawabs* and *Taluqdars* evidently, as their political assistance was a valuable asset for the Muslim league. As India got independence, the Shariat Act, 1937 is implemented as it was sanctioned in 1937. In two different sections it stated that:

i. Issues relating to which *Muslim* law will be mandatorily implemented.

ii. Those regarding which a *Muslim* has choice to follow the *Muslim* law for himself, his minor children as well as their descendants.

The matters covered in the latter were adoption, wills and legacies.

AMENDMENTS IN *MUSLIM* PERSONAL CANON

On 9th of January, 1964, in a conference conducted at New Delhi on *Muslim* personal law during the event of the XXVI International Congress of Orientalists, a few of the orators recommended amendments in *Islamic* personal canon concerning to disinheritance of orphaned grandchildren, unilateral *talaq* and polygamy. Anyway the hesitation to alter conservative mind, the settled policies and deep rooted ideologies is comprehensible, but those taking part in the conference were astonished that a contemporary philosopher hailing from a leading country of Asia, raised the well-known query:

> If the law, the Divine Law, has to march with the times, what do the times have to change with?

In reply, Professor Sayyed Hossein Nasr's reasoning was that as per *Muslims*, the substance or the linguistic procedures is not controlling the world but the will power of the humans. He further stated as follows:[6]

> If you change the law in 1964, in 1974 you will have exactly the same problem.

In the year 1972, when the parliament initiated the Adoption of Children Bill, the *Muslim* society in India was scared that it would be one more move in the line of step by step substitution of the current personal canon through secular canon as intended in the Indian constitution in the article 25(2)(a)—

> Nothing in this article shall affect the operation of any existing law, or prevent the State from making any law, regulating or restricting any economic, financial or other secular activity which may be associated with religious practice.

Since that time, various convocations and conferences have claimed the removal of the Bill and also asked a commitment from the government that there shall be no

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alteration in the *Islamic* personal canon. By ignoring general opinion of the masses, no government can successfully impose a canon. Diecy set down appropriately as—[280]

> Public opinion is always in advance of the law.

Unfortunately, the Muslim religious leaders and intellectuals have never been widely consulted, with one exception, in regard to changes in the Muslim personal law.[281] On contrary, the Indian *Muslim* heads have denied hearing even to those manifestos for amendment which urged them nothing but hardened law with kindness and by this there is an attempt to acquire estate for adopted children or orphaned grandchildren. *Quran*, in truth, has always been vocal about kindness and one can only hope that the *Muslim* religious heads would whole heartedly embrace, and for sure themselves promote, manifestos for sound amendments established on humanitarian base (certainly as per the Godly recommended system).

There are four matters, on which amendments is being tried to obtain i.e., orphaned grandchild, adopted child, unilateral divorce and polygamy.

ORPHANED GRANDCHILD

Even though *Quran* has not acknowledged orphaned grandchildren as successors, but there is no injunction in the *Quran* which specifies that such children cannot gain inheritance through will or *wasiyat*. The *Quran* (4:10), in truth strongly encourages safeguarding economic interest of orphans and thus stated:

> Those who swallow the property of the orphans unjustly, they swallow only fire into their bellies. And they will burn in blazing fire.

Islamic fundamentals protect an orphaned grandchild in matters of obtaining inheritance estate. If it is to be perceived in the Bukhari, which is next to the *Quran* in significance in matters of enlightenment, one will perceive the following in the chapter of succession known as *Kitab alFara'id*:[282]

> Zayd (bin Thabit Ansari) says that grandsons are like sons, and when there is no son the grandsons equal sons, (that is) grandsons inherit like the sons and like them exclude (certain heirs).

LAW OF GIFT AND WILL AS COMPLIMENTARY TO LAW OF INHERITANCE IN *MUSLIM* COUNTRIES

In order to understand the law of inheritance in *Islam* and its utility, and also to avoid the reply of certain critics regarding some cases of exclusion under the scheme of inheritance, one should understand the complete law of property under *Islam* which comprised of law of bequest and gift. It also includes law of *waqf* and endowments. A person is sole owner of his property whether it is ancestral property, property gifted to him or property acquired by him. There is only one property and no different dimensions between the property which a man have owned and possessed. During his life time, he is the sole owner of his property and he is fully entitled to dispose of the same under the law of gift to anyone irrespective of caste, creed and religion. As soon as he takes the last breath, he lose all his material rights of this world including the property right and this right will automatically devolves among the heirs as per the shares prescribed under the law of succession and inheritance. But he has to disown and dispossessed only then the *hiba* is complete. In order to substantiate the will of a person, he or she is allowed to make a will but not more than one-third of his property, if the individual perceives that his would-be inheritors would not look after those destitute relations who are not heirs and to whom he was supporting during his life time. But a person doing so cannot make the will in favour of one heir leaving aside the others and in that situation, he has to take the concurrence of other heirs, only then the will would be irrevocable. Therefore, those grandchildren, who according to doctrine of representation do not represent in the line of succession,

[280] *Id* at 146.
[281] *Ibid*.
[282] *Id* at 147.

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can be compensated from the law of will and in this regard an obligatory bequest laws are already made not only in some *Muslim* countries but in our continent also, in both Pakistan and Bangladesh. We are discussing them hereunder along with the name of their countries.

All the property laws whether they are *hiba* (gift), *wasiyat* (will), *waqf* and inheritance; females as well as males are equally qualified to dispose of the property in the similar way as they acquire and inherit the property. There is no difference between daughter's children and son's children. Hence, the law of obligatory bequest will be equally applicable to all of them.

Orphaned Grandchildren

If a son or daughter of the deceased person had expired in his life or her life and he is survived by other daughters as well as sons, children of the predeceased daughter or son are kept out from inheritance by implementing the ruling "nearer in degree excludes the remoter", and do not obtain any portion in the grandparent's estate. This defect in the customary law, which has been constantly been condemned by various *Islamic* scholars has been stopped by numerous *Muslim* countries. Such as:

(i) In Algeria, Jordan, Morocco and Syria, the grandfather must grant a *wasiyat* supporting the children of a predeceased son a bequest granting them the later's portion but not more than 1/3 of his complete property.

(ii) In Egypt, Iraq, Kuwait, Tunisia and UAE, a same will has to be made in support of children of a predeceased daughter as well.

(iii) In Egypt, Jordan and Kuwait such a will has to be made also in support of greatgrandchildren in same circumstances.

(iv) In all these countries, such *wasiyat* is denoted as obligatory bequest, if not truly made, it is to be supposed by the law to have been made and implemented.

(v) In Bangladesh and Pakistan, because of a direct amendment of inheritance law, children of a predeceased daughter or son of the deceased shall succeed the portion which that daughter or son would have obtained if living during the time of start of inheritance on condition that male will get twice of the female share.

The ruling of *Sunni* law which does not allow a *wasiyat* in support of an inheritor has been eradicated in Egypt, Iraq and Sudan. In these countries a *wasiyat* made in support of an individual who will succeed any share of the bequest maker's estate is currently legal and implementable on condition that the bequest must not be more than one-third of the property.

This is as per the *Shia* law on the course and is very reasonable.

OBLIGATORY BEQUEST

In Algeria, the United Arab Emirates, Tunisia, Syria, Morocco, Kuwait, Iraq, Jordan and Egypt a *wasiyat* has to be mandatorily made in support of predeceased children's matters who do not obtain a portion under the law of inheritance; and if an individual has not made such a *wasiyat*. The law assumes that he did so before demise and implements the bequest. The laws reformed by the various *Muslim* countries in regards to *Muslim* female's bequest rights are given as follows:

Pakistan:

Muslim Family Laws Ordinance 1961 states in section 4 that during demise of any daughter or son of the propositus prior to beginning of inheritance, the children of such daughter or son, if any, alive during beginning of inheritance, shall per stirpes gain a portion equal to the portion which such daughter or son, as the instance may be, would have obtained if living.

Bangladesh

Section 4 of the Muslim Family Laws Ordinance 1961-85 of Bangladesh also stands for the same provision as stated above in Pakistan Family Laws Ordinance 1961.

Egypt:

Law of Bequests 1946, article 76 reads as below:

> (1) If a demised individual has left behind grandchildren, female or male, whose concerned parent demised prior to or with such individual, a *wasiyat* supporting them will be obligatory on such individual.
>
> (2) The sum of such *wasiyat* shall be equivalent to the portion which the specific parent would have succeeded during instance of her or his demise only afterwards the demise of the propositus. Anyway, it shall not be higher than one-third of the property.

Syria:

Code of Personal Status 1953-75 declares in article 257 as follows:

If an individual demises leaving children of a son who had demised before or with such individual, his or her grandchildren shall be given a bequest out of the bequeathable third of such individual's property as per the below provisions:

Clause (a): The binding bequest shall be equivalent to the sum which such a grandchild would have shared in what its demised father would have succeeded from the propositus if he had demised just after the later, on condition that such a will shall not be more than one-third of the property.

Clause (d): The mandatory bequest shall be prefered over optional bequests in remuneration out of the bequethable third of the property.

Iraq:

The Code of Personal Status 1959-87 states in article 74 that:

> (1) Where a child, female or male, demises prior to its mother or father it shall be assumed to be living during the period of her or his demise, and its authorization in the property of the deceased shall move on to its female and male children, according to the fundamentals of canon to be considered as an binding bequest, not extending one-third of the property.
>
> (2) The binding bequest mentioned in clause (1) above shall be preferred over other wills in assigning of one-third of the property.

Article 91:

In the absenteeism of a son of the propositus, a daughter or daughters shall have an authorization to the residue of the property afterwards the parents and the surviving spouse obtains their portions; and in their absenteeism they will obtain the complete property.

Jordan:

The Code of Personal Status 1976 declares in article 182 states that if an individual demises as well as his son had demised prior to or with him leaving behind his own children, there shall be binding for such grandchildren out of 1/3rd of his lawful property a bequest of the sum as mentioned below:

Clause (a) states that the binding will concerning such grandchildren shall be equal to the portion that their father would have obtained in the property if he were living; but it shall not extend more than one-third of the property.

Clause (d) states that such binding bequest shall take preference over optional bequests in the assignment of one-third of property.

Kuwait:

Law on Obligatory Bequests 1971 provides as follows:

Article 1

(1) If a demised person has not willed in support of the descendants of any of his children who dies before or with him to the extent of the portion of such descendants in what would have delivered to that child out of his property had it been living at the time of his demise, in the states property a will shall be binding for such descendant but within the range of not more than one-third, on condition that such descendant is a non-inheritor and the deceased has not already given him in any other manner, but without consideration, what is so due to him.

(2) Such a will shall be due to the first degree among the descendants of the daughter of the deceased, and to all the lineal descendants of his sons, how low so ever, among whom every individual shall exclude his own descendants but not those of any other individual.

Article 3

(1) Obligatory bequests shall take preference over optional bequest.

Tunisia:

The Code of personal status 1956-81 states in matters of inheritance of daughter and obligatory bequest as follows:

Article 143 A

(1) If there is no agnatic inheritor and the *Quranic* inheritors do not exhaust the property the remaining will go back to the *Quranic* inheritors according to their shares.

(2) Where there is a daughter or daughters or son's daughters how low so ever, the remaining of the property shall go back to her or them even in the presence of brothers and uncles among the agnates and in preference to the States's right to escheat.

Article 191

(1) If an individual dies leaving grandchildren, male or female, whole concerned parent expired before him or with him, a will shall be mandatory on such individual in support of such grandchildren of a sum equal to the portion which the concerned parents would have obtained had he or she demised right after such individual's demise, on condition that such a will shall not be more than one-third of the entire property of such individual. Article 192 further states that an obligatory bequest shall not be achieved except in support of the first generation of grandchildren, male or female, and shall be divided between them, the make obtaining twice the portion of a female.

So, Sir J.N.D. Anderson has explained this to be an inventive appliance in the following words:[283]

> not affecting the structure of the Islamic law of intestate succession which it leaves completely untouched, while it yet makes provision for orphaned grandchildren.

It is purely to permit an orphaned grandchild to succeed a highest of one-third of the property, considering it to be a legacy, as *Islamic* canon permits an individual to write a will of a highest of one-third of the property to a non-successor.

After discussing the bequest law of various *Muslim* countries it clears that even though orphaned grandchildren are not a *Quranic* heirs but they can have their shares through *wasiyat* which must not exceed 1/3rd of the entire property.

ADOPTED CHILD

The old Arabian ethnic formation of '*asabiya*, which was loyal to the class of agnates, made sure that the family dominance would continue. Thus, if there would be adoption of children, then they also had to be given the properties rights under succession, which would eventually

[283] *Ibid.*

discard '*asabiya* policy. Hence, the adopted children were denied of any hereditary property. Currently, the policy of '*asabiya* is rarely functioning in any country, so adopted children are getting their shares in succession, as in Negri Sembilan in Malaysia in section 24(d) allows the collector under the Small Estates (Distribution) Ordinance (No. 34 of 1955) to:[284]

> give effect to 'customary adoption where they are satisfactorily proved.' This is a redical departure from Islamic law which gives no right of succession to adopted children.

In India, *Muslims* adopt a child but as there is no mandatory ruling regarding the succession rights of these adopted children as per *Islamic* personal canon, so these children still faces discrimination as the customary canon of adoption implies. The canon should be reconsidered by making every *Muslim* compiled to apply a statement while adopting children that one-third of his property would be given to the adopted children through will on his demise. And if a *Muslim* who has conflicting views regarding this submission, then he or she may stay away from adopting. However, the provision in the Adoption of Children Bill 1972, that an adopted child will be treated in every way as a natural-born child, and that an adopted child will be considered as belonging to the religion to which the child was born,[285] is as a whole divergent theory and which *Muslims* do not consider admissible. Considering the adopted children to be a biological children theory contradicts the distinct '*Quranic* verse (33:4)' and also disturbs the *Islamic* canon of marital tie, as well as in specific instances might distress a child who desires a home. As an instance, if a *Muslim* might wish to adopt a male child and desires to tie his knot to his biological daughter, however, because of the bar from the canon, he would abstain from adoption. Hence, although the actual motive of the Bill is to give complete place of residence and families for the deserted, needy and mistreated children through adoption but it fails due to laws contradicting *Islamic* perspective.

Further clauses relating to the faith of the adopted children discourages the idea of adoption and also not logical. If the faiths of the adopting families are not similar to the adopted children, how the adopted children can entirely participate the religious functions with other members of the families, or how come the adopted children can fulfill and celebrate the rituals relating to their religion by themselves? Of course, the children will feel the isolation, which clearly makes adoption frustrating and unsuccessful. If the framer's purpose was to stop conversion, it could be achieved through rejecting the families to adopt children from separate religious group. India accounts for a great number of orphans and needy children in every society to select from.

Moreover, in *Shabnam Hashmi*,[286] the Supreme Court discussed the right to adoption based on the Juvenile Justice Act, 2000, the Rules of 2007 and (CARA) guidelines. It also observed the previous Court's verdict in the case of *Lakshmi Kant Pandey*,[287] where the Court had discussed the inter-country adoptions. After the decision, statutory body, Central Adoption Resource Agency (CARA) was established in 1989. It had prescribed essential and legal rules for adoption which were granted lawful identification later on under rule 32 (2) of JJ Rules, 2007.

In the case of *Shabnam Hashmi*,[288] the All India Muslim Personal Law Board (AIMPLB) argued that adoption was just a sole considered systems under the Act, 2000 as well as *Islamic* canon did not acknowledge the theory of adoption but instead only obeys the doctrine of *kafala*, in accordance with which foster care is allowed for *Muslims* and not adoption. In doctrine of *kafala*, *kafil* needed to issue for the monetary and complete protection and comfort of the child while the child stayed the real successor of the biological parents. It argued that the doctrine of *kafala*

[284] *Id* at 148.
[285] *Ibid*.
[286] Shabnam Hashmi v. Union of India and Ors., AIR 2014 SC 1281 (India).
[287] Lakshmi Kant Pandey v. Union of India, 1984 AIR 469 (India).
[288] *Supra* note 12.

should be obeyed when fixing the instances of the adoption of a *Muslim* child.

The JJ Act, 2000, as modified, is an authorized codification. As per the apex court, the Act is a minor move in extending towards the objective that is cherished by Article 44 of the Constitution. Individual thinking and trusts, although must be respected, cannot command the functioning of the terms of an authorized law. Further, it stated that a non-compulsory codification that does not hold a certain crucial cannot be hampered by fundamentals of personal canon which, anyway, would always carry on ruling any individual who selects to so giveaway himself. In précis, the court permitted anybody to adopt a child under the JJ Act, 2000 disregarding of their religion on condition that such individuals comply in accordance with the Act.

Anyway, the court declined to frame adoption a fundamental right rejecting it because of the causes that certainly the arena of fundamental rights was extending gradually but formulating adoption a fundamental right requires to rest due to the contradicting perspective of the exercises and thinking of the masses. The Apex court in this judgment has rigidly adhere to the terms of the JJ Act and has not acknowledged the *Sharia* law, taking into account that the doctrine of *kafala* is followed under the *Islamic* law.

Islam does not want to put an end to the identification of biological father. For a very long time now, doctrine of *kafala* is prevailing under *Islamic* law and that is why in numerous *Muslim* countries like Malaysia, Somalia, Tunisia and Turkey, adaptation of "*Kafala* system" is permitted. Morocco, Jordan as well as Algeria also permitted for adaptation of *kafala* system to make *Muslim* foreign adoptions legal. Professor Upendra Baxi has justly mentioned that "a modified Kafala system in which the state and the law have more than a facilitative role is not anti-Islamic."[289]

It can be deduced that if we study the *Islamic* texts and view the *Islamic* practices relating to the inheritance law, it can be understood that how the inheritance law in *Islam* has been perfectly formulated for the successors with reasoning. In India, the *Muslims* are confused between the *Islamic* and the customary canon regarding inheritance either because of lack of desire to know the true injunctions in this regard or due to their own concern and convenience.

RIGHTS GUARANTEED BY THE CONSTITUTION OF INDIA

After the above discussion relating canons in both India and various *Muslim* countries concerning *Islamic* law in matters of orphaned grandchildren and adopted children, it is clear that in India, customary laws are still prevailing instead of the true *Islamic* canons, which is clearly to protect the male members of the society or to keep the property within the family, which is evidently an unjust practice against inheritance rights of orphaned grandchildren and adopted children (particularly females). It is possible by making amendments in laws relating inheritance in *Muslim* personal law. There have been so many hue and cries by the political persons over the treatment of *Muslim* females in *Islam* and delivered lectures to give justice to *Muslim* sisters in topics like triple *talaq* and *halala* etc. but no one is speaking of the *Muslim* female's economic rights. The state and the religious heads of *Muslims* must take the *Muslim* females property rights issue seriously and should force the legislators to repeal the option under section 3 in Shariat Act, 1937 to choose either the customary law or *Islamic* law in matters of wills, legacies and adoption. Moreover, this option is against the fundamentals of the constitution of India. As the constitution of India guarantees equal rights to both men and women for the effective participation in the growth and development of the country. Moreover, there are guaranteed fundamental rights in favour of every citizen of our country which declares the common fundamentals of equality before law and equal protection of laws.[290] It also restricts biasness against any citizen on the ground of religion, race, caste, sex, place of birth or any of them.[291] Further the constitution gives authorization to the State to

[289] "*Shabnam Hashmi v. Union of India*" XVI ILI Newsletter 11, 12 (2014).

[290] India Const.art. 14.

[291] India Const. art. 15 cl. 1 & 2.

ISSN - 2583-2344

create specific provisos for safeguarding the benefits of females and children.[292] Additionally, the constitution authorizes the State to make specific arrangements for promoting interests and welfare of socially and educationally backward classes of society.[293] It furthermore directs the State to promote justice on the basis of equal opportunity and to promote free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[294] Further, it enjoins upon every citizen to renounce practices derogatory to the dignity of women.[295]

But these constitutional rights have been over-looked while initiating the law of option in section 3 under the Shariat Act, 1937. Hence, keeping in mind regarding the constitutional values, the customary rule which gives the option to the Muslims of India to not give inheritance rights to women and also treats the bequest in favour of the grandchildren as an option must be abolished and instead it must be made as an obligatory bequest like the other Muslim countries, where if one does not make a bequest, the State will consider it to be made and enforce it as per Islam. Such step will only be possible if we eradicate the section 3 under Shariat Act. By such initiative, the Muslim women, i.e., specially orphaned grandchildren and adopted children (particularly females) will get their rightful share in succession and will not be left in destitution.

[292] India Const. art. 15 cl. 3.
[293] India Const. art. 15 cl. 4.
[294] India Const. art. 39 cl. (a).
[295] India Const. art. 51 cl. (a).