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CRITICAL ANALYSIS OF ADOPTION UNDER MUSLIM LAW

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ABSTRACT

Due to COVID, which resulted in many of the children losing both of their parents, adoption level increased in today's society. The significance of adoption has been widely acknowledged, and many people view it as a noble deed. Adoption is frequently chosen by couples who are unable to have children naturally for various reasons. So, why does Islam or Muslim law forbid adoption in its faith at this age where in comparison every other religion promotes it? This research paper looks at the history of the well-known prophet Mohammad and tries to explain why Muslim law forbids adoption in its culture. During his reign, the Prophet Mohammad expressed a range of views on adoption. This research study cites numerous books, papers, and written works in order to understand learn about various legal scholars' perspectives and how they interpret the prohibition on adoption. This research paper will also examine the current state of adoption rights in India and how they are being used, as well as how they have changed in relation to Muslim law in particular and whether or not the society is accepting of these changes. Finally, this paper will examine whether the Muslim legal system currently in place is adequate to address the adoption procedure, as well as the inheritance, legacy, and lineage rights of the adopted kid and the adoptive parents. As the ideas are Sunnah (what is perceived to be the consensus), there has been relatively little research on the rights of adoption in Muslim law.

KEYWORDS: Adoption, Muslim Law, Quran, Sponsoring, Inheritance.

INTRODUCTION

What is Family Law?

Law is a set of rules and provisions which regulates a particular community or country. Family law is one such subset of Law which particularly deals with family relations between the people of the society. Family relations include marriage, adoption, and divorce as well as child custody among many more.

In the ancient times, family law was mostly concerned with property law and succession and also with the personal matters such as whether the person is eligible for marriage, question of who is a legitimate or illegitimate child and their rights, etc. Family law in these days have also shared interest in other areas of law such as Criminal law in cases such as domestic violence or any other abusive conduct within the family.²⁵⁵

What is Adoption in Family Law?

Adoption defined as a legal transfer of a child into a family. If we look into the situation in India, orphanages are full of children those who have no one to take care of them. Half of the population of the children in the world don't have parents to take care of them. In India, it is said that every child has a right of Adoption as comparative to other countries India has the highest population of orphan children or those children who have no one to take care of them.²⁵⁶

Adoption rights and procedure is governed under **Guardian and Wards Act, 1890**²⁵⁷ where the court of law gives permission for the adoption of child from an orphanage. In Hindus, **Hindu Adoption and Maintenance Act, 1956**²⁵⁸ also provides provisions for adoption in Hindus as defined under **Section 2** of the Act. However

²⁵⁵ Ian F.G. Baxter, *Family Law*, ENCYCLOPEDIA BRITANNICA (2022), <https://www.britannica.com/topic/family-law> (last visited Nov 9, 2022).

²⁵⁶ Britannica, *Adoption*, ENCYCLOPEDIA BRITANNICA (2022), <https://www.britannica.com/topic/adoption-kinship> (last visited Nov 9, 2022).

²⁵⁷ Guardian and Wards Act, (1890).

²⁵⁸ Hindu Adoption and Maintenance Act, § 2 (1956).

in Muslim, Parsi and Christian Law there is no specific law which regulates adoption so their cases of Adoption are followed under the **Guardians and Wards Act of 1980**.²⁵⁹

Guardian and Wards Act, 1890.

The Guardian and Wards Act of 1890 is applicable to non-Hindu couples who wish to adopt a child. This act does not allow adoption completely but rather makes a child a ward of the couple wanting to adopt. However this act does not provide the adopted child and the adoptive parents the same status as the biological parent-child in the family. It only allows the parents to be the legal guardian of the child till he attains the age of majority. This act is secular and applies to every citizen of India.²⁶⁰

RESEARCH QUESTIONS

What is the Difference between the adoption law in Hindu laws and Muslim Laws?

1. Why does the Muslim Law or religion discourage adoption?
2. What are the Rights given to the Adopted Child under the Muslim Law?
3. Is there is need for a particular law according to Muslim customs and culture for the Adoption process?

RESEARCH OBJECTIVES

The objective of this study is to research into the topic of adoption under Muslim Laws and critically analyze it. The need for this research is because not many research papers are done in this area as these customs and rituals are religious codes. The paper will also look into the famous cases of **Mohammed Allahabad Khan v. Mohammed Ismail** as well as **Shabnam Hashmi v. Union of India** and try to understand

the current situation of Adoption rules in India in Muslim Religion with reference to current laws and provisions which give the rights and status of the adopted child.

SCOPE OF THE STUDY

The study is limited to the whole of India mainly but would look into laws of other Muslim majority Countries and would compare the laws in India. The study would limit itself with the rights and status of an adopted child in Muslim Laws and would analyze these laws. Furthermore, this paper will also look into the procedure followed and requirements of an eligible parent to adopt a child.

RESEARCH METHODOLOGY

This Research Paper makes use of Doctrinal Form (Armchair Research) of Research. The researcher has referred to various articles, books, journals, Acts and research papers to analyse the current situation of Adoption laws in Muslim law. The researcher has referred to similar acts of other religion and countries to compare what Muslim Law says on Adoption.

LITERATURE REVIEW

- *Adoption and The Muslim Law by Danial Latifi*

This Journal article published by the Indian Law Institute, analysis the Children Bill which was introduced in the Rajya Sabha and at that time was in the Parliament. This bill was in the first step towards generalization of the adoption laws applicable to all communities including Muslims and Hindus. Further this article goes on to look into the History of the Arabian culture and whether there are statutes related to adoption are mentioned under the Quran. The paper also looks into the various provisions and rules related to adoption which the Muslim couples can rely on while in the process of adoption. To conclude the paper, the researcher believes that the Bill should be passed without any hindrance from the Muslim side²⁶¹.

²⁵⁹ Herbert J. Liebesny, S. V. Gupte & J. D. M. Derrett, *Hindu Law of Adoption, Maintenance and Guardianship*, 20 AM. J. COMP. LAW 154 (1972).

²⁶⁰ Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. LAW Q. 441 (2005), https://www.jstor.org/stable/25740499?searchText=adoption+in+india&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dadoption%2Bin%2BIndia&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Acd12d54165cd062a89b070e87bafb0c9#metadata_info_tab (last visited Nov 9, 2022).

²⁶¹ Danial Latifi, *ADOPTION AND THE MUSLIM LAW*, JOURNAL OF THE INDIAN LAW INSTITUTE 118 (1974), <http://www.jstor.org/stable/43950316> (last visited Nov 9, 2022).

- *Adoption in Muslim Law by Ali Raza Naqvi*

This Journal article widely defines and states the motives behind the adoption of a child in a general sense. The researcher in his paper looks into the practice of adoption in other communities such as in India Hindus practiced adoption in a way of religious motives, Greeks and Chinese practices were some of the communities which practiced adoption. The paper does its analysis by looking into the customs followed pre-Islamic Arabia which allowed adoption and treated the adopted sons as their own blood, they had the right in the share of the property of their adopted parents. This research paper also briefly explains the story of Prophet Mohammad and what the Allah revealed after the incident. The researcher in this paper also examines the rules in the Classical Muslim Law for Adoption and also what are the current practices among the Muslims in the world for example in Turkey and Palestine.²⁶²

- *Adoption Amongst Mohammedans- Whether Permissible in Law by A. K. Bhandari*

This journal article which is published by the Indian Law Institute, looks into various beliefs and observations of the Muslim Jurists and writers on Adoption in Muslims as well as the Shariat Act of 1937. The paper further goes on to examine the meaning of what is written in the holy Quran about adoptions and the commentary by Mustaf Al- Madinah and Nabawiyah on the Holi Quran. The paper analyses the difference between the real son and an adopted son as given under the Quran but also that the Quran nowhere states that it prohibits adoption amongst Muslims. The custom of adoption is actually very prevalent in many classes of Mohammedans in India's states like Punjab, Ajmer, Kashmir and Bombay being some of them. The prophet himself

²⁶² Naqvi, Ali Raza. "ADOPTION IN MUSLIM LAW." *Islamic Studies*, vol. 19, no. 4, 1980, pp. 283-302.

recognized adoption when he adopted Zaid.²⁶³

- *Supreme Court Gives Adoption Rights to Muslims by Harish V Nair*

On 19th February 2014, the Supreme Court in the case of Shabnam Hashmi v Union of India gave a ruling that Muslims, Christians, Jews, Parsis and all other communities in India have the right to adopt a child. Earlier this right was only restricted to the Hindus, Buddhists and Jains. Any person not respect to his religion can adopt a child under the Juvenile Justice (Care and Protection of children) Act, 2000.²⁶⁴

- *Adoption Rights and Islamic Jurisprudence.*

This paper examines the partial recognition of adoption as under Muslim Law. In the paper the author describes what adoption is as per Muslim law. It also compares the rights and status of the adopted child with the rights and status of the real son as per Muslim law. The paper also talks about a study done I 2011 by Women's in Shura Council which said that Islamic Law and its fundamentals can permit adoption as long as some important ethical guidelines are set up and followed. Further the paper goes on to look into the Rule which are to be followed under Islamic law for Adoption. The paper lastly looks into Islamic Jurisprudence over adoption rights of the children and the adoptive parents in Islam²⁶⁵.

ANALYSIS

History

Adoption among the Muslims was very prominent during the Pre-Islamic Arabia times which was also known as **Jahiliyyah** or the time of Ignorance. The Arabs would adopt the male of their choice as their successor as a sense of Comradeship. The process of such an adoption was that the Arab intending to adopt had to

²⁶³ Bhandari, A. K. "ADOPTION AMONGST MOHAMMEDANS—WHETHER PERMISSIBLE IN LAW." *Journal of the Indian Law Institute*, vol. 47, no. 1, 2005, pp. 110-14.

²⁶⁴ Harish V. Nair, *Supreme Court gives adoption rights to Muslims*, INDIA TODAY, February 20, 2014, <https://www.indiatoday.in/india/story/supreme-court-gives-adoption-rights-to-muslims-181849-2014-02-19> (last visited Nov 9, 2022).

²⁶⁵ Vijaysinh G. Sodha, *ADOPTION RIGHTS AND ISLAMIC JURISPRUDENCE*, 5 INT. J. RES. ANAL. REV. 2348 (2018).

declare publically that the person of their liking is the child of his from that moment on, then only was he given the legal rights over that person or son furthermore the person was also entitled with the responsibilities and rights of the adoptive family and was authorized to be the bearer of the Family name.²⁶⁶

Later on, in the Era of Prophet Mohammad, he stated that Arabs should stop following such unreasonable, unnatural and inhuman practices of Pre-Arabia period. He believed and viewed that domestic relations should be given very high stand and explained elaborately that adoption is similar to what was practiced during the "Days of Ignorance" and thus, discouraged the whole idea of adopted child and adoptive parents but rather put importance to blood relations.

The controversy of Adoption basically started when the Prophet married his cousin Zaynab b' Jashn who was also a former wife of his adopted child Zayd who died in a war while serving for his nation in the military. After this controversy, Allah revealed a verse that Mohammad is not a father of anyone among the people but is a messenger of Allah himself, he is the seal of the prophets and Allah is aware of all the things. He stated that since Zayd b' Haritha was a child when Prophet had adopted him until he has attained adulthood that is the reason why people called him Zayd B Mohammad. But now people should call them by their father's name and if one does not know their father's name, such people are brethren in the faith and are their clients. This is when adoption in Islam started getting discouraged by the people.²⁶⁷

What does the Quran say about adoption?

As per the Quran, adoption is abrogated because the Prophet did not approve of adoption. S. 33, A. 4-6 of Quran is relevant to adoption, it reads as,

²⁶⁶ Imad-Ad-Dean Ahmad, *The Islamic View Of Adoption*, ISLAMICITY (2005), <https://www.islamicity.org/2556/the-islamic-view-of-adoption/> (last visited Nov 9, 2022).

²⁶⁷ Latifi, *supra* note 7.

*"Allah has not made for any man two hearts in his breast nor has he made your wives whom ye divorce by Zohar your mothers, nor has he made your adopted sons your sons; such is (only) your (manner of) speech by your months. But Allah tells (you) the truth. He shows the (right) way to call them by after their fathers: that is just in the sight of Allah, but if ye know nor their father's names (then they are) your brother's in faith or your friends but there is no blame on you if ye make a mistake therein: (what counts is) the intention of your hearts: and Allah is oft-forgiving, most merciful. The prophet is closer to the Believers than their selves, and his wives are their mothers. Blood relations have closer personalities in the Book of Allah than (the Brotherhood of) believers and Muhajirs."*²⁶⁸

As said in the above passage it can be contended that the Holy Quran does not allow adoption in a technical sense but it also nowhere directly prohibits adoption in Muslim Law. The prophet only went on to state that the Adopted son is not to be put on the same level as the biological son as that would create problems with the real and adopted son who is not a natural son. Adoption as such is not banned in the Quran in absolute terms. The prophet intended to avoid the development of a false relationship in exchange for loss of real blood relations.

Different Interpretations

The **Hanafite jurists** have interpreted the story of Zayd b' Haritha in such a way that they have excluded the adopted children from any rights of Inheritance from their adoptive parents and also stated that adopted children were always sons not daughters. Furthermore, they also exempted the adoptive children from the duties and obligations a biological child has towards its parents.²⁶⁹

²⁶⁸ THE QUR'AN, XXXIII:37

²⁶⁹ Latifi, *supra* note 7.

As per **Shariah Law** the lineage of the adopted child now not involve the adoptive parents. In Shariah Law, adoption has no legal grounds and as per these rules the adoptive child has no attribution towards the adoptive parents he is only responsible to his natural parents. In the case, where the adoptive mother breastfeeds the adopted child, the child becomes their foster child however he still won't be eligible to inherit from the family. In other case, where the mother does not breastfeed the child the adopted child will be assessed as any other child with regards to Nikah and Hijab which means the adopted child is allowed to marry his adoptive parent and their children.²⁷⁰

As per **Maliki School of Law**, changing the last name of the adopted child is prohibited unless and until absolutely necessary in for example for Visa, but in such cases as well the child has to know about his natural or biological parents.

Current Scenario

Provisions for the Adopted child under Muslim Personal Law

It was only in recent times that the law on adoption came into existence in India, although other countries such as France and Germany followed civil laws in great extent. In the year 1889 and 1890, House of Lords legalized the bills on Adoption which were introduced by Lord Meath.

Referring to the **Adoption of Children Act of 1926**, the Court allowed the adoption of an infant who was under the age of 21 years of age, British Nationality and lastly was a resident of England and Wales. The applicant for the adoption and rights of the child was more than 25 years of age and also was twenty-one years older than the infant. However, the court stated that unless there are two spouses who are jointly applying for adoption, a British resident person who is domiciled in England Wales can apply for adoption. Furthermore, a British male is forbidden to apply for adoption of a female

child until and unless the court find a special reason for the same. The court also emphasized on the taking of consent of the parents or guardian or anyone who is authorized to have the custody or those who are liable to support the life of the child (if any) of the child prior to adoption is required. It may be possible as one of the two spouse may not apply without the consent of the other but the court may at its discretion with any of these consents allow the application in the particular circumstances provided by the Act.²⁷¹

Parents have to acknowledge the fact that their parental rights have been permanently robbed. Muslims in India are not covered by any general adoption laws, although in consonance with the customs and usage, it is acceptable for the Hindus to adopt. Adoption is an important component of personal laws. Although there are no adoption laws for Muslims, Muslim couples can petition the court in India, a country that supports equality, using the **Guardians and Wards Act of 1890**. The Islamic legal system does not permit adoption.²⁷²

The major downside of the **Guardians and the Wards Act of 1890** is that the Muslim couples can only adopt a child under foster care. The possibility of the adoption ends after the child completes the foster care age. As for Hindu adoption is concerned it is covered under Hindu Adoption and Maintenance Act of 1956. According to Section 2 of the aforementioned Act, Hindus are not permitted to adopt Muslim, Christian, Parsi, or Jewish children. Hinduism accords adoption the proper recognition it deserves, but Islam does not.²⁷³ Muslims have no other option other than to rely upon the **Guardian and Wards Act of 1890**, as their only option. Due to the aforementioned act, the adoptive kid is given the legal status of a biological child of the adoptive parents. Whereas the adopted child is not given the opportunity to inherit the property of the adoptive parents as per the act. There is an

²⁷⁰ Dinesh Singh Chauhan, *Adoption in Islam Prohibited*, <https://www.legalserviceindia.com/legal/article-540-adoption-in-islam-prohibited.html> (last visited Nov 8, 2022).

²⁷¹ Liebesny, Gupte, and Derrett, *supra* note 5.

²⁷² Bajpai, *supra* note 6.

²⁷³ Liebesny, Gupte, and Derrett, *supra* note 5.

existence of a Guardian-ward relationship not a parent-child relationship.²⁷⁴

Muslim law recognizes a mother's unalienable right to custody of her minor children also known as Hizanat. She cannot be deprived of it even by the child's father although the only circumstance that can deny the mother of this right is misconduct. According to the Shia school of thought, the mother's right to custody only lasts throughout the raising period, which ends when the kid reaches the age of two, and not after. Whereas the Hanafi school extends this period to the age of seven years of the minor. In the case of girls the Shia school of thought upholds the right of the mother until the age of seven years of the girl and Hanafi encourages it until the girl attains puberty. With regards to the rights of the natural guardian, the father, their rights extend to the property and the persons. The Fathers overall entitlement to oversight and control remains even though the mother has the custody of the child. The father has the option of naming the mother as the testamentary guardian of the child.²⁷⁵

Landmark Cases

Mohammed Allahdad Khan v. Mohammad Ismail, 1886²⁷⁶

One certain Ghulam Ghaus Khan had two marriages and a concubine. The former lived after him, whilst both of his wives passed away before him. On November 6, 1879, he passed away, leaving a large family that included both legitimate and illegitimate children—the former by his second wife Moti Begam and the latter by the concubine Musammat Nanhi.

Eight people made up the plaintiffs: three of Ismail Khan's complete sisters; Nanhi, also known as Nanhi Begam; the widow of Ghulam Ghaus; and her three boys and one daughter, who identified as Ghulam Ghaus Khan's legitimate offspring. These litigants asserted

ownership of their individual interests in Ghulam Ghaus's estate.

The first claim was that the defendant (Ismail Khan) asserted as a defence to this lawsuit that Nanhi Begam was not Ghulam Ghaus Khan's legally married wife and that his children by her were not legitimately his children, and that as a result, her claim and those of her children to inherit Ghulam Ghaus Khan's estate were unjustifiable; that by family custom, which the eldest son was to succeed and was acknowledged and affirmed by the eldest son. According to the evidence in the case, the court determined that Nanhi Begam's children by Ghulam Ghaus Khan had been treated equally as legitimate by their father and his legal daughters and son and that it must be presumed that Nnahi Begum was the legitimate wife of Gulam Ghaus Khan and that her children were to be treated as the legitimate child of the same.

Shabnam Hashmi v. Union of India, 2014²⁷⁷

In this case, the plaintiff Shabnam Hashmi went to her first adoption centre in New Delhi she was informed that they had no Muslim children in the centre. That was when she got to know that Muslims cannot adopt or be adopted and if they choose to do so, they can only do it in accordance with The Guardians and Wards Act of 1890, which neither grants legal status to biological parents nor grants adoptees any inheritance rights. In order to grant the Muslim parents the same status as biological parents and to have Article 21's recognition of adoption as a fundamental right upheld, she filed a Writ Petition with the Supreme Court in 2005.

After an eight-year legal battle, the courts decided to grant Shabnam Hashmi's request to adopt a child, describing the judgement as "a high milestone in the development of the legislation relating to adoption." She was granted only the Guardianship rights over the child which is not equally recognized as the real, biological child.

²⁷⁴ Laily Washliati, *The Right of the Heirs to the Adopted Child in the Property of the Adopted Parents under the Law of the Heirs in Indonesia*, 7 INT. J. RES. REV. 212 (2020).

²⁷⁵ John D. Mayne, *Adoption in India*, 1 J. SOC. COMP. LEGIS. 237 (1899), <https://www.jstor.org/stable/752197>.

²⁷⁶ Mohammed Allahdad Khan v. Mohammad Ismail (1886) ILR 8 All 234.

²⁷⁷ Shabnam Hashmi v. Union of India (2014) 4 SCC 1 (Cri) 225

CONCLUSION

Considering the findings above, it can be seen that there is a need for a law which gives a crystal clear idea as to what are the rights and duties of the adoptive parents and the adopted child. The law which defines the relationship which is between the Muslim Adoptive parents and the adopted child. It is to be noted that nowhere it is given in laws about the adoption of children from another religion. The Holy Quran talks about the adoption of a child from Muslim parents. As stated earlier, Quran does not prohibit adoption, though it also does not permit adoption of a child from an orphanage and if they wish to adopt a child from orphanage, the couple has to rely on the **Guardian and Wards Act of 1980**. Thus, as **Hindu Adoptions and Maintenance Act of 1956**, Muslims personal law should also include similar Act in consonance with the beliefs of the Muslim culture.

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