

Adoption of Child in Islam: An Overview of Adoption Laws in Pakistan

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Abstract

This paper has been written for comparative analysis of adoption in Islam with adoption as it is known in modern jurisprudence throughout the world having its secular background. Concept of adoption and its scope in Islam has been explored. Further importance of adoption in Islam has been re-iterated in this paper with support of Quranic verses, Hadis and with Instances from Sunnah. Special attention has been drawn towards prevailing laws in Pakistan regarding adoption, protection and security measures embodied in those laws. An overview of Superior Courts Judgement has been made in order to demonstrate the bent of court towards adoption of child and interpretation of law concerning child adoption. This paper also touches the growing international concerns of child laundering and for this purpose brief intro of recent steps taken in Pakistan, i.e. establishment of Sindh Child Protection Authority and enactment of The Prevention of Human Trafficking in Persons Act, 2018 has been given.

Key Words: *Islamic law, Adoption of child,
Human Trafficking.*

Adoption in general terms is a process through which a person assumes the parenting of another person, usually a child, from that person's biological or legal parent or parents. In this process biological

or legal parent whatever the case may be transfers not only all rights and responsibilities of child but status of filiation too.

The term Adoption is defined in Black's Law as:

*"The creation of parent-child relationship by judicial order between two parties who usually are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child. This relationship is brought about only after a determination that child is an orphan or has been abandoned, or that the parent's parental right have been terminated by the court order. Adoption creates a parent-child relationship between the adopted child and adoptive parents with all rights, privileges, and responsibilities that attach to the relationship, though there may be agreed exception. There is distinction between adoption and legitimation, and between adoption and fostering. Adoption usu. Refers to an act between persons unrelated by blood. Universally, a decree of adoption confers legitimate status on the adopted child"*¹

There is a conventional belief that Islam does not recognize adoption. However, this is not only misperceived concept but also in negation to respect bestowed in Islam upon orphans and other children with no source of bread and butter. Islam has very much recognized adoption except conferring right of inheritance and giving name of parent to adopted child other than his/her biological parent.

The importance which Islam has ordained to adoption reflects from the fact that Messenger of Islam Holy Prophet (PBUH) was himself an orphan and was adopted and raised by his Uncle Abu Talib. This importance increases even further from the fact that Holy Prophet (PBUH) himself adopted Hazrat Ziad Bin Harisa, who was a slave gifted to prophet by his wife Hazrat Khadija (R.T.A).

Other instances of such adoption are:-

*The Holy prophet handover the daughter of Hazrat Hamza in custody of Hazrat Jaffar (R.T.A).*²

Hazrat Ali, a cousin of Prophet (PBUH) was in custody of Holy Prophet himself even during the life time of his father Abu Talib.

The Holy virgin marry (PBUH) was adopted by her Uncle Hazrat Zakria (PBUH) as stated in Holy Quran.³

Through Holy Quran Allah almighty repeatedly emphasizes for the good conduct with orphans and rights with regards to their upbringing has been made obligatory upon society. Quran states:-

And treat no orphan with harshness.⁴

Seeth though one who denies the judgment (to come)? Then such is the man who repulses the orphan with harshness.⁵

And they (righteous people) feed for the love of God the indigent, the orphan and the captive.⁶

Those who unjustly eat up the property of orphans indeed they eat up a fire into their own bellies, they will soon be enduring a blazing fire.⁷

They ask thee what they should spend (in charity), say: whatever ye that is good, is for parents and kindred and orphans and those in want and for wayfarer.⁸

Besides these commands of Almighty Allah in Holy Quran, there is another instance referred to Holy prophet:

The Holy prophet (PBUH) once by demonstrating combination of two fingers said I and the supporter of orphans would be in paradise like this.⁹

As observed above Islam prohibits giving the name of any adopted child other than his/her biological parents. Allah Almighty says in Quran:-

*Allah has not put two hearts in a person's body, nor has He made those wives of yours whom you divorce by Zihar your mothers, **nor has made your adopted sons your real sons.** These are the things which you utter from your mouths, but Allah says that which is based on the reality and He alone guides to the Right Way. **Call your adopted sons after their fathers' names: this is more just in the sight of Allah. And if you do not know who their fathers are, then they are your brothers in faith and your friends.** There is no blame on you if you say something unintentionally, but you will surely be to blame for what you say with the intention of your hearts Allah is Forgiving and Merciful.¹⁰*

There is a hadith in which same prohibition has been again repeated:-

“The one who calls himself after someone other than his father, and he knows it, Paradise is forbidden for him.”¹¹

The wisdom behind prohibition of naming of child other than a name of a biological father is obvious from the fact that Islam prefers protection of lineage and honour of family.

The major differences between the concept of Adoption in Islam and adoption as observed in modern jurisprudence with secular background can be ascertained from following factual differences:-

1. Identification

Identification of child is made through his/her biological parents. Whereas in modern jurisprudence parentage is changed with fact of adoption and identity of biological parents remain hidden.

2. Inheritance

In Islam Adopted child does not inherit from adoptive parents, whereas in modern jurisprudence adopted child inherit and gain benefits like real children involuntarily.

3. Privacy of parentage

In Islam privacy of biological parents strictly prohibited. Whereas same is kept private in modern jurisprudence.

Pakistan being Islamic republic with Islam as its state religion under the constitution, acknowledge principles of shariah as its substantive law in personal matters.¹² There is no separate law governing adoption issues and the reason is obvious that adoption as observed in modern jurisprudence in countries with secular background is not accepted Ipso facto, as it is not in accordance with principles of Shariah. However, to the extent of permissible with limited right conferred upon adopted child it is not only accepted by the courts in Pakistan but enforced with spirit too.

Adoption matters in Pakistan are regulated by Family and Guardian courts. Section 8 of the Guardian and Wards Act, 1890 is wide enough for any person to apply for appointment and issuance guardianship certificate, subject court finds it in the welfare of Minor.

Once a question before the Federal Shariat Court arose whether appointment of Guardian of minor is repugnant to injunction of Islam, in case of Mrs. Ambreen Tariq Awan Vs. Federal Government of

Pakistan (2013 MLD 1885). In that case Federal Shariat Court while rejecting the claim of petitioner was pleased to hold that:

As is crystal clear from the above, it is the duty of persons in authority (legislature/ judges/ executive) to appoint, or terminate guardianship of person and property belonging to minors or disabled persons according to the norms of justice, principles of "Ihsan" and, besides, also forbid harmful acts, evil deeds, oppressive conduct and fulfil the Commands of Allah as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (SAW). Islamic Shariah empowers the ruler or Imam, through "Shura", to enact laws according to requirements of various circumstances and to employ sound and legally valid methodology in matters which come within the purview of permissible matters (i.e. "Mubah)", if not specifically mentioned or prohibited in the "Nass" (text) of Holy Qur'an or Sunnah. An "Imam" is thus vested with powers which he shall exercise for the welfare or "Maslaha" of "Ummat".

In case of Rahim Ullah Choudhary Vs. Syeda Helali Begum (1974 SCMR 305) full bench of Supreme Court of Pakistan while deciding the question whether personal law and status of parties has preference over welfare of minor, the Supreme court while answering the proposition held that:

"The question to be decided under section 25 is, however, not the right of the guardian to obtain the custody of the ward as that rights, is given to him by the statute but the welfare of the ward. A natural or certificated guardian may turn out to be an undesirable person or the Court may find it not for the welfare of the minor to deliver him into the custody of the guardian. It is, therefore, provided specifically that although the guardian is entitled to such custody no order will be made to that effect unless the Court is satisfied that it will be for the welfare of the ward."

In case of Muhammad Tahir Vs. Province of Punjab (PLD 2015 Lahore 336), Lahore High Court while applying the principles of constructive guardianship bound the adoptive father to maintain the adopted child. In this case court hold that:

The doctrine of constructive guardian has long been a part of the law of guardian and ward and has been rejected by only

two cases. The situation arises where one assumes to act as a guardian or enters upon an infant's estate, who has not been regularly appointed a guardian. It may result from a voluntary assumption of the duties, a void appointment by a court without jurisdiction, or acts performed by one who was by himself and other parties concerned, considered an "accommodation guardian". Recognition of the need for protection of the infant resulted in giving the infant an election to treat such a person as a wrongdoer or as a guardian. In later case a relation similar to that of trustee and cestui que trust is established and the guardian de son tort may be compelled to account as a guardian.

Since recent past there is a concerns within International Human Rights bodies for Child Protection that adoption process is misused for child laundering. Through Transnational process of adoption children are exposed to structural violence. They are kept in sham orphanages¹³. In Pakistan no legal cover has been bestowed upon inter se private agreements of adoption. Legal cover to Adoption with its limited scope is only possible with intervention of Guardian Court. Guardian court appoints¹⁴ and regulates¹⁵ the custody of Ward under Guardian and Wards Act, 1890. In the said Act a guardian appointed is bound seek permission of court before removing the custody of Ward from Territorial Jurisdiction of court.¹⁶ In case any Guardian violates the commands of law governing guardian and ward, he would be liable to consequences including his removal as guardian and imprisonment.¹⁷

Besides above protection in Guardian and Wards Act, 1890 an authority has been established by Sindh Government with name "The Sindh Child Protection Authority"¹⁸ whose function is to ensure the rights of children in need of special protection, which includes physical and physiological violence, abuse, exploitation, child labour, beggary, Human trafficking within and outside the Pakistan, drug trafficking.¹⁹

Another worth mentioning Law for protection of children in Pakistan is "The Prevention of Trafficking in Persons Act, 2018. This act has been enacted to prevent and combat human trafficking in person, especially women and children. Any person who recruits, harbours, transports, provides or obtains child for the purpose of labour or commercial sex shall be liable for imprisonment which may extend to ten year, and not less than two years.²⁰ It is pertinent to mention that

in order to provide more effective protection to child victims, the burden of proving actual force, fraud or coercion has been lessened from prosecution.²¹ Further usual defense plea of consent from victim, his parent or guardian, which in cases like these is taken, has been rendered ineffective.²²

Conclusion

Conclusion which can be drawn from above discussion is that prohibition of adoption in Islam is misperceived concept. Adoption is permissible in Islam subject identity of biological parents remain unchanged and public. Adopted child would not inherit from adoptive parents. Islam has appreciated the act of adoption as good deed not only in worldly matters but has also conferred reward for adoptive parents in world hereinafter. In Pakistan personal and family matters are governed under Muslim Personal Law as substantive law. However, matter regarding guardian and adoption with its limited permissible scope is governed under law of Guardian & Wards, i.e. Guardian and Wards Act, 1890. While deciding matter of custody of Wards and appointing Guardian of minor, courts in Pakistan are more inclined towards welfare of minor than status conferred upon parties through personal laws. Further by introducing local laws connected with Human Trafficking and by establishment of Sindh Child Protection authority an effort has been made for effective protection minor children from Human Trafficking and consequent abuse.

References

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