



STATUS OF ADOPTION IN MUSLIM LAW

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ABSTRACT:

Adoption is a complex social, legal, and economic phenomenon that has existed in one form or another since ancient history. Adoption in some religions is allowed and in some other religions the practice of adoption is permitted but there are specific guidelines to follow, one such type of religion is the Muslim religion. With increasing numbers of abandoned and orphaned children and a growing number of hurdles, there is a need to tackle the issue. It is beyond the scope of this article to combat all of the nuances and issues raised by adoption in Islam. The main goal of this article is to understand the adoption of the Muslim religion and also an attempt to enlighten the readers regarding the verses of the Quran and the provisions of the Muslim Personal Law (Shariat) Application Act, of 1937. At the end of the paper, an attempt has been made to point out some existing flaws and the solutions to those flaws have been put forward by the researcher by referencing the recent Apex Court Judgement.

KEYWORDS: Shariat law, Adoption, Quran, Drawbacks, Marham

INTRODUCTION:

It's a known fact that adoption is not the same as in secular contexts. This is due to the very fact that when a child is being adopted he/she will not be considered as the true son/daughter of the adoptive family i.e. he/she will not acquire the adoptive family name but rather gets only the biological family's name. This very concept was provided under Islamic laws per se. Though according to Islamic laws, adoption was not followed, it is to the basic understanding that in general adoption or even raising a child who is not biologically related is part of good deeds. In the Muslim community, people state that adoption is prohibited by Islamic laws but in reality that is not the case. They continue to take care of another child as such. This is known as

kafala (الكفالة) in Arabic which is translated into *sponsorship*. According to verse 33:5 of the Quran, Allah reveals, “Call your adopted sons after their true fathers; that is more equitable in the sight of Allah. But if you do not know the true fathers, then regard them as your brethren in faith and as allies”.¹ This particular verse from the holy Quran gives more clarity on the concept of adoption.

MEANING OF ADOPTION:

In general terms, adoption can be stated as the transfer of a child from its biological family to the adoptive family as a gift. When we look into its definitions in the dictionaries, we understand that it is an act of one who takes another’s child into his own family, treating him as his own, and giving him all the rights and duties of his own child². It can also be stated as the process by which a child will be separated from its biological parents and subsequently, becomes the legitimate child of its adoptive parents and also enjoys the other rights, privileges, and so on that come along with the adoption.

ADOPTION IN DIFFERENT COMMUNITIES:

Adoption is prescribed in Manu Smriti and it means the transfer of a child from one family to another family. The adoption laws in India are not consistent. Adoption is only authorized to Hindus including Buddhists, Jaina, and Sikhs. The objective of adoption according to the Hindu religion is to achieve two major things; firstly, the religious objective is to secure the performance of one’s funeral rites. Secondly, the secular objective is to preserve the continuance of one’s lineage.

In some societies, such as ancient Greece, the adopted son was sometimes allowed to return to his natural family and resume his natural rights, and duties, and it was customary for adoption to serve as a means of preserving family estates and fulfilling religious obligations. As a result, many individuals were willing to relinquish their rights to their adoptive parent's property. Japan followed suit, adopting this practice from China, where both practical and spiritual factors were taken into consideration.

ADOPTION IN PRE-ISLAMIC PERIOD:

The practice of adoption in pre-Islamic is considered as an important custom and it is not considered as taboo. The adopted member is considered a family member but not an outsider. The adopted member will be treated the same as a family member and in the pre-Islamic period, the adopted member will have the inheritance rights that are not practiced at present. The Arabs of Jahiliyyah i.e. time of ignorance used to add anyone they wished to their lineage and family by means of adoption as such. A man can adopt any boy of

¹ Quran verses 33:5

² <https://thelawdictionary.org/?s=>

his liking as his son and can declare it publicly. The boy would then become like a son to him, sharing the responsibilities and rights of his adoptive family along with acquiring the adoptive family name.

HISTORY OF ADOPTION:

The controversy started when the prophet married Zayd's former wife Zaynab, who was also a cousin of the prophet. The verse goes like this, 'Keep your wife and fear Allah, while you concealed within yourself that which Allah is to disclose -' 'when Zayd had no longer any need for her, we married her to you in order that there will not be upon the believers, any discomfort concerning the wives of their adopted sons when they no longer have any need for them. And ever is the command of Allah is accomplished.'³

This is because when the prophet married Zayd's former wife, Zaynab, the people said: It is strange that the prophet has married the former wife of his own son. And Allah revealed this verse: "Mohammad is not the father of any man among you, but he is the messenger of Allah and seal of the prophets, and Allah this aware of all things".⁴

This is because the prophet had adopted Zayd B. Haritha as his son while the latter was still a child until Zayd attained manhood, people would call him Zayd B. Mohammad. God revealed: "Call them by the name of their fathers. That will be more equitable in the sight of Allah. And if you know not their fathers, then they are your brethren in the faith and your clients".⁵

Here we got to know that Zayd b. Haritha was called Zayd B. Mohammad. This is the testimony to the fact that adoption was prevalent during the days of ignorance as well as in the early days of Islam, through which people would inherit others and be inherited by them, and the adopted son and the adopting father were treated as father and son until the God solved this through this verse: Quran 33:5.

Based on a verse in the Quran, it has been held by various authors that the prophet himself disapproves of adoption. The relevant verse of the Quran as contained reads as" Allah has not made for any man two hearts in his breast-" " he has made your wives whom ye divorce by zihar your mothers-" and "he has made your adopted sons your sons." "- Call them after their fathers: that it is just in sight of Allah. What counts is the intention of your hearts: and Allah is oft-forgiving, most merciful".⁶ It has asserted that adoption in the technical sense is not allowed in Muslim law. It is submitted that a careful reading of the following passage, would show that adoption is nowhere prohibited.

³ <https://legacy.quran.com/33/37>

⁴ <https://legacy.quran.com/33/40>

⁵ <https://legacy.quran.com/33/5>

⁶ <https://legacy.quran.com/33/4-5>

CUSTOM OF ADOPTION AMONG MOHHAMEDAN:

In Islamic cultures, adoption practices can vary based on cultural and regional customs while still being influenced by Islamic principles. In many Muslim communities, the approach of adoption is approached differently from secular practices. Here are a few general points about customs among Muslims:

1. **Legal Guardianship:** Islamic adoption often emphasizes legal guardianship instead of full adoption. This refers to a child being taken into the care of another family, but their biological lineage is not changed. The child's original name and identity are maintained.
2. **Maintaining Lineage:** The preservation of the child's biological lineage and inheritance rights is a central consideration in Islamic adoption. This practice is rooted in the belief that maintaining family connections is important.
3. **Caring for Orphans:** Providing care and support for orphaned or needy children is highly encouraged in Islam. Families that take in such children are rewarded for their kindness and compassion.
4. **Informal Adoption:** In some cases, informal arrangements may exist where a child is raised by someone other than their biological parents. This might happen within extended families or close-knit communities.
5. **Legal Procedures:** Depending on the country and jurisdiction, there may be legal procedures or guidelines for Islamic adoption. However, the specifics can vary widely.
6. **Consulting Religious Authorities:** Due to the nuanced nature of Islamic adoption, families often seek guidance from knowledgeable religious authorities or scholars to ensure that they adhere to Islamic principles.

This is evident by certain customs recognized by Mohemmeden laws and subsequently, there prevail some judgments as well in support of this.

In the case **Mohd. Atiq Khan vs Union Of India (Uoi) And Ors**⁷ the question that was raised before the Allahabad high court was “whether a Muslim can adopt any person, and if it is permissible or not”? The division bench completely relied on the precedent given in the case **Muhammad Allahdad Khan And Anr. vs Muhammad Ismail Khan And Ors**⁸ where it was held that among the Muslim community there existed a doctrine of acknowledgment of paternity, and there is no further question of adoption in Muslim law.

The concept of adoption was not recognized by Islam. It was held in **Muhammad Allahdad khan and anr.vs Muhammad Ismail Khan and ors** that there is nothing in Mohammedan law that is similar to

⁷ 2003 (3) AWC 1818

⁸ (1886) ILR 8 All 234

adoption as recognized in the Hindu system. The doctrine of acknowledgment of paternity under Islamic law is the nearest approach to adoption.

The main difference between adoption and the doctrine of acknowledgment is that in adoption, the adopted person is the known son of another, whereas, in the doctrine of acknowledgment, one of the essentials is that the adopted person must not know the son of another.

ARGUMENTS MADE BY THE MUSLIM COMMUNITY FOR PROHIBITION OF ADOPTION:

The Muslim Community Board made many arguments in support of the prohibition of legal adoption among Muslims. There were several reasons for making such arguments, namely;

1. The concept of Marham
2. Giving the name of the own father
3. Inheritance

THE CONCEPT OF MARHAM:

The word *Marham* was derived from *haraam* which means that something is 'prohibited'. The word *Marham* means that a person is prohibited from marriage because they have a close relationship by blood, because of *radaa'ah* i.e. breastfeeding.

In this concept, a woman is not allowed to marry her Marham as they are closely related by blood because of breastfeeding, and that it is because they are related by marriage which is also considered to be unlawful per se. This is said to be the main point that was observed in the arguments presented by the Board that an adoptive child will not become a Marham to the adoptive parent. If a child is adopted, a boy, he will not become the Marham to the adoptive mother and in case it is a girl child, she will not become the Marham to the adoptive father. This is because the mother or the adoptive girl has to put on hijab when the adoptive son becomes mature or the adoptive girl becomes mature.

GIVING THE NAME OF THE OWN FATHER:

The other argument which is made by the Muslim Community Board is that Muslims strongly respect blood relationships and the original identity should not be altered. The child should carry the name of the biological father instead of the adoptive father. The practice of acquiring the name of the biological father sometimes can be problematic for the child.

For example, if the father of the child is a criminal, then carrying the name of the biological father may bring trauma to the child and it may also create mental pressure due to harassment from society.

INHERITANCE:

Earlier, it was said that the adoptive child would have the inherent rights of the adoptive family which prevailed during the pre-Islamic period but the Muslim Community Board argued that the right of a woman to inherit property from the family would get disrupted i.e., among Muslims, if a woman has no son to inherit the property, then according to **Sura-al-Nisa**, the woman shall inherit 1/4th part of the property. But when she legally adopted a son, then she will get only 1/8th part of the property. From this, it's clear that the right of women to inherit property is subsequently sabotaged.

DRAWBACKS IN MUSLIM LAW REGARDING ADOPTION:

The concept of adoption can be argued as a more restrictive and rigid concept in Muslim law. It doesn't recognize the concept of adoption, but it only recognizes the concept of acknowledgment. Even though Muslim law recognizes the concept of acknowledgment it is again restrictive and does not allow Muslim females and Muslim males to adopt a child. The personal laws did not talk about couples who did not have a child and it is one of the drawbacks of Muslim personal law. As mentioned earlier, the arguments made by the Muslim community for not legalizing the adoption in Muslim law, one of the reasons is inheritance. Motherhood is an emotion and an experience for a woman. If we put forth the question of inheritance prevails over motherhood, the answer would be that motherhood prevails over inheritance. This is because motherhood is a beautiful experience for a woman experienced during her lifetime and it cannot be denied just because of an inheritance right. The sad reality of Muslim personal law is that religion prevails over the choice a woman has regarding adoption and inheritance. It is also observed by the people that religious scholars should hereinafter think from the perspective of a woman and give more respect to the further sentiments as such.

Shabnam Hashmi vs. Union Of India And Others:⁹

This is a landmark case regarding the practice of adoption in Muslim law. In this case, a PIL was filed under Article 32 of the Constitution of India, requesting the Supreme Court to lay down optional guidelines to adopt a child by any person irrespective of caste, creed, religion, etc. In the said case, the petitioner had taken custody of her adoptive daughter in 1996. However due to the laws prevailing regarding adoption in Muslim law, the petitioner is only was considered a guardian, and her daughter was considered a ward. So the petitioner filed PIL in the Supreme Court contending that she should be regarded as the lawful parent of her adoptive daughter.

The issues that were laid down by the Supreme Court, in this case, were:

1. Whether adoption can be regarded as a fundamental right?

⁹ WRIT PETITION (CIVIL) NO. 470 OF 2005

2. In case of contradiction between the personal law and secular law which will prevail?
3. Whether caste, creed, or religion affect the process of adoption?

The Supreme Court held that the Juvenile Justice Act, of 2000 is a secular law, so it applies to all people irrespective of caste, creed, religion, etc. Hence, a Muslim in spite of being governed by Muslim personal law can adopt a child. The court also stated that it is up to the prospective parent to decide whether he chooses to be governed by the Juvenile Justice Act or by Muslim personal law.

SUGGESTIONS:

From the above discussions, it is clear that the Holy Quran does not prohibit adoption among Muslims in absolute terms. The practice of adoption among Mohammedans was also held valid. There tends to be a necessity for a uniform law for adoption, irrespective of religious barriers in a secular country like India. Article 44 says, "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India"¹⁰.

The uniform civil code will govern all the people uniformly irrespective of caste, creed, religion, etc. The fundamental right under Article 25 of the Constitution of India is not an absolute right given to the citizens. The ultimate aim of adoption is the welfare of the child. Hence, a uniform law for adoption is inevitable per se in India.

The laws relating to adoption have indeed evolved with time. Several countries have amended and enacted laws regarding the rights of children but along with the children's rights, there should also be parents' rights in adoption as well. The case of **Shabnam Hashmi vs. Union Of India And Others** acts as a precedent to describe the rights of parents as well as the rights of children to adopt and be adopted. In the end, the laws which are governing adoption and the subsequent practices need to be reviewed.

As we discussed earlier, adoption can be due to the infertility of the couple, so adoption will indeed prevail as a ray of light for those couples. Imposing personal laws, and telling them that they are only guardians of the adopted child is not only inconsiderate but also unjust per se. Every woman deserves to be a mother to experience the very nature of motherhood. Personal laws should not impose restrictions on the rights of a parent to adopt just because of the customs and traditions. Being a parent of a child is not just for the title, it is an emotional experience. Therefore, we should make a continuous effort to make sure that every person is entitled to be a parent by his/her choice and not by customs and traditions.