

10. Child Adoption Among Hindus and Muslims: A Comparative Study of Pakistan Prospective

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I. INTRODUCTION

Adoption has become one of the most contentious subjects, particularly in Pakistan. The topic of adoption has piqued the public's interest, owing to a shift in societal paradigms and the laws that control it, wherein Hindu families have no legal remedial measures.

In Pakistan, there is no specific law for the adoption of a child, Muslim Personal Law does not govern Hindu children, and since that though Islam does not recognize the adoption while that no prohibition on the adoption of a child existed⁵, and that Pakistan is also not a Hague Adoption country and no child is adopted in Pakistan, there is no adoption authority in Pakistan; nonetheless, guardianship proceedings become inevitable so adopting a child is a lengthy, difficult, and legally complex procedure.⁴ The Guardians and Wards Act of 1890, as particular, regulates minors' rights and interests in Pakistan. The term adoption being alien to Pakistani law, under the Guardians and Wards Act of 1890, its process is carried out in the name of the custody of the child's person. The adoptive parents file an application with the court under section 7 of the Act, and in the event of a child with known paternity, they name the biological parents of the child as respondents, who normally sign a consenting statement in favour

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⁵ Nadra Authorities In the matter of *Suo Motu* Case No. 12 of 2010, heard on 22nd June, 2011, 2015 GBLR 38, Supreme Appellate Court

⁴ *Mrs. Ingrid Pereira and another v. Vith Additional District Judge, Karachi South and 2 others*, PLD 2012 Sindh 208

of the adoptive parent. In Islamic law, adoption is not a recognised form of filiations⁵.

The adoption differs with guardianship. The Guardians and Wards Act, 1890 allows for adoption to be done in the guise of guardianship. The guardian of a person/custodian (e.g., mother or friend) has no financial duty to support the child/ward out of his or her own pocket in guardianship. The true or natural father will be responsible for the child's upkeep. Nonetheless, under section 22 of the aforementioned Act, the guardian of the individual might be charged with the child's/ward's care.

According to Pakistani law, prospective adoptive parents may not be appointed guardians of Muslim children, and Non-Christen may not be assigned guardians of Christen children, however, a Non-Muslim could not be given custody of a deserted or parentless child or a child whose parentage was not known from an orphanage, or otherwise, Child born in nonMuslim family, could be adopted by a Muslim and his custody was to be regulated according to Pakistani law.⁶ Unless there is evidence to the contrary, a child abandoned at an orphanage is assumed to be a Muslim. Adoption is, in general, a communal concern because it lacks official legislation. But outside of the family courts, people frequently choose informal adoptions based on their beliefs. However, in Western nations, such informal adoptions do not meet the standards for giving an adopted kid an immigration visa.⁷ As a result, prospective adoptive parents must follow their own country's immigration laws as well as the restrictions of Pakistan's colonial Guardians and Wards Act of 1890.

The purpose of this research is to respond to the following questions: What if a Hindu family wants to adopt a parentless child abandoned somewhere or a Muslim new-born baby? Is

⁵ Asad Ali Khan, Principles and practice of adoption law in Pakistan, United Kingdom Immigration Law Blog, available at: <https://asadakhan.wordpress.com/2020/09/06/principles-and-practice-of-adoption-law-in-pakistan/> accessed on 05-01-2022

⁶ See f.n 1. *ibid.*

⁷ Miss Nancy Ruth Bany v. District Judge, Islamabad and another, PLD 2011 Islamabad 6

guardianship a viable alternative to adoption? What are the differences between Islamic and secular law in terms of the adoption concept? With the objective of highlighting the pressing need for the appropriate statute to identify the adoption which has been invoked informally, which could prejudice the not only rights but life at stake of infants.

For this comparative study under the qualitative methodology, the legal rulings, jurists', and religious scholars' opinions have been sought for this purpose; now, surveys or interviews are being conducted.

2. CONCEPT OF ADOPTION IN HINDU LAW

Adoption has been considered as a fresh birth; a word sanctioned by Hindu Law Theory. The term "adoption," inherited from Dharmasastra's uncodified Hindu laws, notably Manusmriti. In Manusmriti, adoption is defined as "taking someone else's son and nurturing him as one's own." In India by introducing the word "kid" instead of "son," the Hindu Adoption and Maintenance Act, 1956 has broadened the scope of "adoption." A kid can be either a girl or a boy, and not just a son.⁸ To adopt a kid, you must be a Hindu and have the financial means to do so. A Hindu male who intends to adopt a kid must comply with Section 7 of the act, while a Hindu female who wishes to adopt must follow Section 8 of the same.⁹ The Hindu Adoption and Maintenance Act, 1956 lays forth a series of requirements that must be followed in order for an adoption to be legitimate. For example, a Hindu man or female who wishes to adopt a son must not have a live son, grandson, or even great-grandson at the time of adoption.

3. CONCEPT OF ADOPTION AMONG MUSLIMS

Adoption is not a new notion; it has existed since the beginning of time as part of the religious laws. Adoption was not prohibited in Islam since it was determined to be in the best interests of humanity and the Muslim community around the world.

⁸ Introduction to Hindu law, available at: <https://blog.ipleaders.in/hindu-law-notes/#Adoption> accessed on 06-012022

⁹ The Hindu Adoptions and Maintenance Act, 1956

Adoption was a continuation of a popular ritual in the Arab peninsula, hence few great examples of adoption from history are¹⁰.

The Holy Prophet (PBUH) maintained the tradition by adopting Zaid bin Harisa, a slave provided to the Holy Prophet by his wife Hazrat Khadija (R.T.A), and referring to him as Zaid-bin-Muhammad.¹¹ The Holy Prophet (PBUH) commanded that Hazrat Hamza's daughter be handed up to Hazrat Jaafar (R.T.A). A friend of the Prophet (PBUH), Hazrat Abu Huzifa Bin Atba bin Rabea Bin Abd Shams, adopted one child, Salim bin Ma'qal, and married his niece to Salim bin Ma'qal. As an orphan, the Holy Prophet (PBUH) was adopted and raised by his uncle, Hazrat Abu Talib. Even throughout the life of his father Abu Talib, Hazrat Ali, a cousin of the Prophet (PBUH), was in the custody of the Holy Prophet himself. According to the Holy Quran, the Holy Virgin Mary (PBUH) was adopted by her uncle, Holy Zakaria (PBUH) and The Holy Moses (P.B.U.H) was adopted by Pharaoh and his wife Ayesha.¹²

Similarly, an adopted child is considered equal to a conceived child under Hindu law. Under the old Hindu law, only males were allowed to be adopted. The collective belief was that one would go to hell, called "Poota," if they died without a son. Only the male child could prevent the father from entering Poota.¹³ According to Hindu Law, adoption is considered a new birth, which is a word sanctioned by the Hindu Law philosophy.

The theory itself is based on the principle of complete separation of the adopted child from his birth family and substitution into the adoptive family as if he were born there. For all purposes, accurate or logically applicable, the adopted child relinquishes

¹⁰ Dr. Mr. Muhammad Aslam Khaki, Consultant in Sharia Law, See f.n 1. *ibid*.

¹¹ Ibn Sa'd, *ibid*, V. 3, p. 42; Ibn Athir, *ibid*, V. 2, p. 225; Ibn Hajar, *ibid*, V. 1, p. 563. and al-Ahزاب, 5, 40. and

al-Ahزاب, 5. and Ibn Sa'd, *ibid*, V. 3, p. 43; Bukhari, *Sahih*, V. 3, p. 174; Muslim, *Sahih*, V. 3, p. 131. and

Bukhari, *ibid*, V. 3, p. 303.

¹² See f.n 1. *ibid*.

¹³ Hindu adoption law BY LEXLIFE INDIA POSTED ON MARCH 24, 2020, available at: <https://lexlife.in/2020/03/24/hindu-adoption-law>

his natural family and all associated with it as if he were civilly dead or had never been born into the family. Every male Hindu can legally adopt a son if he is of sound mind, has reached the age of discretion, and has no natural or adoptive son, grandson, or great grandson living at the time of adoption.

The existence of a son who has given up his Hindu religion or lost his caste is not a barrier to the father adopting another son. The doctrine of relation back is applicable in Hindu adoption, where it is widely established that an adopted son obtains all of the father's rights, which are traceable back to the day of the adoptive father's death.

4. RULES OF ADOPTION UNDER MUSLIM LAW:

The rules of adoption under Muslim Law are as under¹⁴:

1. The identification of biological parents is not concealed by adoptive parents.
2. The knot of the kid with his actual parents is never disconnected.
3. The adoptive parents are not authorized to incorporate their names in the column of parentage.
4. Inheritance of adopted kid always belongs to his biological parents.
5. Adopted parents are under obligation to provide maintenance to adopted child which includes food, clothing, lodging, medical facilities and other

¹⁴ Vijaysinh G. Sodha, ADOPTION RIGHTS AND ISLAMIC JURISPRUDENCE, available at <https://ijrar.org/papers/IJRAR19J3209.pdf> accessed on 25.08.22.

necessary expenses of a child from birth till his puberty.¹⁵

5. THE GAPS BETWEEN ISLAMIC AND SECULAR LAW.

When it comes to the rights and responsibilities of the adopted kid, there is a significant gap between Islamic and secular law.

In secular law, an adopted child has the same rights as a biological child, including maintenance, a car, inheritance, marriage prohibition, and identity, whereas in Islam, adoption is limited to the provision of maintenance and care (Kifalah) by the adoptive parents, as the concept of adoption in Islam is that of Kifalah and patronage rather than true parentage.

In secular law, an adopted kid is required to serve his or her relationships and identify with his or her adoptive parents, but this is not the case in Islam. The real/natural parents' identity is maintained by the adopted kid. He/she inherits from his/her original parents and also benefits from his/her adoptive parents' property, and inheritance through gifts and 'wills.' Adoption of a Muslim infant by non-Muslim parents is not prohibited in principle, although it is subject to several restrictions. The home environment has no bearing on the decision to follow a certain faith. Holy Moses grew up at Pharos' house. In Pakistan, there is no formal adoption legislation. Adoption is done under the name of Guardianship by filing a Guardianship application under

¹⁵ Dr. Mudasara Sabreen, Maintenance of child in Pakistan: A Much-needed legislation, available at <https://sahsol.lums.edu.pk/law-journal/maintenance-child-pakistan-much-needed-legislation>, accessed on 25.08.22.

Section 7 of the Guardians and Wards Act, 1890. The Guardians and Wards Act of 1890 prohibits non-citizens from adopting a child to ensure the kid's welfare. However, in the event of adoption, the child must be brought before the court regularly since the court retains parental jurisdiction and power and can review its judgment even after the adoptive parents receive a guardianship certificate. In Islam, the notion of guardianship is not the same as the concept of adoption. It also differs from the secular/European understanding and legislation of adoption in that adoptive parent residing in the United Kingdom or European nations must re-register their adopted kid according to the country's requirements.

The Edhi Foundation places around 250 new-borns and children for adoption every year¹⁶. Over 23,320 new-borns and children have been given to childless couples and families thus far. Although new and current data have been uploaded due to the COVID-19 situation,¹⁷ data until 2010 revealed that over the previous decade, two hundred thousand (200,000) children were adopted each year. According to the Intercountry Adoption Bureau of Consular Affairs of the United States Department of State, the following number of children have been adopted from Pakistan by American residents:¹⁸

¹⁶ Children Services, available at <https://edhi.org/children-services/>, accessed on 25.08.22

¹⁷<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-CountryInformation/Pakistan.html> accessed on 06-01-2022

¹⁸ See f.n.5 *ibid*.

Year	Number of children
2010	41
2009	33
2008	47
2007	35
2006	47
2005	22
2004	31
2003	24
2002	25
2001	24
2000	20
1999	30
1998	24
1997	13
1996	17
1995	02

6. CATEGORIES OF ADOPTION

Based on how they are raised or adopted in society, adopted children may be divided into three following categories:

6.1. ADOPTION OF ORPHANS BASED ON THEIR NEEDS

Children are adopted by their blood relations with the promise of providing them with better living situations in this sort of adoption. These children are frequently dopted while they are young to adjust to their adoptive family's lifestyle and have a better education and quality of life. In most cases, such infants are adopted by educated, financially secure relatives who live in large cities or European nations. They might be childless or not.

6.2. ADOPTION BY CHILDLESS PARENTS

Children are adopted on a welfare-to-utility basis at a very young age in this sort of adoption. Because the adoptive parents are frequently childless, they raise the youngsters as their own children. These youngsters are given homes, and in exchange, they benefit them by assisting them with work or household chores.

6.3. UNCLAIMED BABIES

This category includes children that are the result of culturally unacceptable or unlawful relationships. These are typically left in unsupervised regions by their parents in order to disguise their guilt. Such children are referred to as "NALBU" (illegitimate children) in Pakistan's northern regions, such as Gilgit Baltistan, and are tossed into a NULLAH (water channel, especially a dry one) to meet their fate of death. One such nullah in Skardu is known as Nalbu' Nallah (meaning illegitimate children's nullah), which is named after the method it is used for, which is to get rid of illegitimate offspring. Organizations such as Ceena and Edhi are striving to prevent such killings by implementing the "Jhola Scheme," which focuses on nurturing unclaimed children and then passing them over to adoptive parents who are looking for them.

7. CAN A NON-MUSLIM ADOPT A MUSLIM CHILD

Unless the biological parents were Hindus or the kid was abandoned at Mandar or Gurdwara, a Muslim new-born of C category could never be handed to a Hindu prospective parent. In these circumstances, however, if a Muslim is allowed to live, he might not be abandoned at a religious place for Hindus, so long as an exception is attached to it. It's possible that the youngster is Hindu.¹⁹ Otherwise, each abandoned child is persuaded to be Muslim, and the Muslim infant could never be placed in a Hindu's care. However, as previously stated and explained in the Guardian and Ward Act of 1890, a Hindu family can adopt a new-born child from Category A or B.

However, Supreme Appellate Court of Gilgit Baltistan answered the question that There is no barrier for non-citizens or non-Muslims to adopt or seek custody of a Muslim child. In Islam, adoption is limited to the provision of maintenance and care (Kifalah) by the adoptive parents. Adopting a kid is a noble deed in Islam, considered one of the highest acts of piety. Adoption of a Muslim infant by non-Muslim parents is not prohibited in principle, although it is subject to several restrictions. In Pakistan, there is no formal adoption legislation. Adoption is done under the name of Guardianship by filing an application under Section 7 of the Guardians and Wards Act, 1890.²⁰

Yet, changing the parentage of an adopted kid is severely forbidden. When an adopted child reaches the age of majority, he or she has the option of choosing the nationality of his or her adoptive parents or actual parents. Adoption of a kid by a non-Muslim without proof may result in a child's conversion to non-Muslimism. A child born into a non-Muslim family can be adopted by a Muslim.

¹⁹ Dr. Shahid Iqbal and another v. Public at large and another, 2012-14 GBLR 81 (G.B Supreme Appellate Court)

²⁰ See f.n.1. *ibid.*

Under Muhammadan law, custody of a male or female child can be given to relatives on the paternal or maternal line in the order of prohibited degree relationship.²¹ However, there is nothing to prevent a person from applying to the court under the Guardians and Wards Act, 1890. Adoption in Islam has no legal consequences. Adoption of children by natural children of adoptive parents is not forbidden unless they are related to each other to a prohibited degree, however, adopted child would become mehram to the family, if he or she was breast fed by adoptive mother before the age of two years.²² In terms of love, affection, and general conduct, adoptive parents may treat their adopted child as if he or she were their biological child.

CONCLUSION

The study concludes that according to Pakistani law, guardianship does not confer the right to expand that right through adoption, as it has been identified in India and the West Counties. It is assumed that this is a communal issue that is directly proportional to the aspirant prospective parents' faith. Due to the lack of statutes, Hindus have lost not only their right to adopt according to their beliefs, but the infants from a chance of having family or care which fortune brings on them.

At that age, feeding a religion less new born is a holistic human deed that can complete a family in need of a baby while also producing a well-educated, responsible future generation for the country. Every year, the Edhi Foundation promises to place 250 babies and children for adoption. Childless couples and families have received over 23,320 babies and youngsters. Until 2010, foreigners adopted 200,000 children from Pakistan, but no one knew what conditions they were placed in due to a lack of proper legislation. As a result, there is an urgent need to recognize adoption through appropriate legislation.

²¹ Mariam Bibi through Abida Parveen v. Naseer Ahmed and 2 others, PLD 2015 Lahore 336

²² Jamshed v. Saleemuddin and 4 others, PLD 204 Sindh 120