



ADOPTION AND MUSLIM LAW

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ABSTRACT

Adoption is an act by which a person legally becomes a parent to a child who is not his/her biological child. And it relies upon the personal laws. Unlike Hindu law, Muslim personal law does not recognize adoption. But under the Guardian and Wards Act, with the due permission of the court, adoption from orphanage can be possible and after obtaining majority the child is given liberty to sunder and he is left out from the claims of inheritance thereto and the same applies to Parsis and Christians under which adoption is not recognized.

Adoption under Muslim law is very narrow concept as the personal law does not recognize adoption as such and in India through judgments of the hon'ble courts adoption is made available to Muslims through juvenile justice act. In this paper an extensive study has been made as to the concept of the adoption and Muslim law and discussed thereto under different headings to get a proper understanding.

INTRODUCTION:

Adoption provides a child to a childless parent, and it provides a parent less child a parent. Adoption is a process whereby a person assumes a parenting of another child, from that person biological or legal parent or parents. The legal adoptions permanently transfer all rights and responsibilities along with affiliation, from the biological parents to the adoptive parents unlike guardianship. adoption is intended to effect a permanent change in status and requires societal recognition, either through legal or religious sanction. Different countries made different laws regulating the adoption to satisfy the urge of the society, sect, community, religion of the respective nation. For example, India enacted Hindu adoption maintenance Act ,1956; Guardian wards Act, 1890; Juvenile justice Act 2015

In general, adoption means a legal relation formed between child and parents who are not related by blood, where that parent becomes guardian/ legal parent of that child, and that child incurs the same rights and privileges of a parent as that of a natural child.

According to Manu, 'adoption is the taking of son, a substitute for the failure of male issue. Thus, it is the transplantation of a son from the family in which he is born, into another family by gift made by his natural parents to the adopting parents'.¹

According to Quran, "Apart from being a natural father, sometimes adoption creates rights and obligations in a person who is not the natural father of the child".

As per Juvenile Justice Act,2015

¹ AQIL AHMED, MOAMMEDAN LAW 207 (twenty sixth ed,2016)

Sec 2(2) – “Adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

IS ADOPTION PERMITTED UNDER MUSLIM LAW?

Adoption is not recognized under Muslim Law. It was against the institution of adoption. The Musselman Law, does not recognize the validity of any mode of filiation where the parentage of the person adopted is known to belong to a person other than the adopting father, and an adopted child(or mutubanna) has no rights in the estate of his or her adoptive parents.² Mohammedan Law does not recognize this mode of affiliation since is forbidden by Quran.³

*In Muhammad Allahdad Khan v. Muhammad Ismail*⁴, *Mahmood, J.*, remarked that, “There is nothing in the Mohammedan Law similar to adoption as recognized in Roman and Hindu system. The Mohammedan law does not recognize adoption as mode of filiation”.

EVOLUTION OF ADOPTION AS PER DIFFERENT ACTS:

There were many provisions regarding adoption, which was enacted by various countries. The Laws regarding adoption was first traced back in ancient Rome in 6th century. Later during 18th century first law regarding adoption was enacted in United States i.e. The Massachusetts Adoption of Children’s Act, 1851, which focused on the interest of the child.

Before the Shariat Act 1937, adoption among some muslims was recognized by custom. Under the Oudh Act 1869, s. 29, a Muslim talukdar was permitted to adopt. But it seems, to a very great extent, the custom of adoption stands abrogated.

In the Pre Islamic Arabia, the practice of adoption was not prohibited or restricted by the society. The status of adopted child and biological child was equal, both have equal rights.

Later adoption among some muslims was recognized by custom. But it seems, to a very great extent, the custom of adoption stands abrogated. If no declaration under the Shariat Act, 1937, has been made, it is open to a person to plead and prove the custom of adoption and if he succeeds, it will be given effect to⁵. In Jammu and Kashmir, adoption is recognized under custom⁶ and also the right of adopted son to inherit the share of the property from his/her father is recognized.⁷

In *Mohd. Akbar v. Mohd. Akhnoon*⁸, a full bench of the Jammu and Kashmir High Court has recognized “the existence of several custom amongst Kashmir Muslims such as the right of a Muslim widow to inherit the estate of her deceased husband during her life time or till her re marriage to the exclusion of all other heirs. The right of a Khana Nashin daughter to inherit the properties of her diseased father to the exclusion of other daughters, who are not KHANA NASHIN and the right of an adopted son in inheriting a share in the properties of his adoptive father are also recognized as a valid custom. These customs have been justified by the full bench of this court. By virtue of Jammu and Kashmir Laws Consolidation Act, 1977 such customs have been stamped with the character of law and such a law would be within the competence of the legislature under Art 25(2) of the constitution. In this case High Court recognized existence of a custom of adoption, which modified the Mohammedan Law of adoption and consequently inheritance. In this case the

² Mohammad Allahdad v. Mohammad Ismail, (1888) IL 10 All 289 at p. 340.

³ Mir Zaman v. Nur Alam, AIR 1936 Pesh 108.

⁴ ILR(1888) 12 All . 289.

⁵ Puthiya v. T.K. Avoomma 1956 Mad 244; Moulvi Md. S Mehaboob Begum 1948 Mad 7.

⁶ Md. Ismail v. Noor-ud-Din A.I.R. 1986 J&K 14

⁷ Mohd. Akbar v. Mohd. Akhnoon, AIR 1972 J&K 105(FB)

⁸ 1971 J&K LR 537 :AIR 1972 J&K 105(FB)

adopted son is entitled to inherit the properties and the legislations is not violative of Article 25 of the Constitution⁹.”

*In Neno Khan v. Mst. Sugani And Ors*¹⁰, the High Court has held that there is no institution like adoption among Mohammedans, but by virtue of custom Mohammedans may also have the system of adoption.

In Moulvi Mohd v. Mahabood Begum(supra) was the case where Madras High Court indicates “it is possible to proceed that there can be a custom or usage having the force of law with regard to adoption”

In Abdul Hakim v. Goppu Khan (supra) case, the court dealt with the custom of adoption among the biradari of muslim mahawats .The Court while recognizing the adoption among the muslim mahawats spelt out certain principles as under:

1. Adoption is not known to Muslim law
2. By virtue of custom mohammedans may also have the system of adoption
3. A Muslim who alleges that by custom he is subject of adoption must prove it

Later, The Muslim Personal Law (shariat) application Act, 1937 came into force which does not deal with adoption rather it deals with the guardianship.

Sec 2 of Shariat Act,1937 reads as follows:

“Application of Personal law to Muslims- Notwithstanding any custom or usage to the contrary , in all questions(save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage ,dissolution of marriage, including talaq, ila, zihar, lian ,khula and mubaraat, maintenance, dower ,guardianship, gifts, trusts and trust properties, and wakfs(other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

Before the enactment of the Hindu Adoptions and Maintenance Act 1956, a Hindu, who was converted into Islam could give his Hindu son in adoption. Now, after coming into force of the Act, this cannot be done.¹¹ This was held in the case *Nayan Kumar Trivedi v. Distt. Education officer, Anand*,¹².In this case Kazi Moinuddin who was son of Rafiuddin(a muslim) was given in custody of Ms. Rajnikaben Trivedi who adopted him through a registered adoption deed. Consequently he changed his name as Vayankumar Raj Nikaben Trivedi. It was held that the adoption was valid (because Hindu lady was competent to adopt.)

Later the Guardians and Wards Act has been enacted in 1850, which has brought the solution to muslims and all non hindus i.e. Christians, Paris and jews to adopt the child. Since, adoption is not recognized in muslim law and there is no particular provision for muslims regarding adoption , under the provisions of Guardians and Wards Act the muslims, if want to adopt any child, they can only take child in guardianship i.e. they can adopt by taking permission from court under the Guardian and Wards Act,1850

⁹ Mst. Khatji v. Abdul Razak Sufi, AIR 1977 J&K 44,

¹⁰ 1974 WLN UC 5

¹¹ Under modern Hindu law, on the conversion of the Hindu father to another religion, the right to give the child in adoption belongs to the mother, see author’s work. Modern Hindu Law Chapter VIII(5th ed).

¹² AIR 2004 Guj 53.

But it has some drawbacks i.e.-

1. The adoption is not complete and
2. The child adopted does not get the same status as the biologically born child of family,
3. Their will be guardian and ward relation between two persons rather than parent and child relation.

The Juvenile Justice (care and protection of children) Act,2015

Chapter VIII of Juvenile Justice Act,2015 deals with the adoption, which states that irrespective of religion any one can adopt child. In other words, adoption for muslims also comes under this Act.

Sec 56 of the Juvenile Justice (care and protection of children) Act,2015 states as follows-

“(1) Adoption shall be resorted to, for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder, and the adoption regulations framed by the Authority.

(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.

(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the court, shall be punishable as per the provisions of section 80.”

Central Adoption Resource Authority (CARA) has framed regulation regarding adoption which is called as Adoption Regulations, 2017 . According to CARA there is no any particular provision which restricts any particular religion to adopt a child.

Adoption procedure for resident Indians'

Clause 1 of rule 9 states that the Indian prospective adoptive parents irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, shall apply for the same to specialized Adoption Agencies through Child Adoption Resource Information and Guidance System by filling up the online application form, as provided in Schedule VI , and uploading the relevant documents thereby registering themselves as prospective adoptive parents.

THE PROVISIONS OF JUVENILE JUSTICE ACT APPLICABLE TO ADOPTION FOR MUSLIMS ALSO:

- Sec 56(2) of Juvenile Justice Act ,2015 says that adoption of a child from a relative by another relative , irrespective of their religion, can be made as per the provisions of this Act and adoption regulations framed by the Authority.
- Sec 58(1) of Juvenile Justice Act,2015 say Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a specialized Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.
- Sec 59(3) of Juvenile Justice Act,2015 says that a non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner , who are prospective adoptive parents living abroad

irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorized foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

GOVERNMENT ORGANISATIONS DEALING WITH ADOPTION:

In order to deal with the adoption irrespective of religions, the government has established different adoption regulations organizations which provide the guidelines regarding adoption and related matters.

1. Central Adoption Resource Authority

The Central Government has established a Central Adoption Resource Authority for dealing with adoptions and related matters in the center under the guidance of the Authority. It deals with in-country adoptions and inter- country adoptions in co-ordination with central Agency and frame regulations regarding adoption irrespective of religion and related matters from time to time as may be necessary.

2. State Adoption Resource Authority

The State Government in every state to regulate adoption regulations has established State Adoption Resource Authority which works under the guidance of Central Adoption Resource Authority and it shall function as the executive arm of the State Government for promotion, facilitation, monitoring and regulation of the adoption programme in the state. The State Adoption Resource Agency shall be headed by Principal Secretary or secretary of the department of the State Government dealing with adoption.

3. District Child Protection Unit

It is a child protection unit established by the State Government in every District, which ensures implementation of functions as envisaged under Juvenile Justice Act ,2015 and supervise and monitor adoption programme in the district. It assists the State Adoption Resource Agency and the Authority in all matters related to adoption. District Child Protection Unit shall update adoption related information on Child Adoption Resource Information and Guidance System, as specified in Schedule XVI or as given in the format online by the Authority.

In *Shabnam Hashmi v Union of India*,¹³ The Supreme Court decided that any person can adopt the child they want irrespective of religion as per Juvenile Justice Act, 2015". The Supreme Court of India observed that the Juvenile Justice Act,2000 as amended in 2006 is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the Central Adoption Resource Agency guidelines , as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal laws applicable to him. The Act is a small step in reaching the goal enshrined by the Article 44 of the Constitution. Personal beliefs and faiths though must be honoured, cannot dictate the operation of the provisions of an enabling statute. An optional legislation that does not contain an unfavorable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. The same can only happen by the collective decision of the generation to come to sink conflicting faiths and beliefs that are still active as on date.

¹³ (2014) 4 SCC 1

The court has further observed that the legislation which is better equipped to comprehend mental preparedness of the entire citizenry to think unitedly on the issue has expired its view, for the present, by the enactment of the Juvenile Justice Act,2000 and the same must receive due respect. Conflicting viewpoints prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 i.e., a Uniform Civil Code yet to be fully reached. The Supreme Court further took the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and / or to understand such a right to be encompassed by Article 21 of the Constitution.

CONCLUSION:

The laws regarding adoption have evolved with time. Several enactments and amendments were made to make provisions regarding adoption for Muslims. Before 1850 ,there were many legislations enacted regarding Muslims but they failed to recognize adoption for Muslims .Though shariat Act has recognized adoption by custom it couldn't provide equal right to adopted child as that of biological child .later during 1850 the guardianship Act came into force which provided an alternative to Muslims to adopt a child but the adoption was incomplete .in 2015 ,the enactment of juvenile justice act has legalized the adoption for Muslims and it gave rights to all individuals irrespective of religion to adopt a child .The Shabnam Hashmi case is considered as a landmark judgement with respect to adoption for Muslims, where supreme court held that Muslims can also adopt a child.

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Mohammedan Law by Mulla

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