

# Islamic Adoptional Jurisprudence versus Best Interest Principle with Special Reference to Minor Child in India

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**Abstract:** *In Muslim law, the child is considered as legitimate only if the father of child proves the acknowledgement of his child otherwise child will not be considered as the natural child of that person. Quran also relates the relevant text about the consequences of adoption. Under Islamic law the relationship between orphaned child and the guardian is different from other personal laws. Muslim laws recognize the acknowledgment of paternity and establish the legitimacy of child. However the Supreme Court has extended right to Muslims through its outstanding pronouncement in 2014. Supreme Court held that restrictions placed by personal law i.e. Muslim law should not come in the way of citizen's right to adopt a child. Personal beliefs do not dominate the law of land of country.*

**Key words:** *minor, orphan, adoption, paternity, Kafala, Muhrim, shariyat, acknowledgment, guardianship, adia, juvenile, best interest.*

## I. Introduction:

In Islam taking care of any child or orphan is the noble duty of every person. Raising one's own child or even child of other by a Muslim is encouraged in Islam. In Islam the person who takes care of child of another does not become a true child of that person. And the child does not carry the name of adoptive parents. In Islam family lineage is of great importance so adoption should be such that no child should lose their lineage. In Muslim law, the child is considered as legitimate only if the father of child proves the acknowledgement of his child otherwise child will not be considered as the natural child of that person.

During the period of the Prophet Mohammad, the adoption of son was recognized. Once said by Mohammad that those who take care of orphan will be close to him and he adopted his slave, taken same care as if slave would born to him. The word *adia* is used in Quran which means adoption. Quran also relates the relevant text about the consequences of adoption. "Call the adopted sons by the names of their fathers: that is the more just in the

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sight of God, unless you do not know their fathers.” This is to protect the human rights of natural parents and adopted child. It will preserve the name and identity of lineage of natural parents.

### **Adoption under Islamic Law:**

Under Islamic law the relationship between orphaned child and the guardian is different from other personal laws. Adoption is known as *Kafala* in Islamic terms. *Kafala* means to feed that describes the foster parent relationship between them. There are some rules in Islam for such relationship which are as follows:

- a) The child does not adopt the name of adoptive parents but retains the name and identity of biological parents.
- b) Children do not inherit from adoptive parents but retains the inherited rights from their biological parents.
- c) Family members of adopted family are not blood relatives of adopted child. So members are not Muhrim to adopted child. For example, there will not be any legal impediment or prohibition in marriage. Muhrim denotes legal relationship which regulates marital relation and other aspects.
- d) Adopted parents are mere trustees of the property of adopted child. So child continuous with the property of his own. Adopted parents cannot mix the property of child with their own property.
- e) In Islam Kifalah is recommended but child adoption is prohibited, it is haram. Islam has provided valid reasons for such forbidden act. There is no problem to become kafil for the orphan child.

According to Shariyat laws there is no adoption in Islam. If the child is adopted by adoptive parents then shariya laws does not confer status and rights to adopted child as that of biological child of that parents. It will be very hard to tell the truth to the orphaned child that he is not the real child of the family but there is no problem in acting as kafil for the child. Parents can help themselves with proper consultation to find the way for the truth to the adopted child.

One cannot be real son of parent by mere declaration of such adoption because it does not change the reality or fact of adopted child. And it does not transfer genetic characteristics or psychological traits. Such legal ban is to protect rights of adopted and adopting parents and other members affected as well as society as a whole.

### **Effects and legal consequences in adoption under Muslim law:**

- Adoption cannot be used as a tool to hide the illegitimacy of the child. Every child has father and only one father. There should not be any ambiguity in paternity of the child.
- Quran has established inheritance right to those members who are related by blood or by marriage. Islam has forbidden for father to deprive the natural children’s right. Quran has provided proper distribution of property for deserving heirs.

- Marriages with own real son's wife is prohibited in Muslim law. Such rule is mentioned in absolute prohibition by affinity. These are absolutely forbidden in Islam. But there is no such prohibition if such son is adopted.
- Islam allows raising, educating and treating the orphan child as his own which is not prohibited by Quran. This is noteworthy act which will be rewarded in paradise. But this does not give rights which are reserved for natural children.
- If a man is childless he may give him whatever he wants during lifetime. If a man wants to give everything to such orphan child then he may give his entire property to orphan during his lifetime but after death rights are reserved for natural children.
- Muslim scholars consider artificial insemination is not acceptable because it will be classified as form of adultery. Islam keeps family lineage without any foreign element entering into it. If donor is other than husband it will be great sin.

Muslim laws recognize the acknowledgment of paternity and establish the legitimacy of child. However the Supreme Court has extended right to Muslims through its outstanding pronouncement in 2014. In this case the petitioner claimed that as the child brought from orphan institution does not confer her as real mother because she belongs to Shariat law. Being a Muslim she had guardianship right over the child which does not confer or consider child as biological child.

#### **Adoption through Judicial lenses:**

In India, Juvenile Justice Act protects rights of child and parents through adoption. Juvenile Justice Act defines adoption and confers rights, responsibilities, privileges to adoptive parents and adoptive child. Any parent in India could opt for adoption without any prohibition. Juvenile Justice Act is secular law applicable to all Indians in India without any religious background.

Supreme Court held that restrictions placed by personal law i.e. Muslim law should not come in the way of citizen's right to adopt a child. Personal beliefs do not dominate the law of land of country. The decision is for those who wish to choose to submit to it till Uniform Civil Code is achieved.

The question of adoption was raised by activist shabnam hashmi that personal law does not allow for adoption of child but rather for guardianship. The bench held that "personal beliefs and faiths must be honoured and cannot dictate the operation of the provisions of the enabling statute." Personal law board objected the order as Islam does not consider adopted child as biological child. Justice Gogoi held that Juvenile Justice Act is the small step towards Uniform Civil Code mentioned under Article 44. The landmark Judgment ruled that right to adopt is restricted to Hindus, Buddhist and Jain but now it extends to Muslim, Christians, Parsis and all other communities in India.

Many international laws regulate adoption with Islamic principles. Adopted child has right to know the original parentage and encouraged to embrace biological heritage. In South Wales children are allowed to keep their last name of their family and inheritance can be decided by will. Many countries like India, Sudan, Tanzania regulates laws for adoption and kafala for muslim and non muslim children. Many other Muslim countries allow

international adoption with some modifications under certain conditions. In Muslim majority countries like Indonesia, Turkey, Somalia, Malaysia adoption is legal. Turkey allows full legal adoption with some tradition of kafala.

The adoption practices must secure best interest of the child and further public interest. The well beings of orphan should be the first and primary precedent in Islam. Though general belief forbids adoption indeed some aspects in other countries are compatible with Islamic ethics. National and international laws of the land should be considered in deciding the factor in Islamic law. The beneficial laws can be regarded as Islamic as long as does not harm the society.

Regarding the orphans, Quran has specifically stated that the best interest of the child is the supreme and primary. So according to UNICEF best interest should be guiding principle in adoption or placement of orphan child. All the matters are to be judged according to intentions. UNICEF is strengthening and promoting the best interest of children through research initiatives and ensuring the legal policy framework.

#### **Best interest principle and adoption:**

UN declaration is a first international document where the principle of interest has been mentioned by the declaration. Best interest principle is universally recognized principle. Best interest principle has been enshrined in rights of the child convention. After this convention best interest principle has been wider acceptance. Best interest principle is applicable to all the rights in state which are obligatory to rights of child convention. Best interest principle shall be the Paramount consideration for the child in child matters.

Best interest principle means whatever is in Welfare of the child shall be in Supreme consideration. Best interest principle is considered to be indeterminate, vague and provides discretion to courts in child discourse. Best interest principle is specifically applicable in child custody cases and child related matters. Various National and international organizations are working on best interest principle of the child. Best interest principle is applied by legislature, States, various courts, organizations, NGOs for child development or child custody cases or child related issues like education and other related matter. There are new guidelines as to assert what is in the best interest of the child. Considering the universal principle as adopted by various countries and various conventions adoption of children should be of paramount and supreme consideration.

## **II. Conclusion:**

Supreme Court has prominently granted adoption to all citizens including Muslims, while dealing with such sensitive issue we should protect the interest of children. Laws and regulations should not be constrain rights of children. Always children should be protected in terms of social and legal framework. Rights should be guaranteed under Constitution. The common conception has been removed by Supreme Court by citing outstanding judgments on adoption. Supreme Court has always put forward the principle on best interest. Scope of adoption has been widened by various courts in India. Islamic adoption has been lined up with national and international laws and supportive cases. Considering the general principle of '*maslaha*' rights of child are to be protected in public interest. "The Convention on the Rights of the Child, which guides UNICEF's work, clearly states that every child has the

right to grow up in a family environment, to know and be cared for by her or his own family, whenever possible. Intercountry adoption is among the range of stable care options. For individual children who cannot be cared for in a family setting in their country of origin, intercountry adoption may be the best permanent solution.” In universal agreement the best of the child should be the prime consideration in any decision making. But important question is who is responsible for determining best interest of child.

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