

ADOPTION RIGHTS AND ISLAMIC JURISPRUDENCE

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Subject: LAW

Abstract: Adoption rights are not wholly recognized under the Muslim personal law. Partial adoption is permitted under the Muslim personal law i.e. till the age of foster care of the adoptive child; the adoptive Muslim parents are merely the trustee of the name, surname, estate, etc. of the adoptive child. Moreover, orphan cannot be adopted directly. In order to adopt the orphan child, the adoptive parents have to seek permission from the court of law under the Guardians and Wards Act. The basic character of the constitution of India regarding secularism and equality to all is not completely enshrined because of partial adoption practiced in the society. In order to overcome this latent defect, the supreme court of India has pronounced a landmark judgment in the year 2014. By the said judgment, it granted adoption rights in its purest form to all. In this way the supreme court of India has given prime importance to constitutional provisions rather than personal law's right provisions.

Key Words – Muslim law, Adoption, Islam. Jurisprudence, Child, Guardian and wards.

INTRODUCTION:

A doctrine according to which international law is incorporated into municipal law by custom or statute and then becomes part of municipal law. An act by which a person adopts as his own the child of another. Until recently there was no law of adoption in this country though it exists in other countries, as France and Germany, where the civil law (as to which, see Sand, just.) prevails to any great extent. In 1889 and 1890, Lord Meath introduced Bills in the House of Lords to legalize adoption.

By the Adoption of Children Act, 1926, the Court authorize the adoption of an infant who is under twenty-one years of age, a British subject, and resident in England and Wales, by an applicant who is more than twenty-five years of age, and also twenty-one years older than the infant, unless closely related, and a British subject, resident and domiciled in England or Wales, but a single adopter, only, will be authorized unless two spouses jointly apply. A Male may not adopt a female infant unless the court finds special reasons. The consents of the parents and guardians (if any) and of any other persons having the custody of, or liable to contribute to, the support of the child, are required, and one of two spouses may not apply without the consent of the other, but the court may dispense with any of these consents in the special circumstances provided for by the Act.

The Court may impose terms and require the adopter to make and secure such proviso for the adopted child as the court thinks fit. Probationary adoptions not exceeding two years may likewise be authorized, and if the infant had been maintained and in the custody of the proposed adopter for at least two years before 1926, the court may dispense with the consents referred to. No money or reward any be paid to any adopter, parents or guardian without leave of the court and no other person may give any such money or reward. The effect of the order is to place the adopted child for all purposes except as mentioned below in the position of a child as if born to the adopter in lawful wedlock, inter alia, in regard to custody, maintenance and education, appointment of guardians or consent to marriage, and child assume the same relation to the adopter, e.g., in regard to liability for the latter's maintenance, and natural parents are deprived permanently of their parental rights, and are required to acknowledge the fact.

A There is no general law for adoption in India for Muslim. It is permitted amongst Hindus on the basis of customs and usage. Adoption is an important aspect of personal law. Muslims have no adoption laws, but India being equality promoting country, the muslim couples can approach the court under the Guardians and Wards Act, 1890. The Islamic Jurisprudence do not provide for adoption. The major drawback of the Guardians and Wards Act, 1890 is that, Muslim couples can adopt a child under foster care only. As soon as the child's foster care age is completed, the existence of adoption remains no more. For Hindus, the adoption is covered under the Hindu Adoption and Maintenance Act, 1956. Section 2 of the said act specifically provides that Hindus cannot adopt muslim, Christian, Parsi or Jew child. As per Hinduism, adoption is given due recognition but adoption is not recognized by Muslims.

MUSLIM PERSONAL LAW:

Muslim personal law gives partial recognition adoption. Due to this reason, Muslims have no recourse rather to rely on The Guardian and Wards Act, 1890. Because of the said act, the adoptive child gets the status as if the child is born biologically to the adoptive parents. On the other hand, the adoptive child is not granted the right to inherit the property of adoptive parents. Guardian Ward relationship exists between them. Parent's child relationship does not exist.

Under the Muslim law, the father enjoys a dominant position. It also makes a distinction between guardianship and custody. For guardianship, which has usually reference to guardianship of property, according to Sunnis, the father is preferred and in his absence his executor. If no executor has been appointed by the father, the guardianship passes on to the paternal grandfather. Among Shias, the difference is that the father is regarded as the sole guardian but after his death, it is the right of the grandfather to take over responsibility and not that of the executor. Both schools, however, agree that father while alive is the sole guardian. Mother is not recognized as a natural guardian even after the death of the father.

As regards rights of a natural guardian, there is no doubt that father's right extends both to property and person. Even when mother has the custody of minor child, father's general right of supervision and control remains. Father can, however, appoint mother as a testamentary guardian. Thus, though mother may not be recognized as natural guardian, there is no objection to her being appointed under the father's will. Muslim law recognizes that mother's right to custody of minor children (Hizanat) is an absolute right. Even the father cannot deprive her of it. Misconduct is the only condition which can deprive the mother of this right. As regards the age at which the right of mother to custody terminates, the Shia school holds that mother's right to the Hizanat is only during the period of rearing which ends when the child completes the age of two, whereas Hanafi school extends the period till the minor son has reached the age of seven. In case of girls, Shia laws uphold mother's right till the girl reaches the age of seven and Hanafi school till she attains puberty.

Muslim Law and Adoption:

As per the muslim law, adoption means transplantation of a son from the family of his birth into an another family who is known as adoptive parents. In short, Islam does not recognize adoption. Muslim couple can adopt a child from another muslim couples who must be the natural parents of the child to be given under adoption. If muslim couple wants to adopt a child from an orphanage, then Islam does not permit to do so. For this purpose, such muslim couples have to rely on The Guardians and Wards Act, 1890.

In Muhammad Allahbad Khan V. Muhammad Ismail Khan It is mentioned that amongst the muslims, there is doctrine of acknowledgement of paternity. There is no question of adoption in Muslim Law. The similar view is expressed in Mulla's Muslim Law. In regard property, however, under any disposition or intestacy the child retains his status as child of his or her own parents and does not acquire any right or interest as a child of the adopter. The death duties in respect of any interest in property under any disposition of the adopter and vice versa are livable as if the child had been born to the adopter in lawful wedlock.

There is now some discussion about reconsidering some of the rules about Islamic adoptions. A groundbreaking study was done by the Muslim Women's Shura Council in August 2011 titled, "Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child" This report examined Islamic sources and concluded "adoption can be acceptable under Islamic law and its principle objectives, as long as important ethical guidelines are followed." The study represents a form of independent reasoning (ijtihad) and may raise some awareness and contribute toward shaping a future consensus (ijma) on the issue

Islamic law scholar argues that this report and a number of other developments in the area provide for some optimism that we may be at the cusp of a sea change in this area. Kutty argues that the belief that closed adoption, as practiced in the West, is the only acceptable form of permanent childcare is a significant obstacle to its acceptance among many Muslims. The situation is significantly different when we move to open adoptions, where there is not negation of the biological parentage. Kutty believes that there is sufficient basis in Islamic jurisprudence to argue for qualified support of adoptions and even international adoptions He writes that it is undeniable that taking care of orphans and foundlings is a religious obligation and that the best interest of children has been a recurrent theme among the various juristic school Arguably one of the best ways to take care of these children is to place them in loving homes, provided that a child's lineage is not intentionally negated or concealed. He argues that a reformed model of Islamic adoptions will enable Muslims to fulfill this religious obligation while ensuring that the most vulnerable do not fall through technical cracks and will not be negatively impacted by formal rules that no longer serve their intended purposes.

Rules of Adoption under Muslim Law:

The rules of adoption under Muslim Law are as under:

1. The adoptive parents are not permitted to hide the identity of the Child's biological family.
2. The tie of the child with his biological parents is never severed.
3. Adoptive parents are not the biological parents of the adoptive child.
4. In Islam adoption means 'Kafala'. It means 'to freed'. In other words the foster - parent relationship.
5. The adoptive parents are not allowed to change or alter the name and surname of the adoptive child.
6. Adoptive child inherits from his biological parents and not from his adoptive parents.
7. As soon as the adoptive child becomes grown up the adoptive family ceases to be his blood relatives.
8. Adoptive parents are not allowed interfere with the property of the child given for adoption. They are merely the trustee of such property

Islamic Jurisprudence on Adoption:

Islamic jurisprudence is not based on customs and usage. It does not allow the child to be given in adoption to become the true child of the adoptive parents. The role of the adoptive parents is of a trustee. If adoptive child is breast – feed by the adoptive mother then their relationship is of milk kinship. Islamic jurisprudence gives due recognition to the identity of the child given for adoption. It does not give due recognition to pure adoption. Except as provided by the Adoption of Children Act, 1926, in English Law any renunciation by parents of their legal rights and liabilities in favor of an adopter is a mere empty, form; however desirable an adoption may be, and however solemnly consented to by the parents, it may be canceled by them, and the adopted children restored to the parents, unless they be legally unfit to have the custody of the children; see Custody of Children Act, 1891, Section 3, A contract by the mother of even an illegitimate child or the transfer to another person of rights and liabilities of the mother in respect of the child is invalid.

Supreme Court of India on Adoption by Muslims:

The supreme court of India delivered the landmark judgment in the year 2014 that, any person can adopt a child under the Juvenile Justice (Care and Protection of Children) Act 2000 irrespective of the religion he or she follows and even if the personal laws of the particular religion does not permit it.

Constitution adopted 26th Nov. 1949, amended many times. The preamble affirms the secularity of the State. Article 26 guarantees freedom to manage religious affairs for every recognized religious denomination or sect. The difficulty in reconciling the constitutional protection of the rights of religious minorities and the Directive Provision of Article 44 has meant that legal uniformity is far from being achieved.

Muslim personal law applied by regular court system. Four levels of courts: civil courts, district courts in administrative subdivisions of each state, State High Courts in each of the 18 states and the Supreme Court. Courts of first instance in personal status cases are Family Courts, organized under Family Courts Act 1984. These Courts have same jurisdiction as any district or subordinate civil court, thus also have some criminal jurisdiction with relation to maintenance orders.

The said decision of the supreme court of India is widely protested by the Muslim Personal Law Board as it is against the Islamic Jurisprudence.

CONCLUSION:

From the above information it is conclude that India is a secular country practicing utmost equality amongst its citizen. Right to adopt a child, right to parenthood in case who are not able to become parents naturally have no other recourse rather than adoption. Thus, adoption in its purest form is universal as well as basic fundamental right which cannot be denied to anyone.

It is a well settled universal principle that when there is a conflict or ambiguity between the personal law and the universal fundamental rights then the universal fundamental rights shall exist. Thus, the Supreme Court of India is right in its decision in granting adoption rights to all. The ultimate spirit of the constitution lies in equality to all rather than fragmentation under the name of personal law

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