

## ADOPTION: A COMPARATIVE STUDY OF MUSLIM AND HINDU LAW

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### INTRODUCTION

Adoption, a practice deeply rooted in societal and legal frameworks, plays a crucial role in shaping kinship ties and familial structures. It allows individuals to form new bonds legally and socially recognized as equivalent to biological ties, superseding them wholly or in part. However, adoption practices vary across religious and cultural contexts, leading to diverse legal frameworks and interpretations. Muslim law, guided by the Quran, considers children as divine blessings and places the primary responsibility of their upbringing on their parents. However, the Quran does allow for the entrustment of this responsibility to someone else within or outside the extended family through the kafala system. Adoption, as understood in other contexts, is not explicitly recognized under Islamic law, with certain verses in the Quran discouraging it and emphasizing maintaining the child's biological lineage.

In contrast, Hindu law, governed by the Hindu Adoption and Maintenance Act of 1956, allows for adoption as a means of fulfilling religious and social duties, ensuring the continuity of family lineage, and facilitating the deceased father's soul's journey from hell to heaven. The Act has replaced common law and introduced specific provisions for adoption and maintenance, overriding customary practices. The Juvenile Justice (Care and Protection of Children) Act of 2000 provides a secular framework for adoption, allowing childless couples of all religions to adopt and providing a solution to childlessness. This act aims to rehabilitate orphaned, abandoned, and surrendered children, recognizing adoption as a means to facilitate their rehabilitation.

### ADOPTION

Adoption is the institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are socially (and legally) defined as equivalent to the congenital ties. These new ties supersede the old ones either wholly or in part<sup>1</sup>.

According to the Child Welfare Information Gateway, "Adoption is the social, emotional, and

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<sup>1</sup> International Encyclopedia of Social Sciences, Vol. 1, p. 95.

legal process in which children who will not be raised by their birth parents become full and permanent legal members of another family while maintaining genetic and psychological connections to their birth family<sup>2</sup>.

In India, CARA is the nodal body that adopts the regulations. This is under the ministry of women and child development. They also oversee and control both domestic and international adoptions. In India, there isn't a distinct law specifically for foreign citizens or NRIs to adopt a child, but the Guidelines Governing Adoption of Children, 2015 permit it. According to these guidelines, no one can adopt a child for unlawful purposes, and they stipulate that foreign parents can adopt an Indian child before the child turns three years old.

### **ADOPTION UNDER MUSLIM LAW**

In the Quran, children are divine and are a blessing of God. It is said that Allah decides to bless a person with a son or daughter or none, and the people are supposed to stay happy with whatever the situation is.

Under the Quran, the upbringing of children is the primary responsibility of the parents (biological), but there is a provision of entrustment of their responsibility to someone else in or outside their extended family. This system is called the kafala system, in which the child is placed under a kafil who provides for the child's well-being.

Among many classes of Muslims in India, the practice of adoption is common, and in some instances, individuals who converted from Hinduism have maintained this practice. Adoption is permitted in places where local customs precede general Muslim law, such as Punjab, Sindh, Ajmer<sup>3</sup>, and other locations. The Oudh Estate Act of 1869, section 29, allowed a Muslim landholder to adopt a son to inherit his estate<sup>4</sup>.

Adoption is not allowed under the following verses that are given in the Quran states

1. God won't turn your adoptees into your natural children
2. Adopted children should be called by their natural father's name
3. Marriage to an adoptee's divorced wife would not be prohibited on account of

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<sup>2</sup> Child Welfare Information Gateway <https://www.childwelfare.gov/> last visited at 20 April 2024 at 3:15 pm

<sup>3</sup> Abdullah Khan v. Sunda, 11 I.C. 670

<sup>4</sup> Abdul Halim Khan v. Saadat Ali Khan, (1932) 59 I.A. 202.

### consanguinity

Early Islamic scholars had interpreted the verses by stating that adoption would have no formal and legal consequences, which led to the interpretation that it is prohibited under Islamic law. B.R. Verma, in his Commentary on Mohammedan Law, discusses adoption and its implications under Islamic law<sup>5</sup>. He explains that adoption, in general, does not grant the adopted individual the legal status of a child except in specific circumstances. These circumstances include cases where a valid custom of adoption exists, subject to the provisions of the Shariat Act (XXVI) of 1937, or where adoption is permitted by any current law<sup>6</sup>.

The validity of adoption was discussed in the case of Muhammad Allahbad Khan v. Muhammad Ismail<sup>7</sup>, which was held by Justice Mahommod, who said that there was nothing called adoption under Muslim law. They don't recognize adoption as a mode of affiliation. And there is no uniform bill in the country that could apply to all the people for adoption, including Muslims. However, there are communities in the Muslim religion who have adopted and considered it as a part of their custom. There have been subsequent judgments from the Court that support all these claims, i.e. in the case of Nenuo Khan V. Mst. Sugani And Ors<sup>8</sup>, the High Court has ruled that adoption is not an established institution among Muslims. However, it has been acknowledged that Muslims may adopt the practice of adoption based on customary practice. In the case of the Court had laid down the following criteria, and this was decided in the case of Mst Bibi V. Syed Ali<sup>9</sup> which are the following:

- i) Adoption is generally not recognized.
- ii) Muslims may adopt through custom.
- iii) A Muslim claiming adoption must provide evidence.

In the case of Nesar Ahmed Khan V. State of Orissa<sup>10</sup>, the Court ruled that Muslims are not permitted to adopt minor children under their personal laws and must adhere to the regulations

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<sup>5</sup> ADOPTION AMONGST MOHAMMEDANS—WHETHER PERMISSIBLE IN LAW, A. K. Bhandari, Journal of the Indian Law Institute, January-March 2005, Vol. 47, No. 1, <https://www.jstor.org/stable/43951954> last visited on 17th June 2024 11:45 am

<sup>6</sup> B.R. Verma, The Mohammedan Law in India & Pakistan (1962), 50

<sup>7</sup> Muhammad Allahbad Khan v. Muhammad Ismail ILR(1888) 12 All . 289 para 16,17,25

<sup>8</sup> Nenuo Khan V. Mst. Sugani And Ors 1974WLN(UC)5[1]

<sup>9</sup> Mst Bibi V. Syed Ali S.B. SA No. 132/1990

<sup>10</sup> Nesar Ahmed Khan V. State of Orissa 023 SCC OnLine Ori 2403

( <https://www.scconline.com/blog/post/2023/05/23/muslims-can-adopt-surrendered-child-following-the-procedure-under-juvenile-justice-act-legal-news/>)

outlined in the Juvenile Justice (Care and Protection of Children) Act (JJ Act) for any adoption procedures. Here, the minor kid who was adopted was supposed to be returned to her original father.

### **ADOPTION UNDER THE HINDU LAW**

Hindu Adoption and Maintenance Act 1956 replaced the common law and introduced a specific statute for governing the law under adoption and maintenance. Under Hindu law, adoption was permissible, but it was limited to people of the same caste. Under the act, there is no such restriction.<sup>11</sup> The main advantage of having a statute is that if there is a conflict between customary law and the statute, the law laid down in the statute will prevail.

In the case of *Bal Gangadhar Tilak v. Shrinivas Pandit*<sup>12</sup>, the Privy Council noted that adoption is important in Hindu culture, not just for ensuring the continuity of the father's name in cases of childlessness but also as a religious practice. It allows for the fulfilment of obligations and sacrifices that are believed to facilitate the deceased father's soul's journey from hell to heaven. But traditionally, under Hindu law, the adoption of a male child was only permitted as it was the son who could take part in all the religious practices.<sup>13</sup>

Under the Hindu Marriage and Maintenance Act, the categories for valid adoption are as follows

- The person adopting must have the capacity and legal right to adopt.
- The person giving a child up for adoption has the right to do so.
- The child being adopted must be capable of being taken in adoption.
- The adoption must adhere to the conditions outlined in the Act.

Additionally, for a valid adoption, the following conditions must be met according to Section 11 of the HAMA:

- If adopting a son, the adoptive parent must not have a living Hindu son, grandson, or

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<sup>11</sup> N. Balu ADOPTION - SOME UNSOLVED ISSUE, Journal of the Indian Law Institute, July-December 2003, Vol. 45, No. 3/4, Family Law Special Issue (July-December 2003), pp. 537-542 <https://www.jstor.org/stable/i40163271> last visited on 17th July 2024 at 11:30 pm

<sup>12</sup> *Bal Gangadhar Tilak v. Shrinivas Pandit* (1915) 17 BOMLR 527

<sup>13</sup> Adoption, Kusum & Poonam Pradhan Saxena – Family Law VOLUME I, 2021

great-grandson at the time of adoption.

- If adopting a daughter, the adoptive parent must not have a living Hindu daughter or granddaughter at the time of adoption.
- When a man adopts a daughter or a woman adopts a son, there must be a minimum age difference of 21 years between the adoptive parent and the child.
- The same child cannot be simultaneously adopted by two or more persons.

According to the Hindu Adoption and Maintenance Act (HAMA), Section 7 and Section 8 outline the capacity to adopt for Hindu males and females, respectively. Both genders, if of sound mind and over 18 years old, can legally adopt a son or daughter. However, if they are married, the consent of their spouses is necessary unless the spouse has renounced the world, is no longer Hindu, or has been declared legally incompetent. If a man has multiple surviving wives, he must obtain consent from all of them to legally adopt a child.

In the case of *Kumar Sursen V State of Bihar*<sup>14</sup> The petitioner, Kumar Sursen, a minor at the time, filed a petition seeking a caste certificate and residential certificate, claiming to be the adopted son of Kamal Prasad Roy and residing with him in the village of Madarpur, Vaishali district. However, the district authorities rejected the petition, stating that the petitioner was a Muslim boy named Sahadat, the natural son of Majid Mian and Ayesha Khatoon. The petitioner claimed to have been adopted by Kamal Prasad Roy, a fact not disputed by Roy, who supported the petitioner's request for the certificates. The Patna High Court ruled that under the Hindu Adoption and Maintenance Act, 1956, only a Hindu can adopt a Hindu child. The law does not recognize the adoption of a non-Hindu by a Hindu. Therefore, the adoption claimed by Kamal Prasad Roy for the petitioner is not legally valid, though it may have moral implications between the parties. Consequently, the boy cannot be granted the caste certificate of his alleged adoptive parents, nor can he receive a residential certificate in his name as the son of Kamal Prasad Roy, i.e. under the HAMA, a Hindu can only adopt another Hindu.

In the case of *Sawan Ram V. Kalawanti*<sup>15</sup>, the Court decided that when a widow adopts a child, the adopted son is considered a member of the deceased husband's family. The adoption severs the adopted son's rights in his birth family, replacing them with rights in the adoptive family.

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<sup>14</sup> *Kumar Sursen V State of Bihar* AIR 2008 Pat 24 para 1,2

<sup>15</sup> *Sawan Ram V. Kalawanti* AIR 1967 SC 1761 [1]

Section 12 of the Hindu Adoption and Maintenance Act specifies that when a Hindu female who has been married adopts a child, the adopted son is also considered the adopted son of her deceased husband. This means that a child adopted by a widow is deemed to be the adopted son of her late husband.

The main differences between Hindu and Muslim law are as follows.

- Hinduism views adoption as a religious and social duty, often linked to the concept of "dharma" and the continuation of family lineage. In contrast, Islam emphasizes the care and upbringing of orphaned or needy children but does not consider adoption as a means of changing a child's lineage or status.
- Hindu law allows for the adopted child to be given the adoptive family's name and inherit property as if they were a biological child. In Muslim law, an adopted child retains their biological family name and does not inherit property as a biological child would.
- Under Hindu law, if the adoptive parent is married, the consent of their spouse is required for the adoption to be valid unless specific conditions are met. In Muslim law, there are no specific provisions regarding spousal consent for adoption, as adoption itself is not formally recognized.
- In Hindu law, an adopted child has the same legal rights and status as a biological child, including inheritance rights. In Muslim law, an adopted child does not have the same legal rights as a biological child and cannot inherit as a natural child would.

### **RIGHT OF ADOPTION UNDER THE JUVENILE JUSTICE ACT**

Efforts to create a universal adoption law applicable to all religions have faced challenges. The Adoption of Children Bill of 1972 was opposed by one minority group, while the Adoption of Children Bill of 1980, which applied to all except Muslims, met with disapproval from another minority. The 120-year-old Guardians and Wards Act of 1890, which applies to Muslims, Christians, Parsis, and Jews, considers adoptive parents as guardians only, and the child does not automatically enjoy legal rights of inheritance. The guardianship relationship ceases to exist as soon as the child becomes 18 years old, and the child can inherit only if explicitly willed to do so.

This right is conferred by the law under the Juvenile Justice Act of 2000, and it shall apply to

everyone, irrespective of their religion if a child is adopted under the Juvenile Justice Act. This could be an important step for the people of the Muslim community who are not able to conceive children naturally and are also not able to adopt children due to social and legal complications. The Juvenile Justice (Care and Protection of Children) Act, 2000 (J.J. Act) was enacted to aid in the rehabilitation of orphaned, abandoned, and surrendered children. The act recognizes adoption as a means to facilitate the rehabilitation of such children. Section 41 of the J.J. Act outlines the adoption process under secular laws. Adoption under this act is considered a secular method that allows childless couples of all religions to adopt, providing them with a solution to childlessness. It also ensures that adopted children can grow up in a healthy environment. The primary objective of adoption under this act is to provide for children whose birth parents are unable to care for them, particularly those who are orphaned, abandoned, or surrendered. The responsibility of such children lies with the Court, which can place them for adoption while adhering strictly to the guidelines and provisions specified by the State or Central Adoption Resource Authority and notified by the Central Government. The Court must be satisfied with the background investigation conducted on these children before placing them for adoption.

In the case of *Oriental Insurance Co. Ltd. v. Lalita Sharma*<sup>16</sup>, it was held that merely living with a child in the same house does not prove adoption. This case involved a tragic incident where a child died in an accident, and the father and stepmother, claiming to be the adoptive mother, filed a compensation claim. The Court found several arguments unconvincing, such as the stepmother's claim that the natural mother had left the country after a divorce and handed over the six-month-old child to her, which the Court deemed not believable. Additionally, the Court noted that the natural mother was a necessary party to prove adoption. Therefore, the claim petition of the stepmother, seeking compensation as the adoptive mother of the deceased child, was deemed not maintainable.

In the case of *Shabnam Hashmi vs Union of India*<sup>17</sup>, the Court held that Shabnam Hashmi, a noted human rights activist, initiated her advocacy in 1981, focusing initially on adult literacy. She later faced a legal challenge regarding the adoption of a girl, as Islamic law requires a biological relationship for parental recognition. Hashmi filed a writ petition not just for her case but to address broader issues faced by citizens adopting children. Her petition emphasized

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<sup>16</sup> *Oriental Insurance Co. Ltd. v. Lalita Sharma* AIR 2006 (NOC) 326 (HP) para 23, 29

<sup>17</sup> *Shabnam Hashmi vs Union of India* AIR 2014 SC (CIVIL) 969 para 13

the need to amend personal laws to enable childless couples, regardless of their religion, to adopt children and provide them with care and a nurturing environment. Before this case, adoption was mainly recognized among Hindus under the Hindu Adoption and Maintenance Act of 1956, while other communities relied on the Guardianship and Wards Act for adoption. The Court ruled that every individual, regardless of gender, religion, or caste, has an equal right to adopt. While Muslim personal laws do not explicitly recognize adoption, they also do not prohibit childless couples from adopting and caring for a child's well-being.

The Juvenile Justice (Care and Protection of Children) Act (JJ Act), 2000, allows all Indians, including religious minorities, to adopt. However, adoption through Juvenile Justice Boards is the only permitted method, and initially, there were no mechanisms in place by the various states, leading to confusion. In 2007, rules were framed, allowing courts to facilitate adoptions. Furthermore, the scope of adoption was expanded to include not only abandoned, neglected, or abused children but also surrendered children. Despite these provisions, lack of awareness about the JJ Act and the coexistence of different personal laws have hindered its widespread use for adoption.

### **GENDER JUSTICE UNDER ADOPTION**

Gender equality and gender justice have played a significant role in changing adoption practices in the country. While the emphasis on adopting fair-complexioned male children and the need for maintaining secrecy have not completely disappeared, they have considerably lessened. Adoption agencies report that since the late 1990s, single women have increasingly been adopting children. The fact that the Hindu Adoption and Maintenance Act (HAMA) permits both single men and women to adopt has facilitated this change. Independent urban women faced restrictions under the original Hindu Adoption and Maintenance Act (HAMA), which did not permit women who had separated from their husbands and were in the process of getting divorced to adopt a child.<sup>18</sup> However, the amended Section 8 of HAMA now "removes the incapacity of a married woman to take in the adoption of a son or daughter merely based on her marital status." Additionally, the amended Section 9 provides that the mother, with the consent of the father, and the father, with the consent of the mother, shall have an equal right to give a child in adoption.

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<sup>18</sup> Expanding Adoption Rights, *Economic and Political Weekly*, AUGUST 28-SEPTEMBER 3, 2010, Vol. 45, No. 35 (AUGUST 28-SEPTEMBER 3, 2010), p. 8, <https://www.jstor.org/stable/i25742005> last visited on 18 June 2024 at 10:30 pm



There have been calls for a general adoption law that would apply to all communities, but progress has been slow, partly due to resistance stemming from demands for a Uniform Civil Code. Adoption agencies advocate for a uniform adoption law that would allow non-Hindus to adopt under a uniform law or follow their personal law. However, adoption processes are marred by corruption, administrative insensitivity, and the presence of politically appointed officials lacking expertise in regulation.

In the context of Indian law, development in Muslim law has been limited due to the central role of the Quran, which is considered the main source of law as the direct words of the Almighty. Muslims believe that altering these laws with changing times is not permissible. Despite various attempts by the legislature to establish a Uniform Civil Code in the country, implementation has failed due to divergent views among the masses regarding religious beliefs. The judiciary and legislature need to take steps towards this, as it would lead to less conflict and confusion in decision-making. The British colonial rulers and now political parties have exploited the beliefs of these innocent masses, drafting their agendas to cater to vote bank politics. In the case of *John Vallamattom v. Union of India*<sup>19</sup>, the Supreme Court held that a Uniform Civil Code would promote social integration by removing contradictions based on ideologies. Personal matters and laws have always been a source of conflict in India since the British era. Developing a Uniform Civil Code for a diverse country like India is a challenging task, and such judgments pave the way for achieving this goal. Muslim law has largely remained unchanged and uncodified. The judiciary's step of suggesting an alternative way for the adoption process for Muslims can be seen as the first step towards their liberalization. Adoption fulfils the needs of children without families and those families who wish to raise a non-biological child as their own. Therefore, this step signifies progress and will provide a new, progressive direction for Muslim law.

## CONCLUSION

In conclusion, adoption in India is a complex and multifaceted issue that is deeply influenced by religious, cultural, and legal frameworks. While Hindu law recognizes adoption as a means of fulfilling religious and social duties, ensuring the continuity of family lineage, and facilitating the deceased father's soul's journey from hell to heaven, Islamic law does not formally recognize adoption as a means of changing a child's lineage or status. Instead, it emphasizes the care and upbringing of orphaned or needy children through the kafala system.

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<sup>19</sup> *John Vallamattom v. Union of India* AIR 2003 SC 2902[1]

The Juvenile Justice (Care and Protection of Children) Act of 2000 provides a secular framework for adoption, allowing childless couples of all religions to adopt and providing a solution to childlessness. Efforts to create a universal adoption law applicable to all religions have faced challenges, and progress has been slow. While there have been calls for a Uniform Civil Code that would apply to all communities, implementation has been hindered by divergent views among the masses regarding religious beliefs. Despite these challenges, there have been positive developments, such as the increasing acceptance of adoption by single women and the judiciary's steps towards liberalizing adoption practices in Muslim law. These developments signify progress and provide hope for a more inclusive and equitable adoption system in India.



# BIBLIOGRAPHY

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- Tahir Mahmood, Muslim Law in India and Abroad, 149(2nd edition 2016)
- B M Gandhi, Hindu Law,456(4th edition)
- Expanding Adoption Rights, Economic and Political Weekly, AUGUST 28-SEPTEMBER 3, 2010, Vol. 45, No. 35
- N. Balu ADOPTION - SOME UNSOLVED ISSUE, Journal of the Indian Law Institute, July-December 2003, Vol. 45, No. 3/4, Family Law Special Issue (July-December 2003), pp. 537-542
- The Hindu Adoptions and Maintenance Act, 1956, 5-16, Acts of Parliament,1956
- Juvenile Justice (Care and Protection of Children) Act, 2015, S 2, Acts of Parliament, 2015.

