

Status of Abandoned Children: A Comparative Study of Islamic and Pakistani Law

Ambreen Abbasi

*Assistant Professor, Faculty of Shariah and Law,
International Islami University Islamabad, Pakistan*

Dr. Mudasra Sabreen

*Chairperson, Department of Shariah, Faculty of Shariah and Law,
International Islami University Islamabad, Pakistan*

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Abstract

This paper deals with the rights of abandoned children in the context of Pakistani society. The main issue is regarding legal status of such children which results in violation of their rights. Islamic law provides for rules for abandoned children which can be provided as a source for legislation in Pakistan. The paper argues that there is a need to formulate a clear legislation to ensure rights and protection of abandoned children. Currently the laws enacted in Pakistan lack provisions related to abandoned children. On the one hand the solutions like adoption/kafalah should be channelized and regularized and on the other hand serious efforts should be made to create awareness regarding rights of abandoned children among the masses. This is a comparative study which discusses and analyses relevant provisions in Islamic as well as Pakistani law.

Keywords: *abandoned children, islamic law, pakistani law, adoption*

Introduction¹

Children in Pakistan are a major part of population and in absence of appropriate legal and administrative mechanisms rights of abandoned/parentless children is becoming a serious issue. Pakistan is a party to the Convention on Rights of Child 1989 (hereinafter CRC), however Pakistan is still not compliant which Article 4 of the CRC which requires a comprehensive child protection legislation in the domestic sphere of each state party. So far Child rights in Pakistan are dispersed in various laws including the constitution.

Article 7 of the CRC makes child birth registration mandatory and acknowledges that every child has a right to a name and nationality and to know and be cared for by parents. However absence of a comprehensive legal regime in the country presents gaps which make realization of these rights difficult. The National Database Registration Authority (hereinafter NADRA) which keeps the record of registration did not allow for a column for 'guardian', and a child without a father was registered as "*na-maloom*" (unknown). Later as result of efforts of civil society and NGOs, the column was introduced but still majority of children are unregistered which shows inefficacy and inefficiency of the system. This shortcoming is creating problems for not only the abandoned and orphaned children but is causing complications, legal and psychological, for those children as well who were legally adopted.

Another significant issue is the status of an adopted child, as there is no law regulating adoption and its legal consequences. Some argue that the Guardians and Wards Act 1890 is adequate, but guardianship cannot be an equivalent to 'adoption' as the obligations of guardian ends when the ward reaches the age of majority unlike adoption.

In Islamic law we can find literature regarding status of abandoned children. *Fuqaha* have discussed this issue extensively. In Pakistan there is no comprehensive legislation about status and rights of abandoned children. If we look at the current literature this issue is greatly ignored by researchers and we cannot find comparative studies of Islamic law and Pakistani law regarding this issue. This paper is an endeavour to fill this gap. It will be a comparative research. Researchers will try to explore Islamic law from classical sources as well as current literature. This research aims to examine the issues faced by abandoned or parentless children with specific reference to registration and adoption in Pakistan and review of protection offered by the state and NGOs in the light of Islamic law and CRC. For this purpose relevant statutes, case law and provisions of the CRC have been discussed and analysed. Reference has been made to Islamic law wherever relevant. At the

end conclusion will summarise the findings.

Abandoned Children

'Abandoned' or 'parentless' are the words which are generally used for children whose whereabouts are not known or who are not taken care of by their families. Pakistan is a country with the population of approximately 200 million, with a notable absence of state social security and welfare system. This void is filled by civil society organizations like Edhi, Chippa, Burni, SOS village and many others. These organizations have put in great work by providing rescue services, food and shelter but despite all these efforts these organizations have limited resources at their respective disposal. There is a great need for the State to step in by not only providing required services but also to tabulate and maintain data concerning abandoned and run away children.²

A specific study of the cases of abandoned children in the context of Pakistan could not be found but it can be speculated that most of these children are born outside marriage; probably some are abandoned for economic reasons or are unwanted owing to want of male child.³ In some cases family pressure makes a single mother to abandon her child to be accepted for subsequent marriage.⁴ On the other side natural factors like epidemics, earthquake, war and floods also contribute towards the problem of abandoned or unattended children by causing death of parents and other close relatives.⁵

The term 'abandoned children' includes in it: street children, laboring children⁶ and run away children.⁷ A case in recent history is particularly alarming and provides the insights to the abysmal depths this particular kind of exploitation can reach. In 1999, Javed Iqbal with three of his accomplices, exploited and murdered innumerable children in a horrifying manner, though he was arrested and punished, there exists little evidence that the state has taken any corrective measures regarding repetition of such horrendous offences.⁸

Status of Abandoned Children in Islamic Law

In Islamic law a child abandoned by its parents is called a foundling. According to the *Hanafis* if there is a risk to the foundling's life it is *wājib* on the person who finds such a child to take care of it. If there is no risk to its life it is *mandūb*.⁹ According to all schools to take care of the foundling is a collective duty of the community unless there is a risk of the death of the child in which case it is a personal duty of the person who finds it.¹⁰ The person who finds a foundling should also act as the child's guardian and should protect its interests. In the case of a dispute over guardianship the court shall

decide the issue but the general rule is that a Muslim is preferred over a non-Muslim. If a person claims paternity of the foundling believing it to be his child, legitimacy of the child is established provided the conditions of a valid acknowledgement are fulfilled.¹¹

If the child is found in a Muslim locality it will be considered a Muslim according to all schools. The child will be presumed to be of the same religion which is prevalent in the locality in which it is found.¹² The responsibility for the foundling's maintenance is on the *bait-al-māl* (public funds) but if the guardian spends money on the foundling these funds are recoverable either from public funds or from the foundling after his/her maturity.¹³ Paternity of such a foundling may be acknowledged if all the conditions mentioned before are fulfilled.¹⁴ According to the *Shāfi'īs* if there is one claimant of paternity of the foundling there is no need for evidence or physiognomy to establish paternity. Being a Muslim is not a condition according to them in this case. According to the *Hanafīs* as well there is no need of evidence and paternity will be established by acknowledgement only. According to the *Mālikīs* paternity of a foundling is not established except by evidence. They accept circumstantial evidence in this matter for instance if it is known in the community that the claimant had a child but it was lost. The *Hanbalīs* are of the opinion that it is in the interests of the child to provide him/her with a parent and provider of maintenance so they don't consider any condition for establishment of paternity except acknowledgement.¹⁵ Rules of Islamic law related to foundlings protect children irrespective of their status of legitimacy.

Status of Abandoned Children in International Law

Pakistan, where state religion is very clearly declared as Islam¹⁶ is governed by Islamic rules and therefore the rights and obligations of its people are subjected through the norms and principles of the Shariah. At the same time Pakistan is a party to the international conventions like Convention on the Rights of the Child (CRC) and has obligations under International laws. Relevant provisions of the CRC are mentioned hereunder.

Article 7 of the CRC states that "The child shall be registered immediately after birth and has the right to a name and nationality and to know and be cared for by his or her parents". Similarly Article 19 provides for obligation on member state to take appropriate legal, administrative, educational and social measure to protect children from all sort of exploitations whether in custody of parents or guardians. Article 2 provides that a child who is temporarily or permanently deprived of his/her family environment is entitled to special protection and assistance provided by the State. States Parties shall in accordance with their national laws ensure alternative care for such a child could include foster placement, kafalah of Islamic law, adoption or necessary placement in suitable institutions for the

care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The CRC is the only international instrument which mentions Islamic law distinctly. In Article 20 *kafālah* is mentioned as an institution to care for children deprived of their families. This Article mentions *kafālah* with adoption and foster placement. Children under *kafālah* do not take the name of the adoptive family but they have rights to care, maintenance and education. Such a child will not inherit from the adoptive family.¹⁷ Article 21 is about adoption and does not apply to Muslim countries who consider adoption illegal as Article 20 explicitly mentions *kafālah* as an Islamic alternative to adoption.¹⁸

Birth Registration

Having access to a formal system of registration is recognized as a basic right of the child as without being registered children may not be able to exercise their fundamental rights such as right to an official identity and nationality. Without these legal statuses children can become subject to severe abuse and exploitation.¹⁹

UNICEF in its report in December 2013, *Every Child's Birth rights: Inequalities and trends in Birth Registration*, highlighted the importance of birth registration and its relation with other important rights. The report compared the birth registration trends around the globe. The findings of the report were that around 16 million children under 5 years of age are not registered for multiple reasons and further reported that Pakistan is 3rd out of 10 countries with highest number of unregistered children worldwide.²⁰

Article 7 of the CRC states that

*"The child shall be registered immediately after birth and has the right to a name and nationality and to know and be cared for by his or her parents. The State shall ensure the implementation of these rights in accordance with national law and its obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."*²¹

Birth registration system in Pakistan falls within the National Database Registration Authority's (NADRA)'s jurisdiction. NADRA was subjected to severe criticism on its policy and procedures concerning registration of abandoned/ parentless and adopted children in past few years. Previously NADRA had refused to recognize guardianship, to acknowledge wards as legitimate and to register adopted children under the name of the guardian, thereby compelling many to seek false birth certificates, marriages and fake parents to legitimize their children. Further if a child did not have any known

parent, the child could not be registered. Practical implications of this was that NADRA became that agency encouraging non-registration of abandoned and destitute children and to remain legally unprotected and unable to exercise their fundamental rights, for no fault of theirs.²²

In Pakistan the National Registration Authority (NADRA) presents a curious situation as its registration documentation does not allow any column or space for a Guardian. If a child's father's name is not known then the only available option in the electronic form is "Na-maloom" or Unknown. It has been reported that this is not only effecting orphaned and abandoned children but also those that have been legally adopted by single women.²³

In 2011 Supreme Court of Pakistan on application of Late Abdul Sattar Edhi and the Supreme Appellate Court of Gilgit Baltistan in a matter related to human trafficking raised some serious questions which are summarized as follows;

1. Is a Muslim state not responsible for welfare of a parentless/deserted child and is permission not required for adoption of such a child by any state authority?
2. What are the aims and objectives of welfare organizations registered under the Volunteer Social Welfare Organization Act 1961 and whether the custody of a child can be given by such an organization to the Muslim or non-Muslim nationals or non-nationals?²⁴
3. What is the concept of adoption in Islam and what are the rights of an adopted child and whether adoption of a Muslim child without the consent of his parents is permissible under the law.
4. Whether a Muslim child can be adopted by a non-Muslim and guardian judge in its special jurisdiction is authorized to grant guardianship certificate to a Muslim or non-Muslim to take the child out of its territorial jurisdiction.²⁵

A three-judge bench heard the case in the Supreme Court. The matter was then referred to the Council of Islamic Ideology (CII). The CII recommended that in the National ID Card format space should be made to accommodate guardians and the words abandoned and unclaimed should not be used to avoid stigmatization, instead it should carry the name of adoptive parents or guardians.²⁶ The CII further recommended that if the guardian's name is known then his name should be written otherwise any name may be mentioned in parentage."²⁷

In response NADRA's new policy was formulated and the head of an orphanage where that child lives was granted eligibility to become legal guardian of the concerned child by providing an affidavit. Previously, adoption could only be legally done if a guardian court issued a decree to the

person claiming guardianship under the Guardian and Wards Act of 1890. The policy was presented before a three-judge bench of the Supreme Court, headed by Chief Justice Tassaduq Hussain Jillani, who ordered the Chief Secretaries of the four provinces to ensure that all concerned Provincial Departments were made aware of the new policy and extended their complete assistance to the authority to ensure its implementation.

The new policy made it mandatory that the orphanage seeking birth registration should be pre-registered with NADRA as an institution providing orphan care. Availability of complete record of all children previously residing there along with other necessary documentation as required by the relevant authorities should be in order. In case a child's parentage was unknown, whatever name was recorded by the orphanage in its records would be registered with NADRA. For each new registration, it would be mandatory for the orphanage to report each new birth to NADRA and preempting any further claims of parenthood, DNA tests should be performed by the orphanage if possible.²⁸

The new policy was a step further but registration with NADRA only is not sufficient. Policy implementation is another aspect as it only deals with limited protection and within some of the registered orphanages. Still Guardianship is restricted to only those institutions whether Governmental and nongovernmental organizations/ orphanages or welfare centers that are registered with NADRA. Informal adoptions still remain beyond this protection and according to some estimates the protection cover not even half of the unprotected children.²⁹

On the other side, life of an orphan after registration also faces some complex questions how to integrate these children once they attain adulthood. Some policy level initiatives are required to streamline this integration. Stricter oversight is required for the protection of these children from authorities managing the orphanages. Adoption can be an option but it has its own implications as discussed below. While reading³⁰ about the life of Lillian Marjorie³¹, who was adopted but even at the age of majority after death of her adoptive parents, the rest of family including her sister abandoned her with nothing in her hand and with another set of psychological and sociological issues she faced in her later life, that raised many questions about the future of these children like her and many of those who are even registered with NADRA.

Acknowledgement and Adoption of an Abandoned Child

Parentage or *nasab* means lineage and is directly related to the status of legitimacy. Parentage or *nasab* is the most important right of a minor as other rights like inheritance; maintenance and guardianship depend on it. A child

born during a valid or irregular marriage is considered legitimate. *Nasab* can be established by evidence or acknowledgement of the father.³² *Nasab* gives rise to two rights: maternity and paternity. Paternity is established on legitimacy and other rights are established on the basis of paternity.³³ The status of legitimacy is very important as it is directly related to the rights of the child.³⁴ Maternity is established for legitimate and illegitimate children both but paternity is only established for legitimate children.

Legitimacy can be established by evidence or by acknowledgement. Acknowledgement of paternity is acceptable even if it takes place on a person's death bed.³⁵ There are four conditions laid down by jurists for such an acknowledgement to be accepted. If the following conditions are fulfilled on abandoned child can be acknowledged. First condition is that the paternity of the child to be acknowledged should be unknown. If the child's paternity is known it cannot be changed by acknowledgement.³⁶ Secondly the child must be at least 12 years and six months younger than the acknowledger otherwise it would not be possible for the acknowledged person to be the child of the acknowledger. The minimum age of puberty for a boy is twelve years and the minimum period of gestation is six months which means that 12 years and six months is the age gap which must be there between the child and the father. In the case of the acknowledgement of the mother the child must be nine years and six months younger than the mother as the minimum age of puberty in her case is nine years.³⁷ Thirdly if the child has attained puberty he/she should support the acknowledgement. According to the majority of jurists attainment of puberty is a condition but *Hanafīs* differ. According to them attaining the age of discretion is a condition in this case. If the child is a minor or is insane, its acceptance is not necessary. If the child is a major and does not support the acknowledgement evidence will be needed to prove paternity. The *Mālikīs* differ from the majority of jurists and do not require acceptance of the child as a condition.³⁸ Fourth condition is that no other person should have claimed paternity of the child. If two persons claim paternity of the same child, paternity will not be established by acknowledgement but by evidence. If a person claims paternity on the basis that the child is his child from *zinā*, paternity will not be established. Such a claim or acknowledgment is void. A valid acknowledgement is not only of biological paternity but also of legitimacy.³⁹ If all the above mentioned conditions are fulfilled the acknowledgement of paternity will be considered true. It can be refuted by contrary evidence only. Retraction of acknowledgement of paternity is not acceptable.⁴⁰

The same conditions apply if a mother acknowledges her maternity. If she is married or in *'iddah* at the time of acknowledgement the acknowledgement must be confirmed by her husband.⁴¹ Usually

acknowledgement is made by the father but if he is dead or absent the child may claim paternity and the above mentioned four conditions also apply on such a claim or acknowledgement.⁴²

Another solution for an abandoned child is adoption.⁴³ In pre-Islamic Arabia adoption was a well-established institution. Arabs used to treat their adopted sons as natural sons and prohibition of marriage was created among the parties involved. The status of adoption in Islamic law is determined by the following verses of *Surah Al-Ahzāb*:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ وَمَا جَعَلَ أَزْوَاجَكُمُ اللَّائِي تُظَاهِرُونَ مِنْهُنَّ أُمَّهَاتِكُمْ وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكُمْ قَوْلِكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ ادْعُوهُمْ لِآبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فَاِخْوَانَكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا

*"Allah has not made for any man two hearts in his (one) body: nor has he made your wives whom ye divorce by Zihār⁴⁴ your mothers: nor has he made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the truth, and He shows the right way. Call them by (the names of) their fathers: that is juster in the sight of Allah. But if ye know not their father's (names, call them) your brothers in faith or your Mawlās (freed slaves)."*⁴⁵

وَإِذْ تَقُولُ لِلَّذِي أَنْعَمَ اللَّهُ عَلَيْهِ وَأَنْعَمْتَ عَلَيْهِ أَمْسِكْ عَلَيْكَ زَوْجَكَ وَاتَّقِ اللَّهَ وَتُخْفِي فِي نَفْسِكَ مَا اللَّهُ مُبْدِيهِ وَتَخْشَى النَّاسَ وَاللَّهُ أَحَقُّ أَنْ تَخْشَاهُ فَلَمَّا قَضَى زَيْدٌ مِنْهَا وَطَرًا زَوَّجْنَاكَ لَهَا لِأَنَّكَ لَمْ تَكُنْ مِنَ الْمُؤْمِنِينَ حَرَجٌ فِي أَزْوَاجِ أَدْعِيَائِهِمْ إِذَا قَضَوْا مِنْهُنَّ وَطَرًا وَكَانَ أَمْرُ اللَّهِ مَفْعُولًا

*"Behold: thou didst say to one who had received the grace of Allah and thy favour: 'retain thou (in wedlock) thy wife and fear Allah'. But thou didst hide in thy heart that which Allah was about to make manifest: thou didst fear the people, but it is more fitting that thou shouldst fear Allah. Then when Zaid had dissolved (his marriage) with her, with the necessary (formality), We joined her in marriage to thee: in order that (in future) there may be no difficulty to the believers in (the matter of) marriage with the wives of their adopted sons, when the latter have dissolved with the necessary (formality) (their marriage) with them. And Allah's command must be fulfilled."*⁴⁶

These verses concern *Zaid ibn Hārithah* who was the Prophet's adopted son. In pre Islamic Arabia adopted sons were treated like natural sons. *Zainab Bint Jahsh* was the Prophet's cousin and was *Zaid's* ex-wife. The Prophet married her and was criticized for marrying the ex-wife of his son. According to the Qur'ān a marriage with the ex-wife of a natural son is prohibited.⁴⁷ The above mentioned verses were revealed in this context and it was made clear that adoption does not create prohibition of marriage and adopted children are not to be considered as the same as natural children. *Hārithah* was *Zaid's*

biological father. According to the above mentioned verse children should be named after their biological fathers, so *Zaid* who was called *Zaid ibn Muhammad*, was called *Zaid ibn Hārithah* after revelation of these verses.⁴⁸

By revelation of these verses the custom of adoption was abolished. In Islam there is no concept of legal adoption according to the majority of scholars.⁴⁹ There are some scholars who are of the opinion that adoption is not prohibited, but is *mubāh*. In all Muslim countries the opinion of the majority of jurists is followed.⁵⁰ This can be seen in various reports of Muslim countries to the United Nations Commission on the Rights of the Child, in which they have all said that in Islam the institution of adoption does not exist.⁵¹

It is important to distinguish adoption from acknowledgement of paternity. Acknowledgement of paternity does not create paternity: it only establishes an existing relationship and a natural child is acknowledged by the biological father, whereas in adoption the paternity of the child is neither claimed nor established. In adoption the child is considered to be begotten by someone else but taken by adoptive parents into their care. A child can be adopted even though his/her father is known whereas a child cannot be acknowledged by another person in such situation.⁵²

Fosterage⁵³ creates prohibition of marriage between the child and the family of the milk mother (wet nurse) and is occasionally used as an alternative to adoption. According to a tradition the woman who adopted *Sālim ibn Abū Hudhaifah* came to the Prophet to ask about the status of her relationship with her adopted son after revelation of the above mentioned verses. The Prophet advised her to make him her foster child by breast feeding him.⁵⁴

In spite of the prohibition of legal adoption it is a pious deed to look after an orphan or to be his guardian. The thing which is prohibited is to change the parent's names or change the child's lineage. The Qur'ān says that if you do not know who a child's parents are then call the child as '*your brother in faith*'.⁵⁵

The institution of *kafālah* primarily provides a mechanism to care for abandoned children. The word *kafālah* literally means 'to nourish' or 'take charge of'.⁵⁶ According to Ibn Manzūr '*al-kāfil*' is a person who looks after an orphan.⁵⁷ Such a child has no right to the family name or inheritance of the adoptive parents. But the adoptive parents may give the child up to one third of their property by making a will. An illegitimate child if adopted will be associated to its biological mother and will inherit from her. To deprive the father of paternity rights in the case of an illegitimate child is a punishment as children whether legitimate or illegitimate were considered wealth in Arab society. Islam asked for deprivation of this wealth if the child is illegitimate.

Generally to look after an illegitimate child is a duty of the mother and the state but such children may be taken into *kafālah*.⁵⁸ By prohibiting adoption and encouraging *kafālah* Islam calls for a society based on truth and justice. If adopted children were to be treated as natural children then legal heirs would be deprived of their shares in inheritance which is against justice.⁵⁹

Pakistani Law Related to Acknowledgement and Adoption

In Pakistan there is no statute dealing with these issues so rules are derived from judicial precedents. Pakistani courts consider acknowledgement an acceptable way of establishing paternity. In the absence of any other direct proof acknowledgement of paternity can be made but it must be in accordance with Sharī'ah. If an acknowledgement is against the principles of Sharī'ah it is not acceptable. As there is a presumption of legitimacy, the burden of proof is on the party challenging paternity.⁶⁰ Pakistani courts recognize the importance given to legitimacy by Islam and have declared that the objective of the 'iddah period is to confirm pregnancy and to avoid any possible dispute over the paternity of the child.⁶¹ In *Maj. (Retd.) Abdul Akbar through Legal Heirs v. Mst. Maryam Khushmoo* the Peshawar High Court decided that if *nikāh* between the parties is not proved by evidence Islamic law accepts acknowledgement of the father regarding his marriage and legitimacy of the child. The court said that the basic principle in the cases of legitimacy is that 'the child follows the bed.'⁶² In *Syed Iftikhar Hussain Jafri v. Mrs. Shamshad Begum* the step brother of the deceased Syed Altaf Hussain alleged that his brother's son is illegitimate so he is the legal heir and claimed a share in inheritance. He argued that the *nikāhnāma* (marriage certificate) and divorce deed produced to prove his deceased brother's marriage were fake. The *nikāh* registrar was summoned and he produced the original *nikāhnāma* from his record. The Karachi High Court also noticed that when the deceased was alive he and his wife had a dispute regarding custody of the child. Then they reached a compromise before the appellate court that the minor will live with the father. The court inferred from this compromise that the boy was the deceased's legitimate son.⁶³

If we look into the precedents we can find several decisions stating that adoption is un-Islamic. In *Sher Afzal v Shamim Firdaus* the Supreme Court of Pakistan clearly stated that in Islamic law institution of adoption does not exist.⁶⁴ In Pakistani law is only recognized where a special family or tribal custom is proved, which will prevail provided that the custom is given priority by legislation over Muhammadan law.⁶⁵ Generally rules of adoption in Pakistan are based on Islamic law. An adopted child does not have the rights that a biological child has. The child has no right to the property of its adoptive father, neither in his life nor after his death. But an adoptive father if he wants can give the child one third of his property by will. In *Abdus Salam v.*

A. D. J. *Jhang* the Supreme Court of Pakistan decided that an adopted child cannot inherit from its adoptive parents but has a right to inherit from its biological parents.⁶⁶

Despite prohibition, adoption does take place in practice. Issueless couples adopt children in one of the following ways: they either use the name of the adoptive mother on the birth certificate at the time of discharge from the hospital or the adoptive parents file affidavits declaring that the natural parents have given the child into their care by their free will, without any undue influence or coercion and they are now responsible for the care of the child and will incur all expenses for its upbringing.⁶⁷

In *Irfana Shaheen v. Abid Waheed* the couple adopted an abandoned child after informing the police and respectable people in the locality. The couple separated afterwards. The Lahore High Court awarded custody to the adoptive mother and declared that no one can interfere with the right of an adoptive mother of custody of the child except the biological parents. The Lahore High Court discussed the issue of abandoned children and said that according to article 35 of the Constitution of Pakistan 1973 it is the responsibility of the state to protect marriage, family, the mother and the child. The state should therefore set up institutions for the care of abandoned children and orphans. It is not only a constitutional but also a religious obligation.⁶⁸

Although for an adopted child there are no inheritance rights but he/she is entitled to get maintenance from the adoptive father. In *Muhammad Aslam v. Shazia Bano* the mother of three minors applied for their maintenance, one of whom was an adopted child. The father argued that he is not obliged to maintain the adopted child although he said that if the adopted child is given into his custody he is ready to pay maintenance. The Lahore High Court held that an adopted child is not entitled to inherit from its adopted parents but it is entitled to maintenance.⁶⁹

In Pakistan there is no statute declaring adoption illegal but case law tells us about the approach of the courts according to which adoption is considered illegal. An adopted child has no rights over its adoptive parents and vice versa. Despite this prohibition adoption occurs in practice. It is responsibility of the state to set up institutions for the care of abandoned children. A state sponsored system of *kafālah* can be introduced where the child can be adopted with agreement of biological parents but will not take the family name or inherit. When legal adoption is not recognised there must be an institutional set up to support abandoned children.

The United Nations Committee on the Rights of the Child has shown concern that Pakistan does not have an alternative care system for abandoned

children or children without parents. The Committee showed concern that, although Pakistan in its report has said that adoption is un-Islamic so it refers to the Islamic system of *kafālah*, Pakistan does not have any laws to establish such system.⁷⁰ In Pakistan implementation of *kafālah* system may entail difficulties. In Islamic law *kafālah* is as an alternative to adoption. As Islamic law was developed in a tribal society the system of *kafālah* seems more suitable for that environment. Pakistan being not a tribal society may face difficulties in implementing *kafālah*. In *kafālah* a child can be taken into care but there are some issues which make this system problematic. For instance there is issue of discrimination between a biological child of the *kafil* parents and a child taken into *kafālah* as such children do not have inheritance rights. Another issue is that such a child and its *kafil* parents will not be *mahrām* to each other. When the child will gain puberty technically he or she can marry his/her *kafil* parents. As mentioned earlier this problem can be solved by breastfeeding as breast feeding creates prohibition of marriage between the parties involved but breast feeding is not possible in every case. These are practical problems which can be faced by Pakistan in implementing *kafālah* system.

Recognizing adoption as an institution is beneficial in many respects. Firstly it is beneficial for the abandoned children as they will be able to get secure psychological environment by living in a family environment. Secondly the legal adoption will advance the respect for law as in practice the people who go for adoption claim adopted children as their own through forged documents. Similarly the charity organizations with care of abandoned children also face a lot of procedural problems for their registration without identification of their biological parents.⁷¹ Lastly that will help to promote the inter country adoption of children in need of parents.

Pakistan Child Protection Legislations

Pakistan is a dualistic state so International Conventions are not directly enforceable until there is enabling legislation making them law of the land. Pakistan has not introduced any comprehensive federal law to incorporate provisions of the CRC. Recently some efforts have been made to legislate on Rights of children but proposed legislation is pending in the parliament.⁷² Pakistan, subject to international human rights protection standards, is under obligation to set up a proper child protection system which cannot be done without formal legislation for the same. However, in Pakistan generally child and family affairs are taken to be a personal or private matter letting minimum state or public intervention under the traditional communal value system. Simultaneously child protection in Pakistan is a provincial legislative subject so falls within provincial jurisdiction. Due to this fact development in enacting child protection

legislations varies depending on different cultural/ traditional practices and political situations in each province.

Following is a brief overview of National child protection legislations in Pakistan. The Constitution of Islamic Republic of Pakistan 1973⁷³ does not differentiate between child and an adult still it includes some child specific provisions for instance prohibition of slavery and forced labor⁷⁴; free and compulsory education for all children;⁷⁵ the State's authority to make any special provision for the protection of women and children.⁷⁶ In 2010, KPK has promulgated Khyber Pakhtunkhwa Child Protection and Welfare Act, and drafted Khyber Pakhtunkhwa Child Protection and Welfare Rules 2013. In 2004, Government of Punjab promulgated The Punjab Destitute and Neglected Children Act, and later revised it in 2007. Sindh has also enacted the Sindh Child Protection Authority Act 2011, and Sindh Child Marriage Restraint Act 2013. Similarly after approval from cabinet, The Balochistan Child Welfare and Protection Bill is pending in Provincial Assembly. Legislations in provinces to some extent are done but implementation is way beyond then required.⁷⁷ There is no consolidated Child Rights Act in Pakistan but we can find scattered provisions related to child rights incorporated in general Acts and some thematic codes. The Committee on Right of the Child appreciated the legal efforts but also highlighted some areas of serious concern including birth registration issues, enrolment in primary education, juvenile justice system regarding age limit and treatment of children in prison.⁷⁸

Many governmental and nongovernmental organizations are working to protect children in Pakistan but situation remains unsettled with few improvements. There is a need to formulate a clear legislation to ensure rights and protection of abandoned children. Currently the laws related to child rights are silent on this issue. On the one hand the solutions like adoption/*kafalah* should be channelized and regularized and on the other hand serious efforts should be made to create awareness regarding rights of abandoned children among the masses.

Conclusions and Recommendations

It can be concluded that efforts to protect rights of children without a comprehensive legislation will be futile. A legislation which defines the rights of the child without any relevance to birth, race, religion and social status is needed. Pakistan has already committed to take such steps under the UNCRC but still to be reflected in national laws of the state. Birth registration system, a compulsory legal requirement, is a basic step towards establishment of rights of the child. Institutionalized Adoption (as per Islamic practice) is necessary, without its regularization it will be extremely difficult to ensure protection of abandoned children. There is an urgent need to develop a balanced approach

between Pakistan's international and religious obligations on one side and change in local social attitude towards child protection on the other side.

People cannot be allowed to abandon or kill the children but they cannot also be allowed to have them out of wedlock either. The penal laws regarding child protection needs strict implementation. It is equally important that the inadequate and outdated punishments and fines under the current laws be revised. The investigation through use of DNA test should be used. Compulsory education or schooling and penal action for those parents who do not comply can also help to reduce the number of children in streets. The government should start a fund to help families keep children for instance like Benazir Income Support Fund (BISP) to help the poor and impoverished families unable to afford to raise their children sufficiently and try to abandon their children with such institutions.

There is a need to formulate a clear legislation to ensure rights and protection of abandoned children. Currently the laws related to child rights are silent on this issue. On the one hand the solutions like adoption/*kafalah* should be channelized and regularized and on the other hand serious efforts should be made to create awareness regarding rights of abandoned children among the masses.



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