

# ISLAMIC LAW AND ADOPTION IN PAKISTAN

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Muslims are permitted to look after and provide for children who are not their own, however the adoption of these children is prohibited. In Western countries, where adoption is common practice, the adopted babies or children take the name of the family that adopts them. The majority of these children have no contact with their real parents and do not know who they are. They may, unknowingly, come into contact with their birth families and, in some cases, can end up marrying a sibling because they are unaware of their true heritage.

Islam prevents this problem by placing great significance on the name of a child and thus ensuring that lineage is traceable. Names are important in Islam as many laws relate to blood relationships; these include marriage, custody and inheritance, among others. This is also one of the reasons why some women keep their names after marriage, unlike their Western counterparts.

Thus, the relationship between guardian and child is more of a foster relationship, where the adults do not replace the biological family but perform an extremely valued role in looking after a child who will always belong to someone else. The child who is raised by “*parents*” who are not blood relations is not permitted to inherit from them; however he or she may marry “*relatives*” created by this bond. Even if a child has been abandoned and its father is not known, he or she may not be named after the family that takes him or her in.

The Holy Quran clearly states:

*“Nor has He made your adopted sons your (biological) 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 you know not their father's (names, call them) your brothers in faith, or your trustees. But there is no blame on you if you make a mistake therein. (What counts is) the intention of your hearts. And Allah is Oft-Returning, Most Merciful.” [Qur'an 33:4-5]*

However, if one wants to raise, educate and treat an orphan or an abandoned child as one's own, without giving him or her the rights reserved for natural children, Islam regards this as a meritorious and commendable act. There are many *Quranic* revelations that advocate the care of orphans, leaving one in no doubt of the merits of such a deed:

*“They ask thee concerning orphans. Say: ‘The best thing to do is what is for their good; if ye mix their affairs with yours, they are your brethren;’ (Quran 2:220). Also see Quran 4:2, 6, 10, 127; 17:34.*

Hence, according to Islamic law, adopting a child essentially entails treating him/her as one's own and offering them love, protection, food, clothing and education, but without changing the child's lineal identity and denying parenthood to the natural parents. The adopted child cannot partake in inheritance of the adoptee parents, just as the adoptee parents cannot inherit the property of the

adopted. They can marry their foster siblings as they remain '*Na- Mehram*' for the foster family. It is also permissible for a foster father to marry the divorced wife of an adopted son (*Quran 33:37-40*).

He or she can inherit property from their natural parents and their rights will subsist even after adoption by the other family. The adopter, can however, make out a will bequeathing one-third of their estate to the adopted child, as indeed to any stranger. They can also, during their lifetime, gift property to their adopted child. However, the extended Muslim family is usually very large in size and it is rare that an orphaned child cannot be looked after within the family.

There are often misconceptions about the role of adoption in Islam. The fact is that the Islamic form of '*adoption*' is called '*Kafâla*', which literally means sponsorship, but comes from the root word meaning '*to feed*'. It is best translated as '*foster parenting*', '*Kafala*', or legal fostering, is the promise to undertake without payment the upkeep, education and protection of a minor, in the same way as a father would do for his son. '*Kafala*' is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption.

It is very much encouraged in Islam to look after the orphan and there are many authentic hadiths [*sayings and action of the Prophet (PBUH)*] on the subject. There is a great blessing and reward in taking care of orphans. In the Qur'an the Believers are urged again and again to take care of the orphans. The *Prophet (PBUH)* said, "*I and the guardian of an orphan will be in Paradise or Jannah like these two fingers and he joined his two fingers.*" (*Al-Bukhari*)

The *Prophet (PBUH)* said, "*The best house of Muslims is one where an orphan is cared for.*"

Another Hadith states that, "*Jannah is Farz or Wajib (obligatory) on the one who cares for an orphan.*"

In another Hadith the *Prophet (PBUH)* mentioned that, "*When a person puts his hand of compassion on the head of an orphan, for every hair (that his hand touches) of that orphan he will receive a blessing from Allah.*"

In many passages The Holy **Quran** also encourages looking after the poor and the orphans:

*"They ask you what they should spend. Say: whatever you spend of good must be for parents and kindred and orphans and the poor who beg and the wayfarers, and whatever you do of good deeds, truly Allah knows it well."* (**2:215**)

Pakistan's legal system is based on the '*Shariah*', which does not recognise adoption in the legal sense – that is, to establish a parent–child relationship between individuals who are not related by blood. Consequently, there is no statutory provision for adoption in Pakistan.

Adoption is not governed by any law in Pakistan/Islam. It does not mean that adoption is literally prohibited in Pakistan. Children in especial circumstances are placed under the guardianship of

their near relatives or suitable person appointed by Court. In that case the children do not automatically adopt the parentage of their guardians. They will legally enjoy all social and economic rights except for inheritance of property from their guardian.

In Pakistan, ‘*Kafala*’ defines a system of alternative care that could be considered a form of customary adoption. It provides a model of alternative care that – unlike legal adoption – preserves the blood ties between the child and its biological parents – an acceptable practice under Islam. Under ‘*Kafala*’, children are placed under the guardianship of an individual – always the male in the case of a married couple – through either an informal or formal arrangement:

In Islam what can be termed adoption is at best an alternative care arrangement for a child whose parents have died or are unable to provide the necessary physical care, love and protection. Such children are then cared for by a set of parents or guardians who act as caregivers with the consent, whether written or verbal, from the natural parents or next of kin. Natural parents do not give up their parental rights. Instead, by mutual agreement, they make care arrangements with others for the upbringing of their child.

Importantly, under ‘*Kafala*’, adopted children have no inheritance rights and typically do not take on the family surname. This is due to the primacy Islam places on family relationships, parentage and lineage. However, adoptive parents may bequeath property rights on their adopted children. ‘*Kafala*’ appears to take place without the state involvement in certain circumstances, for example between members of an extended family. By far the majority of adoptions in Islamic states take the form of informal, long-term, first party, care arrangements (or *Kafala*) within the child’s extended family and, as there are no placement rights as such, the parties are essentially left to their own devices. In third party domestic adoptions, where all rights in respect of the orphan or abandoned child are vested in the designated government agency, the placement procedure is controlled by that agency.

‘*Kafala*’ is also a practice that has UN recognition under the Convention on the Rights of the Child, to which Pakistan is a signatory:

*UN Convention on the Rights of the Child.*

*Article 20*

- 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
- 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.*
- 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if 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 *Guardians and Wards Act 1890* is relevant to customary adoption in that it formalises the guardian–ward relationship. Under the Act, the relevant district court can issue a guardianship order:

*Guardians and Wards Act 1890*

*Article 7. Power of the court to make order as to guardianship*

*(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-*

- (a) appointing a guardian of his person or property, or both, or*
  - (b) declaring a person to be such a guardian,*
- the court may make an order accordingly.*

The Act enables an individual to obtain legal guardianship of a child (a practice consistent with ‘*Kafala*’ but not mandatory). ‘*Kafala*’ can be done in conjunction with the state, but this is probably more common when an orphanage or third party is involved.

To obtain legal guardianship, an application must be submitted to the relevant district court for consideration. Generally, domestic adoption arrangements in Pakistan proceed with a minimum of formality. In Pakistan, applicants may seek a guardianship order in respect of an orphan, as a first step, will be assessed by Government officials known as Deputy Commissioner. The assessment will take the form of a home study report accompanied by the usual references and an assessment of their eligibility and suitability to provide a home environment likely to safeguard the welfare of the child concerned. If approved, the child will then be transferred from an orphanage to their care and they will be vested with custody and guardianship rights. If the child’s parents are known to the authorities, and the applicants wish to ‘*adopt*’, then they will have to enter into an irrevocable, bilateral, intra-familial agreement in writing in which the birth parent/s clearly waive any right to reclaim their child.

Despite the availability of this process, the practice of ‘*Kafala*’ does not appear to stipulate a requirement to legalise guardianship. Moreover in Pakistan, most domestic adoptions are first party informal care arrangements or ‘*Kafala*’ and are not necessarily endorsed by court orders.

A guardian can be a de facto or a de jure one. Legal guardians and those appointed by the court are de jure guardians. A father is the natural guardian of a child under the age of 18 years under the Guardians and Wards Act 1890. As opposed to a de jure guardian, a person, like the mother, brother, uncle, other relations except father and father’s father, or an institution like an orphanage, may voluntarily place himself or herself in charge of the person or property of the minor; a mother, however, is the next possible guardian after a father, unless the latter, by his will, has appointed another person as the guardian of the child. She under certain circumstances can appoint a guardian by will. She can do so during the lifetime of her husband if he is incapable of acting; or after his death. A de facto guardian, as opposed to a de jure guardian, is merely a custodian of the person and property of the minor.

Consequently, all ‘*adoptions*’ are formalised in Pakistan. Fostering, in theory, is positively encouraged because it does not involve any transfer of parental rights nor does it obscure a child’s identity. Indeed, there is always the possibility of such children being fostered by non-relatives. Childless couples (even foreign Muslim childless couples) may take in a child from an orphanage, or a ‘*spare*’ child from a large family, and then later, in another country, may adopt that child. In Pakistan, for example, as long as the child is to be brought up as a Muslim, the courts will agree to such arrangements and will give permission for the child to be taken abroad. Although in this

case, the adoptive parents are related, large families do give up 'spare' children for overseas adoption and the Pakistan courts have agreed to such arrangement.

In Pakistan adoption is covered by the personal laws of the different religious communities. In the case of Muslims, adoption is not prohibited, but is not recognized in the law. Only natural born children have the right to inheritance. Therefore, if a child was adopted he/she would not have the same rights. Muslims in Pakistan use the Guardian and Wards Act, 1890, to obtain legal guardianship of a child. This creates a right of the child to be maintained and cared for by the guardian, but still does not create the right to inherit.

As stated above, there is no law formally allowing adoption for Muslims. Laws that allow adoption for other communities, e.g. Christians and Hindus, would be governed by the principle of best interest of the child, whether male or female.

While there is no law related to adoption for Muslims, adoptions are not uncommon. There is no rule that prescribes that only a certain category of children may be adopted. The general practice amongst Muslims who wish to adopt a child, is to approach the guardian court and obtain guardianship of a child after satisfying the court that it is in the interest of the minor. If the child is an orphan, the procedure would be simpler. If the child has a parent or parents they would have to support the application and endorse the claim of the prospective guardian that the welfare of the child can be better looked after by the applicant. There is no prescribed category of children for whom guardianship can be taken. There are guidelines in the law, however, that consider the religion of the child and the prospective guardian as a factor in determining the welfare of the child. The general trend of judicial thought is that the child must be reared in her/his religion of birth if known. There is a principle of Islamic law that if the religion of the child is not known, and the child is a foundling, she/he takes the religion of the person who finds the child. For instance if a child is born in a hospital run by a Christian charity and the mother abandons the child, the child will be presumed to be a Christian. If found in a locality by and large inhabited by Muslims the child will be presumed to be a Muslim.

Alternative care [for abandoned and/or illegitimate children] provided by the state and private sector is grossly inadequate and very poor. There is a great deal of concern regarding treatment of children in institutions. Generally there is neglect, abuse and exploitation. Abandoned children usually end up on the streets, only a few would be institutionalized. Even those who are have dim prospects of development or advancement. There are biases and prejudices against these children, which institutions have done little to eliminate. Children often do not receive the kind of care which would instil confidence in them or give them a sense of security. Social bias against illegitimate children is even higher. Even in adoption, there is a clear bias against illegitimate children and disabled children. There are two major and respected adoption facilities in Karachi - Kashana- i-Atfal's Naunihal Baby Centre and the Bilquis Edhi Foundation. In Lahore there is SOS Children's Village of Pakistan.

As I said earlier, adoption, though not prohibited, is socially discouraged. Attitudinal biases against adopted children are very evident, and any attempts to give the right of inheritance to such children have been resisted by the religious establishment. Childlessness can be an agony for couples who are not able to have a baby for one reason or another. Many feel that life is incomplete for them if

their homes lack the sights and sounds which only the presence of a child can bring. So it is not surprising when many married couples go for the next best option. They adopt a child. But the wait can sometimes be a long one as there are not many babies available for adoption, and also because the rules set by the adoption facilities follow a strict procedure.

The above cited explicit Islamic code explains the lack of solid legislation in the existing laws regarding adoption in Pakistan. However, transfer of custody of a child is allowed by courts of law under the Guardians and Wards Act of 1890 to private individuals, humanitarian and welfare organizations, orphanages, etc. Some of these institutions raise orphans and deserted children themselves, while others make placements in suitable foster homes.

It is unclear as to whether an adopted child has maintenance rights or not. However, the rule of equity is likely to tilt in favour of the right to maintenance, as long as the person remains adopted. The other question that sometimes arises is whether adoption can be annulled by the adoptee parents. Again, equity would demand that once a person is called '*daughter*' or '*son*', that person should remain in the custody, protection and guardianship of the foster parents irrespective of whims, fancies, change of mood or minor altercations and bad behaviour. However, irreprehensible behaviour entitles the father to disown even his real child, and that would apply to an adopted child as well.