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# Law Relating to Adoption: A Contemporary Demand to Be Enacted; Bangladesh Perspective

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*Samira Rahat Mohana*<sup>1</sup>

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## Abstract

Adoption is a common practice in almost every society throughout the world and Bangladesh is not an exception to this. Adoption carries a potential value not only from the social context but also from the religious aspects of Hindus, Christians etc. of Bangladesh. Although not being recognized by their religion Bangladeshi Muslims are often seen to take child in adoption. In most of the cases the practice is going on without any legal sanction. People who are willing to take adoption legally can only acquire legal guardianship of a minor child. Despite of being a pluralistic country, Bangladesh (legislatures) has been showing frown to this issue. This study aims to visualize the importance of taking legislative initiative with regards to the issue of adoption amplifying its social urge/demand along with the problems likely to be arose if so legalizes and solutions thereto.

**Keywords:** adoption, guardianship, *Dattak*, artificial parenthood.

## Introduction

Parentage is an urge of probably every human being from the very birth of this universe. Parentage involves both paternity and maternity. There are two way of filiations known to the law: as a rule, the law treats the natural parents as the father and mother of the child; sometimes, however, adoption leads to the result that those who are not the biological parents, acquire rights similar to theirs.<sup>2</sup> Though adoption is not recognized by Mahomedan law<sup>3</sup> and consequently not legally permitted in most of the Islamic countries of the word, rearing the children of others is seen to have been commonly practiced. The practice is appreciable socially, morally and ethically from the aspect of having accommodated an abandoned child

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<sup>1</sup> The author is a Lecturer at Department of Law & Justice of Bangladesh University of Business & Technology, Dhaka. She has been serving there for last three years. She has pursued her LL.B. (Hon's) and LL.M. from the University of Dhaka. She is keenly devoted herself to legal research and her area of interest is personal law, administrative law and intellectual property law. Besides, she is an advocate (Non-Practicing) of the Supreme Court of Bangladesh. Her email address is [mohana\\_mail@yahoo.com](mailto:mohana_mail@yahoo.com)

<sup>2</sup> Fayzee, Asaf A A, *Outlines of Mohammadan Law*, Fifth edition; Oxford University Press (Bombay) at p.186.

<sup>3</sup> *Muhammad Allahdad v. Muhammad Ismail*, (1888) 10 AII 289 340.

whereby he/she can have a better life. This practice is becoming possible by way of taking legal guardianship (custody of the child) from the Family Court or outside the court by mutual consent. This process undergoes some problems regarding the rights and liabilities of the respective parties, due to the want of proper and specific legal sanction in this regard. In Bangladesh adoption is legally allowed only for members of the Hindu faith under section 37 of The Civil Courts Act 1887; and statutorily restricted for Muslims by section 3 of the Muslim Personal Law (Shariat) Application Act 1937<sup>4</sup>. Practically, people from every community in Bangladesh silently adopt child for various reasons. This study aims to focus on the problems arising from this widely but unrecognized practice of adoption in Bangladesh and to show a way-out to resolve the problem with reasonable justification.

### Adoption: Meaning and Definition

Adoption can be defined as the legal creation of a parent-child relationship, with all the responsibilities and privileges thereof, between a child and adults who are not his or her biological parents.<sup>5</sup> Adoption incorporates a child into a family as an offspring and sometimes a sibling, regardless of genetic ties.<sup>6</sup> There are two main categories of adoption practices, generally termed as closed<sup>7</sup> adoptions and open<sup>8</sup> adoptions. However, in reality most adoption practices fall somewhere on a continuum between fully open and fully closed.<sup>9</sup>

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<sup>4</sup> Section 3 (c) “that he is a resident of 4 [the territories to which this Act extends], may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of 5 [the provisions of this section], and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.”

<sup>5</sup> Muslim Women’s Shura Council, “Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child”, *The Digest*, para 2, p.5 (August, 2011) available at <[http://www.wisemuslimwomen.org/images/activism/Adoption\\_%28August\\_2011%29\\_Final.pdf](http://www.wisemuslimwomen.org/images/activism/Adoption_%28August_2011%29_Final.pdf)> (last visited on 14<sup>th</sup> March, 2016).

<sup>6</sup> *Ibid.*

<sup>7</sup> **Open Adoption:** An open adoption allows for some form of association among the birth parents, adoptive parents and the child they adopted. This can range from picture and letter sharing to phone calls, to contact through an intermediary or open contact among the parties themselves. Many adoptions of older children and teenagers are at least partially open since the children may already know identifying or contact information about members of their birth families, or may want to stay in touch with siblings placed separately.

<sup>8</sup> **Closed adoption:** Where no identifying information about the birth family or the adoptive family is shared between the two, and there is no contact between the families.

<sup>9</sup> *Ibid.*

The Juvenile Justice (Care and Protection of Children) Act 2000, prevalent in India, defines adoption as<sup>10</sup> -

“...the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”

The Juvenile Justice Act 2000 of India calls adoption - the creation of a parents-child relationship between persons who are not related so by birth. In practical terms, it means that the same mutual rights and obligations that normally exist between parent and a child born to them would automatically apply to the adopted child in relation to the adopted family.

Adoption has been considered to be “The creation of a parent-child relationship by judicial order between two parties who usually are unrelated; the relation of parent and child created between persons who are not in fact parent and child. This relationship has brought about only after a determination that the child is an orphan or has been abandoned or that his parent’s parental rights has been terminated by court’s order.”<sup>11</sup> Adoption creates a parent-child relationship between the adopted child and adoptive parents with all the rights, privileges and responsibilities that attached to that relationship, though there may be agreed exceptions.<sup>12</sup> Therefore it can be said that adoption is a socially sanctioned scope to create artificial parenthood where in between the adopted child and the adoptive parents all rights and responsibilities *e.g.* using parental identity, maintenance, inheritance and maintaining relationship with the family members are regulated as those of the natural parent-child relationship.

## Historical Review

The history, practice and recognition of adoption of children are of extreme antiquity great interest. Adoption was widely practiced by the ancient Romans. Two kinds of adoption was recognized and practiced in Rome, but both required that the adopter be male and childless.<sup>13</sup> The first was known as *arrogatio* and applied where the person to be adopted was

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<sup>10</sup> Section 2.

<sup>11</sup> Garner, A Brayan, *Blaks Law dictionary*, USA 9<sup>th</sup> edition (2009) at p-55.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

*sui juris*.<sup>14</sup> In such cases the adoption must be sanctioned by the *comitia curiata*.<sup>15</sup> The second form of adoption was adoption *proper*.<sup>16</sup> That applied to those that were still under the rule of the father, the *patria potestas*, and were thus *alieni juris*,<sup>17</sup> and was accomplished by the father going through the form of selling his son by a formal *mancipatio* to the adopter, which was followed by the rendition of a judgment of adoption. As time passed many other limitations developed; e.g., women could be adopted but could not be arrogated. Neither could they adopt<sup>18</sup>. Finally codification took over.

In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, but he reduced the system to a code, which simplified the proceedings<sup>19</sup>. The effect of adoption was to cast the succession on the adopted in case the adopting father died intestate.<sup>20</sup>

Adoption was practiced at a very early time among the Jews.<sup>21</sup> The Bible tells of the story of the discovery of an abandoned Jewish baby who was adopted by Pharaoh's daughter and named Moses.<sup>22</sup> However, one of the civilizations that have retained its ancient customs, longer than most, including the custom of adoption of male children, is that of the Hindus.<sup>23</sup>

It is the same in Japan. "The same concept shows up in Japan. The Emperor is the direct descendant of the sun and the male line is unbroken for thousands of years. You may ask: "How is this possible?" The answer is simple: "When there failed to be an heir one was adopted."<sup>24</sup>

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<sup>14</sup> Quarles Luis, "The Law of Adoption-A legal Anomaly", *Marquette Law Review*, Vol 32, Issue-4. P. 249

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> 23 Nettleship, op. cit., "Adoption".

<sup>19</sup> <<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3388&context=mulr>> (Last visited on 15 March, 2017).

<sup>20</sup> In re Session's Estate, 70 Mich. 297, 38 N.W. 249.

<sup>21</sup> Quarles Luis, "The Law of Adoption-A legal Anomaly", *Marquette Law Review*, Vol. 32, Issue-4. P. 249.

<sup>22</sup> Exodus 2:5-10.

<sup>23</sup> Quarles, Louis, "The Law of Adoption - A Legal Anomaly", *Marquette Law Review*, Issue 4 February 1949 (Article 2), Volume 32, p. 240.

<sup>24</sup> *Supra* note 14.

## Adoption; Different Thoughts and Practices

- i) **Under Civil Law:** In the twenty-first century, many national and international laws have modernized the practice of adoption, giving recognition to the identity and background of the child. Adopted children often have the legal right to know about their origins and are encouraged to embrace their cultural, ethnic, and biological heritage.<sup>25</sup> In the New South Wales province of Australia, for example, children are allowed to retain the last name of their birth family, inheritance can be decided by a will, and continuing communication between the birth family and the adoptive family is made possible by a mutually agreed “Adoption Plan.”<sup>26</sup> The notion of an adoption absorbing an adopted child’s identity is no longer the ruling paradigm.<sup>27</sup>

In many countries with large Muslim populations, such as Sudan, Tanzania, and India, different laws regulate adoption and *kafala* for non-Muslim than for Muslim children.<sup>28</sup> In a number of Muslim-majority countries, such as Jordan, Algeria and Morocco, regulations governing foreign adoption have been modified to allow for, under certain conditions, transfer of guardianship (*kafala*) of the child to Muslim parents, with the option of later adopting the child under the law of their own country, once the child comes to the new community<sup>29</sup>.

- ii) **Under Muslim Personal Law:** according to the Islamic view, raising a child who is not one's genetic child is allowed and, in the case of an orphan, even encouraged but, the child does not become a true child of the "adoptive" parents.<sup>30</sup> For example, the child is named after the biological, not adoptive, father.<sup>31</sup> The holy Quran does say “Nor has

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<sup>25</sup> Supra note 18.

<sup>26</sup> Adoption in NSW: Information for the Muslim Community,” available at <[http://www.community.nsw.gov.au/docs/wr/\\_assets/main/documents/adoption\\_muslim\\_broch.pdf](http://www.community.nsw.gov.au/docs/wr/_assets/main/documents/adoption_muslim_broch.pdf)> (last accessed on 9<sup>th</sup> March 2017)

<sup>27</sup> *Ibid.*

<sup>28</sup> < <http://dawoodi-bohras.com/forum/viewtopic.php?t=9294>> (Last visited on 15 March, 2017)

<sup>29</sup> “Adoption of Children from Countries in which Islamic Shari'a law is Observed,” Intercountry Adoption, Office of Children’s Issues, US Department of State, available at <<http://www.adoption.state.gov/pdf/Adoption%20of%20Children%20Countries%20Islamic%20Sharia%20Observed.pdf>> (last accessed on 10<sup>th</sup> March., 2017).

<sup>30</sup> < [https://en.wikipedia.org/wiki/Islamic\\_adoptional\\_jurisprudence](https://en.wikipedia.org/wiki/Islamic_adoptional_jurisprudence)> (Last visited on 13 March, 2017).

<sup>31</sup> Huda, “Adoption in Islam”, *About.com Religion & Spirituality*. Available at <<http://islam.about.com/cs/parenting/a/adoption.htm>> (last visited on 14<sup>th</sup> March, 2017).

He (Allah) made your adopted sons your (true) sons. Such is (only) your (manner of) speech by your mouths. But God tells the truth, and He shows the way. Call them by (the names of) their fathers, that is better in the sight of God. But if you do not know their fathers, they are your brothers in religion...”<sup>32</sup> The child is also a *non-mahram* (not within prohibited degree) to members of the adoptive family.<sup>33</sup> Thus many Muslims treat adoption (in the common sense of the word) as impermissible by Islam, but that it is permissible to take care of another child, which is translated into Arabic as: *kafala*.<sup>34</sup> *Kafala* is defined as “the commitment to voluntarily take care of the maintenance, the education and the protection of a minor, in the same way a [parent would do for a child]”.<sup>35</sup> Although the previously stated verse of the Quran focuses on adoption and not *kafala*, in some cases *kafala* may lead to adoption.<sup>36</sup> However, the adoptive child can become a *mahram* to his adopted family, if he or she is breast-fed by the adoptive mother before the age of two.<sup>37</sup> Adoption is practiced in various forms in many Muslim-majority countries. For example, unofficial adoptions within families, as well as secret adoption, occur alongside the *kafala* system.<sup>38</sup> Thus, most of the Muslim majority countries don’t have legally recognized adoption process.

- iii) Under Hindu Personal Law:** Adoption is recognize by the Hindu *sasthra*/religious law, but even in that system of law there may be a family or caste custom prohibiting adoption; and if such custom is proved, effect will be given to it by the courts.<sup>39</sup> In order to fulfill the criteria of adoption, the person to be adopted must be a male<sup>40</sup> and also belong to the same caste as the adoptive parents. He should not suffer from any infirmity or be an orphan.<sup>41</sup> The object of adoption is twofold: the first is religious, to secure spiritual benefit to the adopter

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<sup>32</sup> Quran 33: 4-5.

<sup>33</sup> *Ibid.*

<sup>34</sup> <[https://en.wikipedia.org/wiki/Islamic\\_adoptional\\_jurisprudence#cite\\_note-1](https://en.wikipedia.org/wiki/Islamic_adoptional_jurisprudence#cite_note-1)>. (last visited on 14<sup>th</sup> March, 2017)

<sup>35</sup> International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), “*Specific Case: Kafalah*,” Fact Sheet No 51, (Geneva: ISS, 2007).

<sup>36</sup> *Ibid.*

<sup>37</sup> Supra note 18.

<sup>38</sup> Supra note 4 at p 42.

<sup>39</sup> *Fanindra v. Rajeswar*, (1885) 11 Cal 463 12 IA 72; *Verubhai v. Bai Hirabu*, (1903) 27 Bom 492 30 IA 234.

<sup>40</sup> *Gangabai v. Anant* (1889) 13 Bom 690.

<sup>41</sup> Huda, Dr. Shahnaz, “Personal Law in Bangladesh: The Need for Substantive Reforms”, XV(I) (2004) *Dhaka University Studies*, PP.103-126 at p. 124.

and his ancestors by having a son for the purpose of offering funeral cakes (pinda) and libations of water to the manes of the adopter and his ancestor.<sup>42</sup> The second is secular, to secure an heir and perpetuate the adopter's name.<sup>43</sup> To complete a valid adoption there needs to be the performance of a *Dattahoma* (oblation to fire) ceremony and the adoption is completed by an actual giving and taking.<sup>44</sup> Adoption has the effect of transferring the adopted boy from his natural/biological family to the adoptive family and it confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son.<sup>45</sup> An adopted son is considered to occupy, for all purposes, the same position as a natural son.<sup>46</sup> At the same time the adopted son loses all the rights in his natural family including the right of claiming any share in the estate of his natural father or coparcenary property.<sup>47</sup> It doesn't sever the tie of blood between him and his natural family and therefore he cannot marry in his natural family within the prohibited degrees.<sup>48</sup> The only cases in which an adopted son is not entitled to the full rights of a natural born son are where a son is born to the adoptive father after the adoption and where he has been adopted by a disqualified heir.<sup>49</sup> The right to adopt belongs primarily to only males and a wife cannot adopt without the consent of her husband if he is alive and able to give such consent.<sup>50</sup> A widow under the *Dayabagha* School of Hindu law, (applicable in Bangladesh and in West Bengal and Assam in India) may adopt, but only based upon the implied or expressed consent of her husband given before he died.

**iv) Christian Personal Law:** Under Christian religious law, adoption is accepted and a child may be *baptized*<sup>51</sup> in the Catholic Church<sup>52</sup>. In Christianity, adoption is considered a sacred work.<sup>53</sup> Christian

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<sup>42</sup> Desai. T. Sunderlal, *Mulla, Principles of Hindu Law, Bombay* (15), 1982 at p. 490.

<sup>43</sup> *Sitaram v. Harirar*, (1911) 35 Bom 169 179 180 8 I.C. 625.

<sup>44</sup> *Supra* note 18.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Anath Bandhu Guha v. Sudhansu Sekhar Dey*, 31 DLR (1979) 312.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Mootia v. Uppon*, (1858) Mad SD 117.

<sup>49</sup> *Supra* note 23 at p. 44.

<sup>50</sup> *Supra* note 29.

<sup>51</sup> Christian religious ceremony.

<sup>52</sup> Huda, Shahnaz, *A Child Of One's Own, Bangladesh Shishu Adhikar Forum*, Dhaka (2008) at p. 67.

<sup>53</sup> Due, Rev. Dr. Noel (Coromandel Baptist Church) "The Biblical Doctrine of Adoption" *New Creation Teaching Ministry-Monthly Ministry Study*, 28 October 2009–MMS82.

personal law not only permits adoption but also encourages it. According to Christian religious law, adoption is equivalent to devoutness to God. The Bible says: “Whoever receives one such child in my name receives me” *i.e.* when you adopt a child you are saying yes to receive God’s blessings.<sup>54</sup> Christians believe that God created everyone and does not divide people by race; there are people all around us who have needs and it’s important to follow where God is leading you. If you do adopt a child it’s another extension of God’s love to treat them as your own biological child.<sup>55</sup>

### Adoption process in Bangladesh

In 1972, the procedure of adoption was simple under the Bangladesh Abandoned Children (Special Provisions) Order 1972, mainly for speeding up the adoption of liberation war orphans by the foreign foster parents.<sup>56</sup> But this procedure was amended in 1981. The 1981 amendment states that the foster parents can now only get the guardianship of a child.<sup>57</sup> However, only Bangladeshi citizens are eligible to apply for guardianship of Bangladeshi children.<sup>58</sup> The Guardianship and Wards Amendments Ordinance, 1982 prohibits the granting of guardianship of Bangladeshi children to non-Bangladeshi parents.<sup>59</sup>

Their respective personal/religious laws govern family or private matters of Muslims, Hindus and of other communities in Bangladesh, including the practice of adoption.<sup>60</sup> From the perspective of personal laws of the different communities, there are different thoughts regarding adoption. As seen from the above, it is easier for a Hindu or Christian couple to adopt than it is for a Muslim couple.

It has been mentioned already that Muslim law permits a system of guardianship (*kafala*), which resembles foster-parenting, but is more

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<sup>54</sup> “*The Book of Genesis (The Holy Bible)*”, Matthew 18:5.

<sup>55</sup> “And when he was exposed, Pharaoh’s daughter adopted him and brought him up as her own son.” Quoted from “*The Book of Genesis (The Holy Bible)*”, Acts 7:21.

<sup>56</sup> “Babies born to Bengali women consequent of their being raped by the Pakistani soldiers and other criminals who took advantage of the situation of the war in 1971”- *Banglapedia- National Encyclopedia of Bangladesh* (2030); Vol-10 at p. 345.

<sup>57</sup> Last visited on 20 April, 2016 <http://lawandpractice.com/law-practice/child-adoption-procedure-bangladesh/>

<sup>58</sup> Section 7, the Guardians and Wards Act, 1890.

<sup>59</sup> *Ibid.*

<sup>60</sup> Huda, Dr. Shahnaz, “Anglo-Mohammedan and Anglo-Hindu Law- Revisiting Colonial Codification”, *Bangladesh Journal of Law*, Vol-07 (2003) p. 01.



stable.<sup>61</sup> In this continuation, adoption has not been legally recognized in any legislation as the majority population of Bangladesh follows Islam. Only the Hindu community of Bangladesh can legally adopt a son as their religious law so permits. But the matter of fact is that there is no legally recognized adoption procedure even for the Hindus. Irrespective of their religion, all the communities of Bangladesh follow the provision of taking legal guardianship of a minor<sup>62</sup> (*Palak/dattak*<sup>63</sup>).

If any citizen of Bangladesh is willing to adopt a child legally there is no direct way open for him other than acquiring the legal guardianship of the child through the intervention of the Family Court under the Guardians and Wards Act, 1890.

The process of taking legal guardianship is as follows:

The interested party has to apply to the Family Court seeking legal guardianship of the minor. A Bangladeshi citizen<sup>64</sup>, who is interested in adopting a child, may contact organizations who are working in the area of child adoption like an NGO or an orphanage or even an individual, who is willing to give a child up for adoption. An application for legal guardianship must be made to the Family Court which has the sole jurisdiction over family matters.<sup>65</sup>

There are some documents required for obtaining legal guardianship of a child, including the child's birth certificate, an irrevocable release of the child, signed by the biological parents (if any) before a Notary Public or Magistrate in Bangladesh and a 'no objection' certificate from the Home Ministry<sup>66</sup>:

Along with these listed documents the foster parent/s must apply to and satisfy the Family Court to appoint him/them as custodian or guardian of the adopted child. It is the discretionary power of the Court to allow the adoption/guardianship.<sup>67</sup> If he/they get the permission from the Court, he is/they are legally permitted to take guardianship over the child, with the title of "court appointed guardian". After getting the permission from the

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<sup>61</sup> Supra note 5 at p. 42.

<sup>62</sup> Information collected from Akramul Hoque Samim, Assistant Judge, Kishorganj (former Judge of Khulna Family Court).

<sup>63</sup> Local term of Adoption.

<sup>64</sup> Section 7, the Guardians and Wards Act, 1890.

<sup>65</sup> *Ibid*, Joint effect of section 7, 8 & 9.

<sup>66</sup> Available at <<https://adopt.com/bangladesh/>> (last accessed on 19 April 2017).

<sup>67</sup> Supra note 64.

court he/they needs to show it to the respective person or organization under whose immediate custody and guardianship the child stays.<sup>68</sup> Once the documents of permission are presented, the legal guardian can take the child in custody and the ‘adoption’ procedure is completed.

### **Limitation/lacuna of the existing legal provision regarding adoption**

Appointment of legal guardian and taking legal adoption are two solely distinct matters with distinct objects, rights and obligations. Having different legal provision and procedure from that of the adoption, people of Bangladesh often undergo some difficulties, these are -

- i. **Cessation of guardianship:** Legal guardianship obtained from the Family Court of a ward (whose person or property there is a guardian appointed by the court<sup>69</sup>) can only be allowed if the ward is a minor and the guardianship ceases on the minor’s attainment of majority or, if the ward is a girl, on her marriage<sup>70</sup>. On the other hand, adoption means an eternal parent-child bond. One of the prime objects of taking adoption is to ensure social security of the adoptive parents, especially during old age. Here, if either of the parties to a guardianship willfully/deliberately renounces the relation, the other does not have any legal way to enforce it. In case of an issueless couple having no means of their own (financially unstable/ill/physically disable) who adopted a child by taking legal guardianship to meet their urge of parenthood, if the ward, on attaining his/her majority wants to leave them, they do not have the recourse to enforce maintenance rights through the court under the **Parents Maintenance Act 2013**<sup>71</sup> as the guardianship has ceased in the eye of law.
- ii. **Want of Recognition of Adoptive Parents name in formal/legal documents/ activities of the adopted child:** The relationship of a court appointed guardian and ward doesn’t permit the ward to use his/her adoptive parent’s identity in any of his identity documents like National Identity card or passport. Neither can the ward legally represent his legal guardians in any of their professional activities.

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid*, Section 2.

<sup>70</sup> *Ibid*, Section 41.

<sup>71</sup> This Act of 2013 compels both male and female child of elderly parents to provide maintenance.

- iii. **As to the determination of prohibited degrees:** Every religion has set down some prohibited degrees of relationships within which marriage is considered to be void. Hindus considered the adoptive son as their natural son and prohibited degrees accordingly apply to him. Unlike Hindus, a marriage of an adoptive Muslim son or daughter with any of the relation of his/her adoptive family, which would have prohibited to their natural child, is legally valid but seems indecent and goes against social and ethical values.
- iv. **Unrecognized right of inheritance:** In the present law there is no standard of determining rights and liabilities over the property of the adoptive parents by the adopted child. An adoptive child does not legally possess any right over the property of his/her adoptive parents. In Bangladesh, for Muslim families, since the adoption process is only legal by way of taking legal guardianship, it does not actually create any parent-child relationship. As Hindu *Shastric* law permits adoption, there is no such legal bar for the Hindus<sup>72</sup> Thus, the adoptive son of a Muslim adoptive parent is not entitled to inherit any part or share of the latter's property.
- v. **Unauthorized practice:** For want of appropriate law, people sometimes adopt children out of the kindness of their heart, and under no legal authority or interference of the court. In such practices neither party can claim any legal support in reference to the adoption. For example, if a daughter is adopted without following any legal process and treated as a maid depriving her of all the privileges of a daughter, she won't even be able to enforce her right of maintenance.
- vi. **Lack of monitoring mechanism:** Due to lack of monitoring mechanism, children adopted informally and without any interference from the court, may become victims of trafficking for child labour, prostitution, begging; and forced to participate in other kinds of anti-social activities.

### **Importance of Adoption under the socio-cultural perspective of Bangladesh**

As the majority of our population follows Islam and adoption is not recognized under *Shariya* Law, no step has yet been taken to smoothen the way of taking adoption directly.

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<sup>72</sup> Section 37, the Civil Courts Act, 1887.

Infertility is a problem in our country and one of the main reasons why adoption is popular – even the informal, undocumented kind. According to the doctors involved in the business of infertility treatment, there are over 3 million identified infertile couples and 10% to 15% of the couples are suffering from infertility<sup>73</sup>. Due to the changes in global environment, food habits, socio cultural practices etc. the infertility rate is apparently increasing in our country. These couples can have a child by way of using test tube technology, but it is too expensive; and surrogacy<sup>74</sup> and sperm donation are taboo or not supported due to social, legal and religious aspects.

On the other hand, due to poverty, there is a huge quantity of abandoned street children in Bangladesh, especially in Dhaka. A survey commissioned to BIDS by the organization ARISE on 'Estimation of the Size of Abandoned Street Children and their Projection for Major Urban Areas of Bangladesh 2005' shows that the number of street children in Dhaka 249,200; Chittagong 55,856; Rajshahi 20,426; Khulna 41,474; Barisal 9,771; Sylhet 13,165 and the total number in Bangladesh is 679,728.<sup>75</sup> According to this research, it has been estimated that the probable number will be 1,144,754 in 2014 and 1,615,330 in 2024.<sup>76</sup> The government does not have the adequate means to accommodate and rehabilitate this large number of destitute children.

It is also stated in the Third and Fourth Periodic Report of the Government of Bangladesh, under the Convention on the Child Rights (2007); Government of Bangladesh under Ministry of Women and Child Affairs: “Bangladesh has 85 orphanages with the capacity to accommodate 10300 children, 6 baby homes (capacity 550 for abandoned children aged 1-5 years); 3 Adolescents Development Center with the capacity of 550, 6 Destitute and Vagrant Center (capacity 1900); 3 Shishu Paribar in 3 hill districts; 6 Safe Home (capacity 400) and 2 homes with the capacity of 500 children. These homes are also alleged to have committed certain child abuse.”<sup>77</sup>

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<sup>73</sup> <http://ubinig.org/index.php/home/showArticle/14/Farida-Akhter/#sthash.0F67FE2F.dpuf>

<sup>74</sup> “A traditional surrogate is a woman who is artificially inseminated with the father's sperm. She then carries the baby and delivers it for the parents to raise. A traditional surrogate is the baby's biological mother” collected from  
<<http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother>>  
(last accessed 19 April 2017)

<sup>75</sup> Available at <[http://www.unicef.org/bangladesh/Protection\\_of\\_Children\\_Living\\_on\\_the\\_Streets.pdf](http://www.unicef.org/bangladesh/Protection_of_Children_Living_on_the_Streets.pdf)> (last accessed 19 April 2017)

<sup>76</sup> *Ibid.*

<sup>77</sup> Available at <[http://www.unicef.org/bangladesh/BD\\_CRC\\_Report.pdf](http://www.unicef.org/bangladesh/BD_CRC_Report.pdf)> (last visited on 19 April 2017).

Approximately 4.9 million children between the ages of 5-14 work, often very long hours in hazardous conditions on very low wages, a majority portion of these children are abandoned.<sup>78</sup>

Not only do these children deserve to live life with humanity and dignity, and the state has the responsibility to ensure the same, the adoption of abandoned/orphan children by the issueless couples or by well-off interested parties, can lessen the burden on government.

### **Solution/Recommendations**

To solve the aforesaid problems a separate civil law/legislation can be enacted to legalize adoption for the entire citizen of Bangladesh irrespective of religion where both boy and girl child can be adopted by any competent/qualified citizen of Bangladesh. Dr. Shahnaz Huda says<sup>79</sup>

“Like the Guardian and Wards Act, 1890 the parliament may enact a law allowing adoption without any reference to religion. This law will ONLY be available to those who wish to adopt.”<sup>80</sup>

In 2005, Bangladesh Mahila Parishad had proposed the same, allowing adoption of the children up to the age of 5 by persons of not below the age of 25.

This article would like to recommend the enactment of a separate legislation on adoption which will be applicable to any citizen of Bangladesh willing to adopt. The legislation should focus on some controversial issues (discussed earlier under the head “Limitation/lacuna of the existing legal system regarding adoption”) that may likely arise:

The enactment should contain the following issues-

- All kinds of adoption should be regulated under this new Act and will be adjudicated by the Family Court. Adoption should be included in the jurisdiction of Family Court and the Family Courts Ordinance 1985<sup>81</sup> should be accordingly amended.

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<sup>78</sup> (Last accessed on April 2017) <[http://www.unicef.org/bangladesh/Protection\\_of\\_Children\\_Living\\_on\\_the\\_Streets.pdf](http://www.unicef.org/bangladesh/Protection_of_Children_Living_on_the_Streets.pdf)>

<sup>79</sup> Supra note 52, at p. 47.

<sup>80</sup> *Ibid.*

<sup>81</sup> Section 5.

- As nowhere in Bangladesh adoption is defined, an exhaustive definition should be formulated containing the distinctive features of adoption.
- All adoption must be made with the permission of the Court following all relevant legal procedures.
- The adoptive parent must execute a specific ***adoption deed*** through the intervention of court, which must be duly registered.
- Adoption should be made permissible at any age of the adopted son or daughter but the earliest be encouraged.
- Qualification of the adoptive parent should be well-defined and the principle of ***best interest of the minor*** as explained in the Guardians and Wards Act 1890<sup>82</sup> should be taken into consideration to grant adoption.
- Adoptive parent's name should be authorized to use in any documents after the adoption process is accomplished. Showing the registered adoption deed will be enough to use so.
- All the rights and responsibilities between the adoptive parent and adopted child should be well determined and fixed and regulated as if the parties are natural parents-child.
- If we want to make a uniform law on adoption there may be problems arising from prohibited degrees. This problem can be solved by providing four principles:
  - i) Prohibited degree will be extended to both the families (adoptive and natural);
  - ii) Prohibited degree with the natural family would continue as per the rules of their personal law. If both the parties of an adoption profess the same religion, they will follow their own personal law to determine prohibition.
  - iii) If they are from different religions the legislation should set the prohibition as to the marriage in accordance with the standard of decency, social and ethical values.

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<sup>82</sup> Section 17.

- iv) If any marriage with a prohibited relation takes place, the adoption will be allowed to be revoked and the marriage to sustain.<sup>83</sup>
- Another controversy may arise with inheritance rights of the adoptive child. As we know inheritance is regulated by the personal law e.g. Hindu Law, Muslim law, Christian law etc. which are distinct to each other. The suggested Act can make the provision of **mandatory bequest** of a certain portion of the adoptive parent's property in favor of the adopted child irrespective of sex like Indonesia, Tunisia etc. Dr. Shahnaz Huda suggested making a will during the course of adoption process to guarantee the right to property of the adopted child, rather than leaving it to the whims of the remaining adoptive parent.<sup>84</sup> The benefit of transferring the property through testamentary instrument is that there will be no scope left to deprive or dispossessed the adoptive parent from the property during his life time and the heirs after his death.
  - The adoptive parents (who do not have any other means) must have legally enforceable maintenance rights under the Parents Maintenance Act 2013. Adoptive parents should have the right to get maintenance from the adopted child's property in life interest.
  - Rolling review by the court must be ensured for the better protection of the rights fixed by law. With this view a **monitoring authority** can be introduced.
  - Any practice of adoption without the interference of court or violating any provision of the adoption law shall be taken into account and made unlawful. Thus, an enactment will protect children in more ways than just giving them a parent/family.

## Conclusion

Across the world child adoption is considered as one of the strongest mechanisms to help the government in accommodating and rehabilitating the orphaned, abandoned, destitute and poor children. It can also be the last resort of the childless couples. All the developed countries have their

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<sup>83</sup> Evlat Edinme, Adoption, *Adalet Hukuk*. Available at <<http://www.doc88.com/p-9713193109147.html>> (last visit on 20 April 2017).

<sup>84</sup> Supra note 52, at p. 47.

formal laws to make legal adoption possible. Numerous significance of child adoption can be properly judge by the presence of adoption related provisions in different international instruments.

The United Nations Convention on the Rights of the Child (CRC) under Article 21 stipulates controlling and monitoring mechanism for ensuring the standard of adoption process and safeguarding the welfare of the adopted child. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993 is the exhaustive instrument to regulate inter-country adoption for the best interest of the child. But the matter of regret is, Bangladesh is not the signatory of the Hague convention<sup>85</sup> and has imposed reservation<sup>86</sup> on the application of Article 21 although of being a signatory of the CRC. If Bangladesh withdraws the restriction and becomes signatory of these two international instruments on child adoption, it would make the next step of legalizing adoption easier for us.

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<sup>85</sup> Signatory list available at <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>> (last visited 20 April 2017).

<sup>86</sup> Reservation on article 21 available at < [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec) > (last visited 20 April 2016).