Establishing Guardianship

The Islamic Alternative to Family Adoption in the Canadian Context

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Introduction

Islam is not just a religion but an all-embracing code of life. The word 'religion' in its normal and common usage, when applied to Islam, may therefore convey an erroneous and misleading impression among those not familiar with Islam which, unlike other religions, not only prescribes beliefs (faith), but also emphasises the rules of social behaviour which acquire the quality of legal authority, and a concomitant requirement to fulfill the obligations created thereby (action). Moreover, it is also concerned with the correct interpretation and application of its laws.

Even a cursory glance at the subject index or concordance of the Holy Qur'an, the first and foremost source of Islamic law, would reveal numerous references to legal requirements at various levels of an obligatory, recommendatory and desirable nature exhorting help for the poor, the needy and the destitute, including the orphans by definition. The Qur'an praises those *"who prefer others above themselves, though poverty be their lot"* [59:9]. We can cite the famous saying of the Prophet Muhammed (pbuh) in the same vein of recommendation: "The best of men is the one who does good to others." [1]

The nature of these obligations requires that the intent, the basic motivating factor and the underlying spirit in fulfilling these obligations is one of charity and love for fellow human beings. One of the legal mechanisms for fulfilling charitable and humanitarian obligations is through the method of adopting a child--within the bounds permitted by Islamic law (Shariah).

The spirit of charity and social justice is universal and shared by all religions. Canada has a history of many humanitarian and charitable efforts of a large magnitude. A recent example is the Canadian government's offer to accept a good number (about 500) of the 5,000 Romanian children adopted by foreigners after the fall of Nicolae Ceaucescu.

In order to accommodate the needs of a special situation, the government took special measures to help Canadians who wanted to adopt these Romanian children. Provincial government procedures and the federal government's immigration and external affairs procedures were coordinated and a new system was established to satisfy the needs of the Canadians as well as to protect against the potential danger of creating a black market for selling Romanian children to Canadians.

Secular rulings on a religious law

There are more than one million children in the Indo-Pakistan subcontinent who have lived all their lives on sidewalks and back alleys. There are many people among the three to four hundred thousand Muslim Canadians who are extremely anxious to help these children by way of adoption. The needs of

Muslim Canadians can be attended to if the various levels of governmental authorities of adoption and immigration assist Muslims and modify their respective procedural requirements as they have done in other contexts.

However, it is reported that applications by Muslim Canadians requesting immigration visas for adopted children are being turned down. Islamic law is being cited as the reason for refusal. In effect, Canadian immigration officials are arguing that since Muslim law does not permit adoption, how can immigration be permitted on the ground of a relationship based on adoption? The problem is that officials are operating under a misapprehension concerning Islamic law in relation to the purposes of adoption.

There is an urgent need for both Muslims and Canadian government authorities to clear away an apparent misconception concerning the meaning of the term 'adoption'. Because the term connotes *different shades of meaning* to each party, the *differences of semantics have ramifications of a technical legal nature.*

Islam and adoption

The matter of adoption is dealt with in the Qur'an in Chapter 33, Verse 4. The Qur'an is the foremost and the initial source of Islamic law. Abdullah Yusuf Ali's translation and his explanation of the verse (attached as Appendix A) includes the following comment: "Adoption in the *technical sense* is not allowed in Muslim Law." [2] Yusuf Ali is a well known and highly regarded modern day scholar and an authority on Qur'anic commentary.

Ameer Ali presented the law on this point in his authoritative textbook of 1880 entitled *Mohammedan Law* as follows:

> Adoption, *in the sense* in which is it understood by the *Hindus* and as it was practised among the *Romans*, is not recognized by the Mohammedan Law.
>
> . . . and an adopted child (or *mutabanna)* has no rights in the estate of his or her adopting parents. . . [3]

It may be argued that what Muslims (particularly in India and Pakistan) practise, in its *technicality*, is not the same as what Canadian authorities understand by the idea of 'adoption'. On the other hand, as far as the *true spirit*, charitable purpose and humanitarianism of adoption in the Muslim and Canadian legal context is concerned, the *de facto* practice of Muslim adoption is the same as Canadian adoption. In effect, the *only* main difference between the Muslim and Canadian system of adoption concerns the adopted child's legal capacity to inherit from the intestate adopting parents. The Canadian law allows the adopted child to inherit from his adoptive parents and not from his biological parents, whereas the Muslim law would permit the adopted child, even after adoption, to inherit from his biological parents but not automatically from the adoptive parents or guardian.

If the adopted child is an orphan, the Qur'an gives clear instructions about

their inheritance from their biological parents.

The Canadian case

Since the issue of inheritance appears to be the main impediment to a possible reconciliation between Canadian and Islamic legal perspectives, let us look at the rationale underlying Canadian adoption laws. A close examination reveals that the *motivating element* behind these laws is charitable and humanitarian, while the law's *purpose* is economical (i.e., to provide for the protection and financial security of the adopted child). In other words, the law's aim is the *care* and *custody* of the child who is to be helped by way of adoption.

If the Canadian Muslims could provide a reasonable and acceptable substitute for (a) the inheritance aspects of Canadian adoption legislation (as interpreted by the Canadian judicial and administrative authorities), and (b) legal mechanisms enforceable in Canada which will assure permanent custody and irreversible transfer of the child in favour of the adoptive parents, then this might satisfy the Canadian legislative purpose and its public policy. The alternative methods, so provided, may thus become acceptable to Canadian government authorities of all levels. On the one hand, what is necessary is a mechanism which permits a Muslim married couple wishing to adopt to be able to take effective steps to protect their adopted children from financial insecurity and economic and social deprivations in a way that is permissible under the Muslim law. This would have to be accomplished without breaking the Islamic law of adoption and inheritance that technically forbids adopted children from inheriting automatically as heirs of their adoptive parents, but permits them a good share of the estate as legatees. On the other hand, the proposed mechanism must be able to satisfy the spirit and purpose of the Canadian laws, if not the technicalities or the technical interpretation of the relevant provisions of adoption laws of Canadian provinces, which require adopted children to inherit automatically from their adopting parents.

Where there is a will, there is a way

Law is based on principles and a principal can sometimes hurt a person. A general principle cannot be changed because a particular person suffers or has suffered on this account. The philosophy of law in Islam stipulates that law should embrace all and that the exception should be made only in cases of genuine necessity.

The general principle is that in any event of death, some relations of the deceased are entitled to inherit in accordance with the formulas laid down in the Qur'an. If by chance someone suffers on this account, the remedy has been spelled out in the Qur'an and the Hadith. There are also is the law of testamentary disposition in Islam, which makes it possible for a person to Will a share of his property to a person who is not otherwise entitled to inherit from him. Take for example the case of an orphan deprived of the right to inherit from his grandfather. The general principle is that the son should inherit. The sons of the son, in turn, we'll inherit from him (i.e. from the son) and not from the grandfather. But in a particular case where the father is already dead, the

grandfather can Will a portion of his property (up to a maximum of one-third of the estate) to his grandson. The provision for special cases obviates the necessity of changing the general law. It's solves the difficulties and complications of individual cases without changing (or offending) the general law.

The above principle can easily be applied to the individual cases of "adopted sons" who come unto the general law of inheritance, cannot inherit from "the adopting parents" for the reason that they are not related to each other by blood.

The Islamic style of Guardianship of orphans or other children is a legal alternative to the Western (non-Muslim) style of adoption which is technically not permissible under Muslim law.

Muslim legal authorities leave no doubt about the permissibility of adopting the *modus operandi* or technique whereby Muslim adoptive parents could be required to bequeath up to the maximum, and leave a legacy in favour of their adopted children. The following four classical and authoritative works of Muslim *fiqh* may be cited in support:

Fatawa Alamgiri

'Ainul Hidayah

Rad-ul-Mukhtar (Durr-e-Mukhtar)

Kitab-ul-Fiqh Ala-al-Madahibe-al-Arba'ah [4]

Two more authoritative works may be cited as follows:

Hughes' *Dictionary of Islam:* "Such a son or daughter (i.e., adopted son or daughter), is however, entitled to what may be given under a valid deed in gift or will." [5]

Bailie's *Digest of Mohammedan Law:* "And if the *bequest* is of the *'like* of his son's or daughter's portion', the bequest is lawful, though he should have a son or a daughter; for the like of a thing is not the thing itself, but something different." [6]

Some constitutional implications

In the Canadian context we need to establish the constitutional implications of the prevailing government policy of not regarding Muslim adoption (some people, for instance Pakistani government authorities, prefer to designate it as 'guardianship') as good enough to satisfy the legal requirements of the provincial and the federal ministries responsible for administration of adoption and immigration.

The Canadian Charter of Rights and Freedoms, as set out in the Constitution Act of 1982, guarantees rights and freedoms to citizens, subject only to reasonable limits as can be demonstrably justified in a free and democratic society. However, there is a growing unease among the Muslim community in Canada who are of the opinion that the Canadian laws and government policy based on certain narrow interpretations of the laws concerning adoption and immigration effectively render the Islamic type of adoption illegal. Canadian Muslims feel that such laws and policies fall outside the ambit of 'reasonable limits' recognized by the

Charter. As such, the laws on adoption are unconstitutional.

There emerge four specific areas of concern in relation to such unconstitutionality:

1. Section 2(a) of the Charter says everyone has "freedom of conscience and religion". From the Islamic perspective, once a person chooses to become a Muslim, he or she is obliged to adhere to and comply with Islamic law, *no matter where one lives.* This includes matters dealing with issues involving one's personal status (e.g., marriage, divorce, maintenance, guardianship and custody of children, inheritance and wills, etc.). Thus, the matter of adoption falls within the domain of Muslim Personal Law which is an integral part of the religious structure of Islam. No one, not even Muslims themselves, can modify or amend the Divine Law which God has given. [7]

The limits imposed by Canadian adoption laws, as interpreted by Canadian authorities, require an adopting couple to let their adopted child inherit. Muslims, in following the Divine Law, are unable to comply with this requirement. This effectively forces Muslims to give up an aspect of their religious tradition. This is obviously a flagrant denial of freedom of conscience and religion, since the limits imposed by Canadian laws are, in effect, so unreasonable as to offend Section 2(a) of the Charter.

2. Section 15(1) of the Charter provides that: "Every individual is equal before and under the law and has the right to the equal protection and *equal benefit* of the law *without discrimination* and, in particular, without discrimination based on race, national or ethnic origin, colour, *religion,* sex or mental or physical disability."

We believe that equality is not necessarily served by subjecting people to a rigidly monolithic process (e.g., the requirement regarding inheritance in case of adoption). In fact, *real equality* may only be possible in some, perhaps many, cases if one offers people an *opportunity to choose,* from among a set of alternatives, *the one that best suits their circumstances or abilities.* [8] By not providing Muslims with an opportunity to choose an alternative which suits their special circumstance of belonging to a different religion and the concomitant requirement to conform to the Divine Laws regarding adoption/inheritance, the government policy and the adoption laws are not treating Muslims (or others in similar circumstances) *really* equally, nor are they given an *equal benefit* of the law as required by the Charter.

Moreover, one also must realize that a key feature of the idea of equality is a function of what is meant by being given an unfair advantage or being unfairly disadvantaged. [9] In regard to the matter under discussion, one could see clearly how Muslims are unfairly disadvantaged because they do not belong to a religion such as Christianity which gives followers of the latter tradition an unfair advantage over Muslims. One may fairly ask, is the present government policy consistent with the preamble of the Charter which states that: "Canada is founded upon *principles that recognize the supremacy of God* and the rule of Law"? Or can it be considered consistent, just for the

sake of argument, even with the concept of 'secularism' which is supposed to be based on a notion of neutrality and a neutral perspective in interpreting law, policies, etc.?

In Canada, there is said to be a separation between church and state, or temple and state, or mosque and state. This separation is intended to curtail the possibility that people in power may try to impose a certain kind of religious perspective-- namely, their own-- onto the citizens of the country, irrespective of the wishes of those citizens. What in fact happens, however, is that government officials either: (a) use a variety of strategies, diversionary tactics and Machiavellian manipulations to camouflage their religious prejudices; or (b) wield a set of non-religious biases in order to place obstacles in the way of as well as impose constraints upon, the way one can pursue one's religion of choice. Although, in the latter case, the people in power claim that they are being neutral with respect to religious beliefs and practices, *in reality there is a huge difference between being neutral and being oriented in an anti-religious manner*.

Being neutral in matters of a religious nature means, to be sure, that one does not favour one religion over another. On the other hand, *being neutral also means that one does not favour a non-religious perspective, or vice versa.*

Unfortunately, what happens in practice is that many governmental authorities, elected officials and judges often tend to interpret the idea of separation of state and religion to mean that a non-religious, rather than neutral, perspective should be adopted in interpreting law, policies, programmes, directives and the Constitution. This is the case when we examine the particular way our provincial adoption laws have been and are still being interpreted. More specifically, reference can be made to the current interpretation of the phrase "if the adopted child had been born to the adoptive parents," whereby the adopted child must have the legal capacity to inherit from his adopting parents. This surely is an interpretation which is 'non-religious' as distinct from 'neutral', in that it does not accommodate the religious views of certain sections of the citizenry (e.g. the Muslims). The alternate argument, of course, would hold that even if it is taken to be a 'religious' interpretation--to conform with the Canadian Constitution Act of 1982 which clearly states Canada is founded "upon principles that recognize the supremacy of God"--then one cannot escape the ill effects of monolithic undercurrents playing havoc with the current legal interpretation in that it tends to favour a Christian bent of mind without giving weight to the views of other religions.

However, in reality, if any governmental official or jurist actually made a decision based on an articulated principle which recognized the supremacy of God, that individual would wreak upon himself or herself the collective wrath of the gods and idols of secularism who would be exceedingly jealous of such supremacy. [10]

3. Section 27 of the Charter provides that the Charter "shall be interpreted in a manner consistent with the *preservation and enhancement* of the multicultural heritage of Canadians." Practices and customs related to the Islamic Personal

Law (based on Divine Law) have become so engrained into the Muslim religious personality that such practices cannot be divorced from the cultural personality and heritage of a Muslim person without doing severe damage. The *Islamic form of adoption* and the concordant prevailing practice in the Muslim world forms an integral part of Islamic culture. We contend that the provisions of Section 2(1) and 15(1) of the Charter should be interpreted in a manner prescribed by Section 27 so that, for example, inheritance requirement, emanating from creating a cessation of such child-parent relationship between biological parent and child, would not make them inconsistent with the cultural heritage of Muslims. *An interpretation that would make room for accepting an alternative method of satisfying the true spirit and purpose of inheritance requirements (e.g., by gift or will) would, I suggest, fulfil the government obligations under this Section.* It would substantially reduce, if not completely eliminate, the risk of hurting the multicultural heritage of a good segment of Canadians (i.e., the Muslims).

4. The crux of the adoption dilemma quite clearly lies in the interpretation of the two-letter phrase 'as if' which appears in Section 158 of the Child and Family Services Act of Ontario, R.S.O. 1990, Ch. C.11, and Section 61(1) of the Child and Family Services Act of Manitoba, S.M. 1985-86, C.8. Other jurisdictions in Canada may have some similar provision or wording since this deals with the effect of the adopting order and lays down how the adopted child is to be treated by all concerned parties. Subsection 2(a) and (b) of the above-quoted laws are reproduced below to indicate what a crucial role this notion of 'as if' plays when interpreted differently in the context of the Canadian form of adoption *vis-à-vis*the Muslim form of adoption.

Effect of adoption order

Section 158(2) states:

> For the purposes of Law, as of the date of the making of the adoption order, (a) the adopted child *becomes* the child of the adoptive parent and the adoptive parent becomes the parent of the adoptive child, and (b) the adopted child *ceases* to be the child of the person who was his or her parent before the adoption order was passed and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent, *as if* the adopted child had been born to the adoptive parent. . . [emphasis is added by way of italics].

'As if' connotes the sense that one thing resembles, or can be likened to, another thing. The phrase suggests the two things being likened are similar but *not* precisely the same. In other words, things which are self-similar cannot possibly be self-same. The laws of logic stipulate that "the like of a thing is not the thing itself" or that "the like of a thing is something other than the thing." Both the Muslim law and the Canadian law aim at giving expression to the foregoing logical principle by holding

that an adopted child, although treated 'like' a biological child or treated *as if* the adopted child had been born to the adoptive parent, cannot be treated in the *same* manner as a biological child, but can be treated in a manner *similar* to a biological child. However, when it comes to interpretation and application of this rule, the two legal systems differ in the *extent* of 'similar treatment' accorded to an adopted child under their respective systems.

'Similar' is not 'the same'

The relationship between a biological parent and a biological child is a natural relationship created by the bond of *real blood* bringing them together, whereas the relationship between an adopting parent and an adopted child is fostered by the artificial, man-made bond of *legal blood*, or *technical blood*. The secular law of Canada and Divine Law of Islam take a different view when it comes to the scale and extent or the level and degree of effectiveness of these two kinds of blood. In the eyes of the Divine Law of Islam, 'legal blood' is not as thick as the secular Canadian law regards it to be. Since Muslims lead their lives on the basis of their essential belief that the Almighty Creator is All-Knowing and Supreme in His Wisdom, they are duty-bound to adhere to the Divine Wisdom inherent in the Divine Law. To put it in yet another way, as a consequence of the fundamental difference in approach in the context of adoption, the Canadian interpretation of 'as if' is much closer to 'same' than it is to 'similar'. When the 'adopted child *becomes* the child of the adoptive parent" under Section 158(2)(a) of the Ontario Act, on the one hand; but on the other hand, when "the adopted child *ceases* to be the child of the person who was his or her parent before the adoption order was passed," within the meaning of Section 158(2)(b), the Canadian interpretation makes the effect of 'as if' closer to *'similar'* than it is to 'same'. As a consequence, in the former situation, an adopted child can inherit just as a biological child would, and the latter situation is a most unnatural situation which deprives the child of economic as well as emotional benefits. The Muslim Law approach, of course, creates the reverse consequences.

Of facts, fictions and legitimacy

It will be useful to examine, albeit briefly, the historical background to this aspect of the legislation in the West. In the past, if a child were to enter an adoptive home (with the shame of infertility problems or illegitimacy), the secrecy of the child's origin was often maintained to create a fiction or illusion as if the birth had occurred in the adoptive family. Parents of adopted children were encouraged, indeed required for all legal purposes, to consider the child 'as if' born to them." [11] This course of action was motivated also by the desire to hide the immorality of the illegitimate child's natural parents, as well as to protect the adoptive parents from the related stigma. The assumption was that illegitimacy was so severe a stigma that only by way of being born anew with a new set of parents and an altered and 'fraudulent' birth certificate, publicly sanctioned of course, could the stigma be hidden. It was never to be erased. Even now, adoptive parents are obliged by law (the Vital Statistics Act) to sign an amended Statement of Live Birth, substituting their names and other information for the name(s), etc. of the birth parent(s). Many adoptive parents

have complained that this practice is tantamount to fraud. [12]

The collusion to hide the facts, among all the parties to the adoption, was the somewhat tainted basis upon which the institution of modern adoption (in the West) was founded. [13] Challenging this earlier assumption that illegitimacy was stigmatizing, Ontario decided that any action would be justified to avoid that outcome, including maintaining a secret file on the original birth. Ontario has responded to the question of illegitimacy by including in its Children's Law Reform Act of 1980, Section (1):

For all purposes of the law in Ontario, a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.

Lawmakers are not usually known to be in advance of public behaviour or attitudes, nor should it be expected that Ontario would be an exception. Many jurisdictions preceded Ontario in voiding the definition of illegitimacy. The legislature in 1980 felt no risk in declaring as law what was a fact in life. Though they felt safe in general on the question of illegitimacy, they maintained the fiction of adoption in the same Section 1(2): "Where an adoption order has been made, the child is the child of the adopting parent *as if* they were the natural parents." There did not appear to be any compulsion to be logically consistent. [14] This obvious inconsistency is still maintained and it is still assumed and carried through in the Child and Family Services Act, R.S.O. 1990, Section 158(2) that adoptive parents accept the 'as if born to' *myth*, and everyone act as if it were true. On the contrary, most adoptive parents in American and British studies indicate an acceptance of the reality of adoption and support for their adopted children, now adult, in the search for their origins. It is also sadly true and obvious that disclosure of the fact of adoption, which is now permitted, is a contradiction of the bestowal of an 'as if born to' status. [15]

In order to reconcile the apparent differences, a concerted effort must be made to realistically determine how much credence ought to be given to the literal and figurative meaning of creation and cessation of the *child-parent relationship.* There is a need to lift the veil of *linguistic formalities* and *procedural roadblocks* of a merely technical nature which are *prone to defeat the real purpose* behind the Canadian and Muslim legal systems. In other words, to be able to develop an acceptable solution to the prevailing dilemma, obviously both parties must take aim at applying the true and real spirit behind the legal principles and the charitable and humanitarian purpose governing these matters.

It is quite clear that the real and paramount purpose of the Canadian adoption system and the Islamic version of the adoption system (which we may refer to as 'guardianship') is none other than welfare of a child in need--the need for social and economic security as well as the love and affection necessary for nurturing the young. Both systems in effect then provide the needed mechanism in their own ways for the care and custody of the child by a person(s) who is fit to look after the welfare, take charge and take care of the

emotional, financial and other needs of the child (who is called an 'adopted' child of adoptive parent(s) under one system and 'ward of a guardian' under the other system). Both systems have the same admirable, humanitarian, charitable aim and purpose with a selfless motivation to help the young and the needy.

The consular misrepresentations

Creation of a child-parent relationship envisaged in Section 158(2)(a) of the Ontario Act and Section 2 of Immigration Regulations cannot be taken literally because the reality of the matter is that *the adopted child becomes the child of the adoptive parent only to the extent necessary for fulfilling the real purpose of adoption*, namely, welfare, care and custody of such a child. If the Canadian Federal Immigration Regulations intended the child-parent relationship to be treated in a literal sense, as the Canadian visa office in Pakistan appears to have held, then the conflict between the Immigration Regulations and the provincial adoption laws becomes irreconcilable. The Ontario and Manitoba adoption legislation qualify this relationship in two ways: (a) by the use of the phrase 'as if' and (b) by providing an exception in subsection (b) of Section 158 of the Ontario Act for the purposes of the laws relating to incest and the prohibited degrees of marriage (Section 61(6) of the Manitoba Act). It follows, therefore, that creation of a 'child-parent relationship' is not meant to be interpreted literally. The ruling of the Immigration/Visa office in Pakistan based on such an erroneous interpretation, then obviously becomes untenable.

To regard cessation of the 'child-parent relationship' as "severing of *all legal ties* between him/her (i.e., adopted child) and his/her natural parents" (the wording used by the Visa Section of the Canadian Embassy in Islamabad, Pakistan) is also reflective of the erroneous approach of such a literal interpretation and is, as such, untenable on these grounds: (a) for the aforementioned reasons and arguments, among others, respecting creation of such relationship; (b) it deprives the adopted child of the benefits of inheritance from his natural parents, which is contrary to and has the effect of defeating the real purpose of adoption--namely, welfare of the child; and (c) simplistic assumptions, whether legislative or interpretive, that the natural blood relationship of biological child-parent could be brought to an abrupt end by a stroke of a pen defies all natural instincts and emotional and rational considerations. Canadian thinking on this point has been changing quite rapidly in favour of modifying or abandoning this archaic school of thought as evidenced by the observations and conclusions of studies on disclosure of information conducted by the Manitoba and Ontario government authorities, for instance. [16]

Islam and bilateral inheritance

The technical bar to inheritance by a child who is the subject of the *Islamic form of 'adoption'* (ward of a guardian) cannot be taken so literally as to mean that such a child can get nothing from the estate of the adoptive parents. Muslim jurists are agreed that the purpose of the relationship will be better served by providing the 'Islamically adopted' child a share of the estate of the adoptive parents/guardians by way of a

bequest in a will and by gift. Under the Islamic system, the child given in adoption/guardianship retains his/her rights of inheritance from his/her biological parents, as noted above, and thus may inherit from both sets of parents.

Permanent transfer, not terminal relationship

As to the idea of permanent transfer of a child from one family to another, it must be remembered that such a concept is not dependent upon 'severing of *all* legal ties' between the adopted child and his natural/biological parents. Contrary to the views expressed by the ruling of the Canadian Embassy Visa Office, it is submitted that all legal ties need not be severed. Severance of legal ties only to the extent necessary for accomplishing the real aim and purpose of adoption is all that is needed. Retaining the legal ties for the purpose of taking a share of inheritance which would have been given to him/her because of his/ her legal right (which would have existed even under the Canadian law) is necessary for the creation of a Muslim Canadian form of adoption/guardianship. If the legal mechanism of intra-familial agreements executed even outside of Canada could be adapted to accommodate the permanent transfer of a Muslim child to a Canadian citizen, Canadian authorities should be satisfied with the effective end result of such agreements. Insertion of a clause in the agreement stating that the terms of the agreement would be governed by the law and will be subject to the law and the law enforcement processes of Canadian federal and provincial government and agencies is all that is probably needed.

If the bilateral, intra-familial agreement is made irrevocable by its terms (which would contain a waiver by the natural parents of their right to reclaim the child from the second family at any time), and if they should wish to terminate the agreement, does it really matter if the relationship is formally designated by Muslims as that of 'guardian-ward relationship'? As the legal advisor to the Canadian Embassy in Pakistan reiterates: "Though adoption in its *strict sense* does not have legal sanction under Muslim law, *in practice* it is not unknown, in the form of custody and guardianship."

Adoption laws and procedural requirements

As regards the procedural requirements under provincial adoption laws respecting placement of children for adoption, it is interesting to note that, in essence, the Canadian and Pakistani procedures fulfil the essential needs of the statutes and the regulations. For instance, in Pakistan, dealing with orphans and foundlings, people wishing to apply for guardianship may apply for transfer of the child into their custody, through agencies which operate as homes for young children, to high-ranking governmental officials who perform both administrative as well as certain forms of judicial functions and are known as Deputy Commissioners. The applications are screened, necessary enquiries are made, applicants are interviewed to determine their fitness financially and emotionally and for their ability to provide a good home environment. Pakistani courts, on application by Canadians wishing to 'adopt', may award guardianship of the child with permission to take the child to Canada *for permanent residence.*

In pursuing the foregoing, the Muslim citizens of Canada cannot afford to disregard as a guiding principle, the dictum of the Shari'ah-- *"Wherein lies most of good and least of evil"*--because it implies that if circumstances are such that one cannot conform wholly to the requirement of the *Shari'ah*, the course which promises to yield the greatest amount of good and the least amount of evil should be adopted. [17] The economic interests of a child adopted by a Muslim parent or parents could be protected in the form of a Muslim Will which contains a clause that the adopting parent could bequeath "the like of his son's or daughter's portion" from the one-third of the deceased's estate, which a testator is at liberty under the Muslim law to bequeath to whomsoever he wishes. With such a clause, the adopted child could get a lot more than a son's/daughter's portion, depending on what survivors the testator leaves behind. Moreover, with the consent of the heirs, an adopted child could even take the whole estate of the adopting parent. All this can be done without sacrificing any religious principles or legal-cum-religious requirements of the *Shari'ah*.

It is equally obvious that Muslims must operate within the framework of the Canadian laws and, when required, they must have their adoption applications processed through the provincially licensed agencies and in accordance with the prescribed procedures for foreign adoption. The Muslims cannot run a parallel adoption system. [18]

Recommendations

On the basis of the foregoing analysis, personal observations, practical considerations, discussions of a logical and technical nature, and arguments of a constitutional and legal nature, the following recommendations could be made:

1. Muslims should be willing, and should have no restrictions under the *Shari'ah*, to provide reassurance of financial security to the 'adopted' child by means of (a) gifts, endowments, trust instruments etc., and (b) bequest in the Will of the adoptive parents.

Canadian authorities, provincial and federal, dealing with adoption and immigration should (a) accept the gift/will/bequest alternative as sufficient to satisfy their legal requirements, and (b) permit the adopted child to inherit from his biological parents.

2. Muslims may (a) obtain guardianship orders from courts in the natural parents' countries; (b) obtain permission from such court and other government authorities to let the child emigrate for permanent residence in Canada; and (c) enter into an irrevocable, bilateral, intra-familial agreement in writing, enforceable by Canadian courts, waiving the reclaiming rights of natural parents.

Canadian authorities should be able to do the following: (a) accept this alternative as sufficient to satisfy the permanent relationship envisaged by Canadian laws and a reasonable enough safeguard, under the circumstances, against the possibility of reclaiming by natural parents; (b) in the case where the child is not an orphan or an abandoned child, treat the procedure whereby an authorized government official (e.g., the Deputy Commissioner in Pakistan) issues an order appointing the applicants

as 'guardians' and custodians as an alternative equivalent to the Canadian requirement of "placing a child with a child welfare authority for adoption"; and (c) in the case of orphans and foundlings, where applications to government officials (e.g., the Deputy Commissioner in Pakistan) may be initiated by the homes for young children which operate in a manner that provides reasonable standards of care and support of such children, the government of Canada should accept this procedure without, any problem, as being equivalent to a 'private placement agency' of the Canadian variety.

3. The Canadian government should be able to issue clear instructions to its visa offices abroad that compliance with the above procedures satisfies the requirements of Section 2(1) of the Immigration Act, and that they also comply with the requirements of Immigration Regulations as well as the requirements of all provincial adoption laws.

4. Since it is not legally obligatory under the amended laws on adoption to change the name of an adopted child, it must be made clear that no requests for change-of-name need be made by Canadian authorities, nor is there any need for Muslims to accede to such requests, if at all made, at any time.

5. Both parties (i.e., the Muslim community and the Canadian authorities at all levels of government) must accept the reality that no two systems of law can be identical or similar in all areas of concern. Interpretation of Canadian and Muslim laws must reflect these realities and should therefore be undertaken in good faith, aiming to accomplish the true spirit and purpose of adoption. Adherence to mere semantics, with undue emphasis on technical and literal aspects of the wording of relevant legislation, can only defeat the real charitable and humanitarian purpose. In order to make both systems work in tandem for the common good, all that is needed is the will and perseverance to accommodate each other and accomplish what is good for all.

6. Both the Canadian democratic system on which the Canadian laws are based and the Muslim system of life on which the Islamic laws of Divine origin are based share a beautiful quality, and that is the capacity of both systems to change and adapt themselves in matters of importance, so long as they do not conflict with the fundamental principles and foundations on which the systems are built. The traditional Canadian views are changing fast. The government's operating policies must keep pace with the changing needs of the Canadian cultural mosaic. Recent trends in the area of disclosure of adoption information do provide us with a fair barometer of the direction of the winds of change. Predictions of more and more liberalization and relaxation of archaic ways are clearly in the air.

Notes

1. Dr. Muhammad Hamidullah, *Introduction to Islam* (Lahore: Sh. Muhammad Ashraf, 1974), paras. 111, 225, 227.

2. Abdullah Yusuf Ali (trans.), *The Holy Qur'an* (USA: Muslim Students' Association of the United States and Canada, 1975), p. 1103, note 3671. For full translation

of Qur'an 33:4 and commentary, see Appendix A.

3. Syed Ameer Ali, *Mohammedan Law* (Lahore: All Pakistan Legal Decisions, 1965), pp. 195-6. For an excerpt, see Appendix B.

4. Syed Ameer Ali (trans. Urdu), *Fatawa Alamgiri* (Karachi: Darul Ish'aat, 1989), p. 472; Syed Ameer Ali (trans. Urdu), *Ainul-Hidayah* (Lahore: Idarah Nashriat Islam, n.d.), p. 438; Kurram Ali & Ahsan Siddiqui (trans. Urdu), *Rad-ul-Mukhtar Dar-e-Mukhtar Ghayatul Awtar)* (Karachi: H.M. Saeed Company, 1408 Hijri), p. 460; Abdul Rahman Aljazeri (trans Urdu), Manzoor Ahsan Abbasi *Kitab-ul-Fiqh Ala-al-Madahibe-al-Arba'ah* (Karachi: Ulama Academy, 1980, p. 483

5. Thomas Patrick Hughes, *Dictionary of Islam* (Lahore: Premier Book House, n.d.), pp. 10 and 667. For excerpts, see Appendix C.

6. Neil B.E. Bailie, *Digest of Mohammedan Law* (Lahore: Premier Book House, 1965), pp. 639-40. For excerpts, see Appendix D.

7. Syed Mumtaz Ali & Dr. Anab Whitehouse, *Newsletter--Family Law Campaign Issue* 2:1 (Toronto: The Canadian Society of Muslims), p. 6.

8. Syed Mumtaz Ali & Dr. Anab Whitehouse, *Oh! Canada! Whose Land, Whose Dream?* Sovereignty, Social Contracts and Parliamentary Democracy: An Exploration into Constitutional Arrangements (Toronto: The Canadian Society of Muslims, 1991), pp. 51-53.

9. Ibid., p. 50.

10. Ibid., pp. 101-102.

11. Report of the Special Commissioner, Ralph Garber, *Disclosure of Adoption Information* (Toronto: Ministry of Community and Social Services, Government of Ontario, November 1985).

12. Ibid., p. 40.

13. Ibid., pp. 13-14.

14. Ibid., p. 16.

15. Ibid., p. 18.

16. Ibid.

17. M. Asaf Khidwai (trans. Urdu), *Muhammad Manzoor Nomani* (Lucknow, India: Academy of Islamic Research and Publications, 1973), p. 145.

18. Ali & Whitehouse, *Newsletter*.

Appendix A

A. Yusuf Ali (trans.) *The Holy Qur'an--Text, Translation and Commentary.* (U.S.: The Muslim Students' Association of the United States and Canada, 1975).

Qur'an 33:4

> *"God has not made for any man two hearts in his (one) body: nor has He made your wives who ye divorce by Zihar your mothers; nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells (you) the truth, and He shows the (right) way."*

Commentary: Notes 3671-3673, p. 1103

3671 If a man called another's son 'his son', it might create complications with natural and normal relationships if taken too literally. It is pointed out that it is only a *facon de parler* in men's mouths, and should not be taken too literally. The truth is the truth and cannot be altered by men's adopting 'sons'. 'Adoption' in the ***technical sense*** is not allowed in Muslim

Law. Those who have been "wives of your sons proceeding from your loins" are within the prohibited degrees of marriage (iv.23) but this does not apply to 'adopted' sons.

3672 Freedmen were often called after their master's name as the 'son of so and so'. When they were slaves, perhaps their fathers' names were lost altogether. It is more correct to speak of them as the *Maula* of so and so. But *Maula* in Arabic might imply a close relationship of friendship: in that case, too, it is better to use the right term instead of the term 'son'. 'Brother' is not objectionable because 'brotherhood' is used in a wider sense than 'fatherhood' and is not likely too be misunderstood.

3673 What is aimed at is to destroy the superstition of erecting false relationships to the detriment or loss of true blood relations. It is not intended to penalize an unintentional slip in the matter, and indeed, even if a man deliberately calls another his son or father who is not his son or father out of politeness or affection, "God is Oft-Returning, Most Merciful". It is the action of mischievous parties which is chiefly reprehended, if they intend to make false insinuations. A mere mistake on their part does not matter.

Appendix B

Syed Ameer Ali, *Muhammedan Law* (Lahore: All Pakistan Legal Decisions, 1965), pp. 195-196.

Adoption Not Recognized

Adoption in the sense in which it is understood by the Hindus and as it was practised among the Romans is not recognised by the Mohammedan Law. Among the Romans, as among the Hindus of the present day, it was intimately connected with religious ideas, "having relations to the repose of the souls of the departed and the preservation of the household divinities." It existed also among the pre-Islamic Arabs and, no doubt, had a similar origin.

The Prophet (pbuh) appears to have recognised the custom at the time he adopted Zaid, the son of Haris. Later, when he had weaned the idolatrous tribes from the revolting practices to which they were addicted, he explained in fuller terms that adoption similar to what was practised in the 'Days of Ignorance' created no such tie between the ***adopted*** and the ***adopting*** as resulted from blood relationship.

The Mussulman Law accordingly does not recognise the validity of any mode of filiation where the parentage of the person adopted is known to belong to a person other than the adopted father, and an adopted child (or *mutabanna*) has no rights in the estate of his or her adoptive parents. See *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1888) IL10 All. 289, 340; *Muhammad Umar Khan v. Muhammad Niaguddin Khan* (1911) IL39 Cal. 418. See also *Bai Machhbai v. Bai Hirabai* (1911) IL35 Bom.264, which was the case of an adoption by a convert to Hinduism.

Appendix C

Thomas Patrick Hughes, *Dictionary of Islam* (Lahore: Premier Book House, n.d.), p. 10.

Adoption ~ Arabic *Tabanni*

An adopted son, or daughter, of ***known*** descent, has no right to inherit from his, or her, adoptive parents and their relatives--the filiation of this description being neither recommended nor recognised by Muhammedan Law. Such son or daughter is, however, entitled to what may be given under a valid deed in ***gift*** or ***will***. In this particular, the Muhammedan agreed with the English and the Hindu with the Roman Law.

(Tagore Law Lectures, 1873, p. 124)

A bequest of a son's portion of inheritance is void, but not the bequest of an equivalent to it. For example: If a person says, "I bequeath my son's portion," such a bequeath is null; but the bequeath will be valid if he says, "I bequeath an equivalent to my son's portion."

Appendix D

Neil B.E. Bailie, *Digest of Muhammedan Law* (Lahore: Premier Book House, 1965), pp. 639-40.

Bequest of the like to a son's or daughter's portion:

If a person should bequeath his son's or daughter's portion, when he has a son or daughter, the bequest is not valid; because he is, in fact, giving away what belongs to another. But if he has neither son nor daughter, the bequest is lawful. And if the bequest is "of the like of his son's or daughter's portion," the bequest is lawful, though he should have a son or daughter; for the like of a thing is not the thing itself, but something different. The son's portion is then to be ascertained, and an equal amount given to the legatee; but if that should exceed a third of the estate, the bequest requires the consent of the heirs, while, if it be only equal or less than a third, it is lawful without their consent; as for instance, if there be but one son, the legatee's portion is half, if allowed by the son, and only a third if disallowed by him, and if there be two sons, they and the legatee take each a third of the estate, without any necessity for their allowance. Where again, the bequest is for the like of a daughter's portion, and there is but one daughter, the legatee is entitled to half of the property if allowed by the daughter, or a third if disallowed by her. And if there be two daughters and the other circumstances of the case are the same, the legatee's portion is a third.

Of the portion of a son, if there had been one:

If one should bequeath "the portion of a son, if there had been one," the effect would be the same as in the case of the bequest "of the like of a daughter's portion," and a half be given to the legatee, if allowed by the heirs. And if the terms of the bequest were "the like of a son's portion, if there had been one," the legatee would have a third of the property.

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