

# Harmonizing Hope: The Urgency of a Uniform Adoption Law in Bangladesh

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## ABSTRACT

Bangladesh has established itself as a secular nation with the objective of promoting and safeguarding human rights and equality. Nevertheless, even after half a century after gaining independence, some significant matters concerning personal laws remain antiquated. Although personal laws and usages were codified under the British era, a significant portion of them have not been amended by legislation. Neither under the Pakistani administration nor after the independence of Bangladesh in 1971, did anybody undertake the responsibility of amending the outdated personal laws via legislation. The topic of adoption remains outmoded and discriminatory, posing possible dangers for children who need a stable home. In Bangladesh, the process of adoption is regulated by a collection of laws that result in inconsistencies, uncertainty, and procedural flaws when attempting to pursue adoption. The current diversity in the legal framework also results in prejudice when it comes to adoption by individuals from various cultures. An adoption legislation that applies uniformly is necessary to alleviate the hardships faced by many abandoned, impoverished, and parentless children in our nation. This essay examines the need of implementing a consistent adoption legislation in Bangladesh. This study examines the current laws and practices around adoption in order to identify any deficiencies in the legal framework. This essay seeks to demonstrate the need of a thorough legal framework that can provide clear guidelines, guarantee openness in procedures, and prioritize the well-being of children, all of which are crucial for fostering a unified society. This article proposes a comprehensive adoption legislation that encompasses both national and international adoption rules. It argues that such a law may contribute to social development and serve as a means to improve the welfare of disadvantaged children.

**Key words:** Adoption, orphaned children, childless parents, archaic personal law, uniform

## INTRODUCTION

It is said that youth is the future of the nation. A nation's economic growth largely depends on the youth population who are going to be the future leaders and entrepreneurs. According to a recently published census report, of the Bangladesh Bureau of Statistics (BBS), Bangladesh's current youth population is 45.9 million (4 crore and 59 lakh) in numbers.<sup>1</sup> That means one-fourth of the country's total population is in the 15-29 age group. According to SOS Children's Village, there are more than 4.4 million orphaned children in Bangladesh which means almost 10% of the youth population of the country are orphans.<sup>2</sup> Various reports show that Bangladesh is failing to utilize its youth generation in a fruitful or, effective manner. The necessity of taking effective measures for the welfare of the youth population is beyond measure. However, we should be extra concerned and cautious about those children who do not have any parental authority over them. They are the vulnerable segments of the society. A large number of the orphaned children in Bangladesh are deprived of basic necessities like food, cloth and shelter let alone education and health care. As to a newspaper report in the Daily Jugantor, young female orphans residing in Chotomoni Nibash face premature mortality and lack the necessary abilities or resources to sustain themselves independently in society. The imperative of undertaking suitable

<sup>1</sup> "Youths Account for 28pc of Population" *The Daily Star* (10 April, 2023), <https://www.thedailystar.net/bangladesh/news/youths-account-28pc-population-32931> viewed on October 6, 2023

<sup>2</sup> "Dire Need for a Law on Adoption", *The Daily Star* (13 September, 2021) <https://www.thedailystar.net/news/Bangladesh/law-our-rights/news/dire-need-law-adoption-2138066> viewed on October 6, 2023

measures to guarantee an improved quality of life for orphaned youngsters and transform them into proficient human capital can no longer be disregarded. An affectionate household with nurturing parents is the fundamental prerequisite for their enhanced quality of life. Adoption may provide a friendly and effective answer to the challenges faced by these underprivileged youngsters. Adoption is a means of providing an individual without a family with one. Conversely, adoption enables childless parents to realize their lifetime aspiration of raising a child and experiencing parenthood. Regardless, the notion of adoption contributes to the well-being of mankind. In Bangladesh, there is no particular uniform law dealing with adoption. Whereas it is approved and allowed in Hindu, Buddhist and Christian personal laws it is not approved in Muslim personal law. So, whether a Bangladeshi citizen can avail the right of adoption or whether they can even have it, depends solely on the religion he follows or, belongs to. Only the fate of a Hindu, Buddhist and Christian orphaned child can be changed by adoption but the same does not go for a Muslim orphaned child of Bangladesh. This is because there is no uniform law on adoption in Bangladesh. Since in Bangladesh family law is administered by religion, introducing a law that is not fully approved in every religion is very difficult. However, for the greater interest of the community the Government should strive to take cautious step towards enacting a uniform law on adoption that would serve the plights of orphans as well as keeping the religious sentiments unoffended. This article aims at analyzing the existing adoption law prevailing in the country with an assessment of possible benefits of a uniform law on adoption.

### Definition of Adoption

The concept of adoption was devised and approved in the society because of various reasons like infertility, inability to have children, desire to help a child, for having a male child etc. In general parlance adoption can be defined as a socio-legal process of taking someone into custody through which all the legal rights of a legitimate biological child are transferred to the adoptee. Adoption can be defined as the legal creation of parent-child relationship and privileges thereof between a child and adults who are not his or her biological parents.<sup>3</sup> “In other words, it is a kind of legal device by which a family can convey its natural child to another family.”<sup>4</sup> Adoption is the institutionalized practice through which an individual belonging to one kinship group by birth, acquires new kinship ties that are legally and socially defined as equivalent to the congenial ties.<sup>5</sup> The Juvenile Justice (Care and Protection of Children) Act 2000, prevalent in India, defines adoption as<sup>6</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 defines adoption as a parent-child relationship between persons who are not related by birth. This parent-child relation will confer upon the adoptee and the adoptive parents’ same rights, duties privileges and obligations existing between biological parents and children. As per the law, the moment the adoption is complete, the biological parent will cease to have any parental authority over the child.

Adoption has been interpreted 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. The relationship has been 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 the court’s order.”<sup>7</sup> Therefore adoption can be called an institutionalized and socially sanctioned mechanism or, practice through which a legal parenthood is created where in between the adoptee and the adoptive parents all rights and responsibilities of natural parents and child are regulated.

### Adoption in Muslim Law

Though the concept of adoption in Bangladesh is nor facilitated by all religious quarters still many instances can

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<sup>3</sup> Muslim Women’s Shura Council, “Adoption and the Care of Orphan Children: Islam and the Best Interest of the Child, *The Digest*, para 2, p 5

<sup>4</sup> Mohammad Ataul Karim, *Hindu Law in Bangladesh: intersecting religion, tradition and law* (Oriental Law Publication, Dhaka, 2020), p 106

<sup>5</sup> International Encyclopedia of Social Sciences (1<sup>st</sup> edn, 2008) vol 1, p 95

<sup>6</sup> The Juvenile Justice (Care and Protection of Children) Act 2000, s 2

<sup>7</sup> Garner, A Braynan, *Blacks Law Dictionary*, USA 9<sup>th</sup> edn (2009) p 55

be found where families raising children of others. In Muslim law this is known as Kafalah. Kafalah has origins in Islamic law (sharia, hereafter), as an alternative care option for orphans and abandoned children.<sup>8</sup> The term shariah<sup>9</sup> refers to a set of rules which governs the life of a Muslim. In legal adoption the adoptee is given the name of the adoptive family and is entitled to inherit and loses family name and inheritance rights in the natural family. Muslim law puts an embargo on adoption (tabanni)<sup>10</sup> by Quranic injunctions and hadith because adoption contradicts with different Quranic stipulations. Surah Ahzab, Chapter number 33, Verses number 4 & 5 of the Holy Quran says that, “Neither has he made your adopted son your son (in fact). That is your own saying, the words of your mouths; but God speaks the truth, and guides on the way. Call them after their true fathers; that is more equitable in the sight of God.” In Bukhari Hadith number 3508, Prophet Mohammad (PBUH) said that, “If somebody claims to be the son of any other than his real father knowingly, he but disbelieves in Allah.” So based on these sources of Quran and Hadith, it is evident that in Islam a person is prohibited from legally adopt a child. Since the family law in Bangladesh is administered by religion, Muslim citizens of Bangladesh cannot adopt lawfully. But on the contrary, there are many verses of the Quran in which Allah urges to help the orphan, take care of the orphan, to be just to orphans and to protect and uphold their rights. Surah Al-Baqarah verse number 83 states, “You shall serve none but Allah, and do good to parents, kinsmen, orphans and needy; you shall speak kindly to people and establish prayer and give Zakah.” Surah An-Nisa, verse 2 says, “Give orphans their property, and do not exchange the bad for the good, and do not eat up their property by mixing it with your own.” Surah Al-Isra verse 34 says, “And do not even go near the property of the orphan, except that it be in the best manner, until he attains his majority.” Surah Ad-Duhaa verse 9 says, “Therefore, be not harsh with the orphan. That is as you yourself have been an orphan and Allah graced you with the bounty that he made the best possible arrangements to help you in that state, therefore, in gratitude you should see that no orphan is treated unjustly and harshly.” Islam encourages helping a child in need. In Islam, one is allowed to take a child into foster care for the welfare of the child but cannot give him the legal name and right to inherit or, usurp the child’s property. But Islam permits one to bequeath one-third of his property to anybody he wishes. So, even though the adoptee cannot inherit by default, property can still be given to him by will. Conforming to the rules of Shariah, one can raise a child by not changing the adoptee’s natural status and without disrupting inheritance. Islam has just set some limitations on the legal consequences of legal adoption. Giving the adoptee the family name is prohibited in Islam. But if the child was two years old or less and was breast fed by the adoptive mother for at least a day and a night or, fifteen times consequently, then the child will become mahram<sup>11</sup> to the new family. The child will remain non-mehram if not breast fed as mentioned. As far as the concept of helping the poor and the orphan is concerned, Islam not only agrees to it but even highly recommends it. (Rizvi Sayyid M, 2020)

### Adoption in Hindu Law

Unlike Muslim law adoption is recognized under Hindu law, in Bangladesh. A Hindu can lawfully adopt a son as it complies with the principles of traditional Hindu law. It was held in *Anath Bandhu Guha v. Sudhangshu Sekhar Dey and Others* that in Hindu law an adopted son in relation to the adoptive father stands equally with the natural son in both spiritual and temporal matters.<sup>12</sup> In Hindu religion, only a son can offer funeral cakes also known as pinda<sup>13</sup> to the deceased at the sraddha ceremony to secure spiritual benefit to his father and ancestors. Hence a family not having a male issue can adopt one to secure the spiritual benefit. On this subject Atri says, “By a man destitute of a son only, must substitute for the same, always be adopted: with someone resource, for the sake of funeral cake, water and solemn rites.”<sup>14</sup> It was held in *Ram Dasi Pal v. Sura Bala Dasya*, 14 DLR, (1962) that, the secular purpose of adoption is the securing of a male heir and to continue the lineage. Based on these texts, it can be said that Hindu law approves adoption but the adoptee has to be a male. To complete a valid adoption the performance of *Dattahoma* (oblation to fire) is necessary.<sup>15</sup> Even if *Dattahoma* is not performed

<sup>8</sup> Kafalah means an alternative care option for children deprived of a family environment.

<sup>9</sup> Sharia is based on different sources of Muslim law, including the Quran, the Hadith, the Sunna, the Ijma and the Qiyas (collection of case law), as well as other sources such as customary law, the opinion of the savants etc.

<sup>10</sup> In pre-Islam world, the term for adoption was called ‘Tabanni’, where an adopted child takes after the identity of the adoptive father.

<sup>11</sup> In Islam Maharam is a person with whom marital relationship shall be considered as unlawful.

<sup>12</sup> *Anath Bandhu Guha v. Sudhangshu Sekhar Dey alias Halder and Others*, 31 DLR (AD) (1979), p 312

<sup>13</sup> Pindas are balls of cooked rice mixed with ghee and black sesame seeds offered to ancestors during Hindu funeral rites.

<sup>14</sup> J. C. C. Sutherland, *The Dattaka-Mimamsa & Dattaka-Chandrika*, Two Original Treatises on The Hindu Law of Adoption, (Sree Nauth Banerjee & Brothers, Cossitolah Street, 1856), p 1

<sup>15</sup> 23 Nettlehip, op. cit, “Adoption”

the adoption will not be considered as executed as long as the actual giving and taking of the child from the natural family to the adoptive family is not completed. There are two categories of adoption as per Hindu law.<sup>16</sup> The first category is called Krittima son where the adoption takes place with the consent of the adoptee. The other category of adoption is Dattaka where the son is given in adoption by his natural parents. In Dattaka form of adoption the consent of the natural parents is necessary for the validity of adoption. In Bangladesh no legislation has been enacted to deal with adoption in Hindu law and the shastric law of adoption is still being adhered to. The archaic concept of adoption is totally discriminatory towards female and orphaned children as shastric Hindu law does not approve adoption of an orphaned child or a female child. Adoption is practiced just as a way to be parents of a son so that he can perform the religious observance and perpetuate the name of the adoptive father and his ancestors. However, unlike Muslim law in Hindu law the adoptee gets the family name of the adoptive father and succeeds to the property of the adoptive family like a natural son. After completion of adoption the adoptee is completely severed from his natural family. That means he will not be entitled to practice any of the religious or, legal rights to his natural family. Only the blood relationships with the natural family and prohibitions regarding adoption and marriage remains in force. (Desai, 1997) The existing adoption practices under Hindu law in our country is obsolete and discriminatory and that is in desperate need of multifaceted reformation.

### **Adoption under Buddhist and Christian Law:**

In Bangladesh there is no separate personal law for the Buddhists existing. Hindu personal law is applicable to them. Hence the law of adoption under Hindu is followed by the Buddhists citizens of our country. Since Buddhism promotes compassion and the idea of helping needy people, adoption is something that aligns with the Buddhist teachings.

The verses of Bible do not directly approve the idea of adoption. But there are several passages in Bible discussing and encouraging to help the orphans. In the verse James 1:27 (NIV) it is stated that, “Religion that our God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.” This verse encourages to take care of orphans and vulnerable children. Under Christian religious law a child may be baptized<sup>17</sup> in the Catholic Church.<sup>18</sup> 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 blessing.<sup>19</sup> According to Christian personal law adoption is equivalent to devoutness to God. In Bangladesh there is no legal mechanism for Christians concerning adoption. However, like Muslim law legal adoption is not possible under Christianity. That means Christian parents cannot formally adopt children and if a child is taken into foster care, he or, she will not have any right towards the property of the guardian. Under Guardians and Wards Act 1890, Christian parents can acquire guardianship of a child which is far from complete parenthood.

### **Adoption Procedure in Bangladesh:**

In Bangladesh family matters are dealt with personal laws. Each community holds different views regarding family matters including adoption. As seen from the above discussion, adoption is permitted under Hindu and other personal laws except Muslim personal law. Though Muslim personal law permits guardianship it does not approve the concept of adoption. A child can be taken into foster care under Muslim law. Since Bangladesh is a Muslim majority country, no secular or, uniform legislation has been enacted to give recognition to adoption as adoption is not recognized under Sharia law. Only the Hindu citizens can take a son in adoption as their personal law permits adoption. However, the concept of adoption under Hindu law is very archaic and does not provide any specific procedure for adoption.

Citizens of Bangladesh irrespective of their religion can acquire legal guardianship of a child under the Guardians

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<sup>16</sup> Mohammad Ataul Karim, Hindu Law in Bangladesh: intersecting religion, tradition and law (Oriental Law Publication, Dhaka, 2020), p112

<sup>17</sup> Christian religious ceremony

<sup>18</sup> Shahnaz Huda, A Child of One’s Own, Bangladesh Shishu Odhikar Forum, Dhaka 2008, p 67

<sup>19</sup> The Book of Genesis (The Holy Bible), Matthew 18:5

and Wards Act, 1890.

The process of taking guardianship of a child under Guardians and Wards Act, 1890 is given below:

Citizen of Bangladesh, follower of any religion can be entitled to the guardianship of a child through the intervention of Family court. Any person interested in adopting a child can contact with the NGOs working in the area of child adoption, orphanage or, even private individuals who are keen to give their child in adoption. An application for legal guardianship must be instituted in the District Court having the jurisdiction to entertain an application under the Guardians and Wards Act, 1890.<sup>20</sup>

Along with some required documents as for example, 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 the proposed guardian must apply to the court. On being satisfied that appointment of guardian shall ensure the welfare of the child, the Court shall appoint a guardian of the child's person or, property or, both.<sup>21</sup> None can claim guardianship of a child under the Guardians and Wards Act as of right. Hence it is the discretionary power of the court to select and appoint a guardian for a child. While doing so the court's primary aim will be to ensure the best welfare of the child. As per the same act, the applicant shall not be considered suitable if he or, she is not desirous of being the guardian of the minor, or, any relative or, friend of the minor.<sup>22</sup> Apart from that the court shall also have regard to the age, sex of the minor, the capacity of the proposed guardian, the wishes of the deceased parent, if any and any existing previous relations of the proposed guardian with the minor or his property.<sup>23</sup> If the minor be old enough to form an intelligent preference, the court may consider the preference. If the court gives permission, then, the proposed guardian becomes the legal or, certified guardian of the child. On showing the court's written permission the custodian of the child will be bound to give the child to the guardian appointed by the court. However, as already discussed, guardianship and adoption are totally two different concepts with distinct objects, rights and obligations. Guardianship can enable aspiring couples to take a child into foster care but it does not establish any parental relationship between the child and the guardian. The parental title of the natural parents cannot be taken away by conferring guardianship. Hence, it would be ideal to say that, since we do not actually have any specific state law on adoption, there is no legally recognized uniform and reliable process of adoption in Bangladesh.

### **The Possible Transformative Impact of a Uniform Adoption Law**

As the personal laws of Bangladesh solely depends on the concerning religions it is next to impossible to bring any change without inflaming the religious sentiments and resulting backlash. Thus, it is probably prudent to come with a uniform law on adoption regardless of religion and caste to protect orphaned children. A proposed uniform law of adoption, applicable to all religious communities named *Bangladesh Abandoned Children (Special Provisions) Order* had been introduced in 1972, but was dropped in 1982 on the face of opposition from Islamicist party Jamat-e-Islami. Since then, Bangladesh has had no civil law governing adoption. The Government seems to be reluctant to take initiatives to enact a uniform law because of 'vote-bank' politics and the possibility of facing religious outcry.

With changing times and growing cases leading to discrepancy it is time to fulfil the lacunae and provide a uniform law in order to give the orphaned children social security, economic support and affection from parents. It is a practical necessity.

To substantiate the argument of need for a uniform law of adoption we must discuss how the enactment of such law will be beneficial and further the pursuit of justice and social progress.

Firstly, if all adoption come under a uniform law outside the barriers of religious rulings it would be possible to maximize the number of adoptions, therefore finding homes for a larger number of orphans. For a developing

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<sup>20</sup> The Guardians and Wards Act (Act No VIII of 1890), s 4

<sup>21</sup> *Ibid*, s 7

<sup>22</sup> *Ibid*, s 8

<sup>23</sup> *Ibid*, s 10

country having a large number of orphaned youths, adoption is a safe legal process of handing the disadvantaged children to childless couples who are desperate to have kids. Because of late marriage, environment, processed food, sedentary life style, generally weak health conditions, improper medication excessive use of contraceptive etc the incidence of infertility is increasing in Bangladesh. A uniform law of adoption can be a viable option for couples trudging through the tragedy of childlessness.

Secondly, though Hindu law recognizes adoption, it prohibits adoption of orphaned child or, of a female child. This rule is apparently unreasonable that hinders social justice as it is the orphans who require the safety net that adoption can provide the most. On the other hand, in Muslim law an orphaned child can be taken into foster care is just a guardian-ward relationship without any inheritance right. Enacting a uniform law of adoption may solve these problems of different schools in a manner that would be most facilitating to orphans.

Thirdly, a unitary law on adoption can become an embargo or control mechanism on the practice of polygamy. Polygamy is approved in Hindu law on instances of having no issues or, male issues and the same excuse is often sought in support of polygamy in a lot of Muslim family as well. Legalizing adoption through a uniform law can reduce the number of polygamies on the ground of childlessness.

Fourthly, despite of not having any law on adoption many Muslim families take children into foster care. However, because of lack of any provisions or, statutes on inheritance right of the adoptee, the adoptee does not succeed to the property of his or, her adoptive parents. A unitary law specifying that Muslim adoptive family will be entitled to bequeath one-third of the property to the adoptee through testament or, otherwise shall ensure future security of the adoptee. This can uphold the right of the adoptee and at the same time keep the concept of Sharia law intact. On the other hand, even though adoption is approved in Hindu law because of lack of codified law adopted child is often seen to be restrained from inheriting the adoptive parents. It was upheld in *Anath Bandhu Guha v. Sudhansu Sekhar Dey alias Halder and others*, that Hindu law does not make any distinction between natural son and adopted son in the matter of inheritance. Since we do not have any codified law on the inheritance right of adoptee, and because of lack of knowledge of the archaic law, often it is observed that adoptee is deprived of the property by the kinsmen of the adoptive parents.<sup>24</sup> A codified law on adoption with specification on inheritance right will enable the adoptee to practice the right of inheritance over the property of his or, her adoptive parents and ancestors.

Fifthly, under archaic Hindu law adoption has a discriminatory approach. Adoption of daughter and inter-caste adoption are invalid. These rules are against equality and non-discrimination provisions of the Constitution of Bangladesh. Article 28(1) states that, “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or, place of birth.” Another discrimination is that a Hindu can adopt in Bangladesh but a Muslim cannot, a Hindu can be adopted but a Muslim cannot be. Even though all of them are citizens of Bangladesh, Hindu community has the facility of adoption but the Muslim do not. This is clear violation of Article 27 of the Constitution that is about equality before law for all citizens. Not only that. The Constitution in its’ preamble calls ‘secularism’ as one of the fundamental principles of the constitution. Hence, a uniform law on adoption should be enacted and enforced to uphold the fundamental principle of the Constitution.

Sixthly, since there is no appropriate law on adoption, couples who are willing to take into adoption following legal procedure cannot do so. As a result, they opt for informal adoption. In such kind of adoption there is no interference of the court or, legal authority. Because of such unauthorized practice neither the adoptee nor the adoptive parents can claim any legal support in reference to adoption. For example, if a daughter is adopted by a Hindu family and has been brought up by the family, it may so happen that after passing significant period of her life in the adoptive family she will be excluded from succeeding her adoptive parents. In such a situation she will not have any legal support since we do not have any law ensuring the adoption of daughter valid under Hindu law. She will not even be able to claim maintenance as well. A uniform law on adoption addressing this issue can remove the uncertainty faced by the adoptive parents and the adoptee.

Sevently, lack of meticulous monitoring in adoption process often leads to instances like child labour, human trafficking, and involvement in prostitution and engagement in anti-social activities. Implementing a strong

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<sup>24</sup> Ibid s 8

monitoring framework coupled with standardized legal provisions governing adoption can mitigate and address these multifaceted challenges.

Lastly, childless parents of Bangladesh who are willing to adopt a child cannot do so because total adoption is not recognized by the personal laws of some religion. Hence, they opt for guardianship under the Guardians and Wards Act, 1890. The only relationship that is established under this Act is that of guardian and ward. The court has the power to appoint any Bangladeshi citizen as guardian of a child if the court is satisfied that it is for the welfare of the child.<sup>25</sup> However, being entitled to guardianship of a child under this act, does not mean that the guardian shall be able to call the child as his son or, daughter. Having authority to look after a child does not amount to adoption. Guardianship ends once the child becomes major. The process of appointing a guardian under the Guardians and Wards act 1870 is consistent with Muslim personal law. The Guardians and Wards Act, 1890 was introduced in order to provide a remedy to those whose personal law do not provide for adoption. So, this law cannot be called completely ineffective as it does bear fruits. However, a standard adoption law that is applicable to all communities would not only grant a child same legal status as a child born to the family but also ensure equal treatment to all adoptees irrespective of their communities.

### **International Obligations and Legislative Imperatives for Adoption Law Reform**

The Convention on the Rights of the Child (CRC) is a comprehensive human rights treaty which outlines children's civil, political, economic, social and cultural rights. This treaty requires the state parties to act in the best interest of the child in all legislative and administrative matters. Bangladesh is one of the early adopters of this international instrument. Bangladesh signed and ratified this treaty on 26 January, 1990.<sup>26</sup> The ratification of the CRC signifies Bangladesh's commitment to promote and protect children's rights. Bangladesh is under obligation to align domestic laws with the provisions of the Convention. However, despite the ratification, there remains challenges and impediments in fully implementing some aspects of the CRC in domestic laws, particularly in areas like adoption, where pluralistic legal system poses difficulties. The challenges posed by pluralistic legal system in this context have already been discussed by the author in the previous section of this article. It is important to understand despite the challenges Bangladesh as a state party to the convention, is still indeed bound by its obligations to ensure the welfare and upheld the rights of all children. Below is a legal argument in support of this claim.

#### **Binding Nature of the CRC on State Parties:**

As per article 2 of CRC, all State Parties are required to take measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or, beliefs of the child's parents, legal guardians, or family members. This non-discrimination principle binds Bangladesh to ensure equal safety and security to all children irrespective of their religious backgrounds. However, the current system of fragmented personal laws existing in Bangladesh occurs discriminatory treatment of children of different religion resulting inconsistency with the obligation under article 2.

Article 3(1) of the same Convention mandates that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration." From this principle it is very clear that Bangladesh is obliged to enact adoption law prioritizing best interest of the child, which is currently compromised because of lack of unified legal framework.

#### **Specific Provisions on Adoption:**

Article 21 of the CRC directly addresses adoption. It says that, States which permit adoption must ensure best interest of the child. The domestic legislation named, "Guardians and Wards Act, 1890, does not provide

<sup>25</sup> The Guardians and Wards Act (Act No VIII of 1890), s 7

<sup>26</sup> United Nations Treaty Collection, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-11](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11) accessed 24 September 2024

definition of adoption. This law cannot be considered as comprehensive adoption law ensuring full implementation of Article 21. That is why a clear legal framework aligning international standards should be introduced since Bangladesh permits guardianship and adoption under personal laws.

### **General Comment No. 14 (2013) on the Right of the Child to Have Their Best Interests as a Primary Consideration:**

The Committee on the Rights of the Child, in General Comment No. 14, interprets the best interest principle to mean that any legislative or administrative decision concerning children should systematically consider the rights and needs. It was emphasized that legal framework on adoption, should not be discriminatory or, subject to legal distinctions based on religion or, cultural practices.<sup>27</sup> Thus the Committee's interpretation requires Bangladesh to eliminate existing disparities in the adoption laws by creating an all-encompassing law treating all children equally.

### **Obligation under International Human Rights Law:**

Bangladesh is party to the International Convention on Civil and Political Rights (ICCPR), which in its Article 26 states about right to equality before law. The existing adoption law in Bangladesh based on religious context, clearly discriminates among children since some are being eligible for adoption and some are not, and hence Bangladesh is failing to ensure equality before law for the children. So, it cannot be denied that Bangladesh is violating the commitments under ICCPR as well. A unified law that ensures equal treatment for all children would ensure compliance with both CRC and ICCPR.

### **Obligation to Harmonize Domestic Law with International Obligations:**

Article 4 of CRC states that the State Parties should take appropriate legislative, administrative and other measures to harmonize domestic laws with CRC. Bangladesh should take measures to comply with this provision by enacting new unified, non-discriminatory law on adoption.

Despite the challenges imposed by the pluralistic legal system of Bangladesh, she is legally bound under international instruments to establish an all-encompassing adoption law ensuring best welfare of the child. Being a State Party to CRC and ICCPR Bangladesh must enact laws on adoption to harmonize with the provisions of the international treaties. Failure to do so would only result in breach of international obligation, regarding the best interest of the child, and the right to an ideal family environment.

## **RECOMMENDATIONS**

In light of the prior discussion, it is undeniable that it is necessary to establish a uniform adoption law with effective monitoring to legalize the adoption process for all inhabitants of Bangladesh, regardless of their religious beliefs.

“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>28</sup>

This article advocates for the enactment of comprehensive adoption law that applies to all Bangladeshi citizens who choose to adopt. The legislation should deal with some controversial issues as discussed earlier under the head “The Possible Transformative Impact of a Uniform Adoption Law”.

The enactment should contain the following issues:

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<sup>27</sup> Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the Child to Have Their Best Interest as a Primary Consideration (Art.3, para1)*, CRC/C/GC/14 (29 May 2013)

<https://www.refworld.org/docid/51a84b5e4.html> accessed on 24 September, 2024

<sup>28</sup> Shahnaz Huda, *A Child of One's Own*, Bangladesh Shishu Adhikar Forum, Dhaka (2008) p 47



1. A complete and standard rule regulating adoption must be enacted and strictly implemented in order to guarantee that all religious groups—Muslims, Hindus, and others—have their feelings and beliefs respected and upheld. For a legislation of this kind to be effectively implemented and enforced in the multitude of religious contexts, it must be based on conformity with the various religious teachings and requirements. Regarding the applicability of Islamic jurisprudence in Malaysia, a country with a Muslim majority, the Registration of Adoptions Act 1952 provides the legislative framework governing adoption. This Act, which has been carefully crafted to adhere to the tenets of Sharia law, establishes an all-encompassing legal framework for enrollment. In particular, Section 2 of the Act provides explicit provisions permitting Muslim individuals who are residents of Malaysia to adopt a child in a lawful manner. They are authorized to undertake custodial obligations under this provision. It is essential to note, however, that the Act exactingly safeguards the adoptee's biological lineage, stipulating that the adopted child's legal standing remains separate from that of a biological progeny. This ensures that the adoptee maintains doctrinal tenets of Islamic law concerning lineage and inheritance, as the adoptive parents do not consider the adoptee to be of the same status as a biological child.<sup>29</sup> Thus, Malaysia has successfully enacted legislation on adoption while respecting the constraints imposed by Sharia law. India has made a significant legal transformation by implementing the Hindu Adoption and Maintenance Act, 1956, which has had a revolutionary impact on adoption laws. This Act primarily applies to Hindus, Buddhists, Jains and Sikhs. Section 7 of the Act has legalized the adoption of both boys and girls.<sup>30</sup> Section 8 of the same Act ensures that both husband and wife can adopt with the consent of each other. Section 8 has also legalized taking adoption by divorced woman or, unmarried woman on attaining age of majority.<sup>31</sup> Thus, this law has removed gender discrimination. A single Hindu woman in Bangladesh is totally restrained from any right to legally adopt.<sup>32</sup> So, India has not only enacted a more secular and gender-friendly law on adoption coming out of all the backdrops of shastric concept, but even enforcing the new legislation very competently by the judiciary. Nevertheless, the Hindu Adoptions and Maintenance Act of 1956 does not extend to Indian Muslims. The personal rules of Muslims in India dictate their governance. Indian Muslims use legal guardianship or kafala as a means to provide care for children who have been orphaned or abandoned.
2. The current personal laws do not address the requisite age of the adoptee. In the ancient treaties on Hindu law of adoption, there is no specification about the age of the adoptee. It is stated that the adoptee must be adopted before upanayana i.e., before the boy becomes invested with sacred thread.<sup>33</sup> The comprehensive law on adoption should stipulate the requisite age parameters, specifying both minimum and maximum age at which a child may be eligible for adoption.
3. It is essential to define adoption in a thorough and clear manner, including all the specific characteristics relevant to the process of adoption. This definition must be universally applicable to every citizen of Bangladesh. Adoption procedures must strictly follow to official court proceedings. Hence, it is essential to establish certain legal regulations to control these court proceedings, guaranteeing their rigorous compliance and deterring any tendency towards informal adoption practices. Informal adoptions will be considered definitively illegitimate and unenforceable according to the existing standard laws. Moreover, the Family Courts have exclusive authority over issues related to adoption. In order to do this, it is required to make an amendment to the Family Courts Ordinance, 1985, which will provide these courts the legal ability to handle adoption-related cases. As per the Guardians and Wards Act while appointing guardian for the minor child the court should consider “the best interest of the child”. Not only that. If any conflict arises between personal laws and best interest of the child, the later shall prevail. The same rule should be taken into consideration to grant adoption.

<sup>29</sup> The Registration of Adoptions Act 1952, s 2

<sup>30</sup> The Hindu Adoptions & Maintenance Act 1956, s 7

<sup>31</sup> The Hindu Adoptions & Maintenance Act 1956, s 8

<sup>32</sup> Shahnaz Huda, *Combating Gender Justice: Hindu Law in Bangladesh*, The South Asian Institute of Advanced Legal and Human Rights Studies (SAILS) Dhaka, Bangladesh (2011) p 26

<sup>33</sup>J. C. C. Sutherland, *The Dattaka-Mimamsa & Dattaka-Chandrika, Two Original Treaties on The Hindu Law of Adoption*, (Sree Nauth Banerjee & Brothers, Cossitolah Street, 1856), p 1

4. The legislation must clearly and unambiguously state the inheritance rights of adoptive children. The proposed legislation should require that a certain part of the adoptive parent's assets be designated for the adopted. This clause is crucial in ensuring that the adoptee has an absolute right to the assets of the adoptive parents, without any chance of being excluded or having their rights to the property limited. It is essential to have clear and specific laws on this matter, as it provides the adoptee with a strong legal foundation to seek compensation under state law if their rights to the adoptive parents' inheritance are violated. The clarity in the law not only strengthens the adoptee's entitlement to inherit but also supports the idea of fair treatment in legal ties within families. The rights and responsibilities of the adoptive parents and the adoptee should be properly mentioned in the Act. Besides including provision on rights of the adoptee over the adoptive parents the rights of the adoptive parents on their adopted child should also be described. They should legally be entitled to claim maintenance from their adopted child as if they were his or, her natural parents.
5. In order to ensure the legal legitimacy of the adoption process, it is crucial to require adoptive parents to execute an adoption deed. The adoption must be officially registered in compliance with applicable legal laws in order to establish legal recognition and enforceability.
6. It is crucial to preserve and uphold the restrictions on the degree of connection within the natural family unit, even after the adoption procedure is completed. To ensure and enforce the restrictions on obtaining a degree, it is crucial to diligently implement and follow the rules outlined in the relevant personal laws that control these things.  
The proposed law should include a well-defined clause specifying the minimum acceptable age gap between prospective adoptive parents and the kid being adopted. Implementing such a provision is crucial for ensuring consistency and fairness in the adoption process, thereby successfully protecting the child's best interests and well-being. This specific provision will help simplify the implementation and understanding of the Act, guaranteeing that the adoption processes are carried out in a way that gives utmost importance to the child's welfare and entitlements. The Hindu Adoptions & Maintenance Act states in section 10 that no person shall be capable of being adopted if he or she is above fifteen years old. As per section 11 of the Hindu Adoptions and Maintenance Act 1956, there should be at least twenty-one years' age gap between the adoptive father and the adoptee if the adoptee is female. In the same way if the adoption is by a female and the adoptee is a male their age gap should also be of twenty-one years. In the case named *Golak Chandra vs. Kritibas*<sup>34</sup>, it was held that, requirement of age gap 21 years between the adoptive parents and the adopted, if violated is sufficient to render the adoption invalid.
7. When considering the creation of a uniform adoption law in Bangladesh, international experiences should be examined to get valuable lessons on overcoming legal and social challenges while ensuring compliance with international obligation. One significant example comes from India, which like Bangladesh has a pluralistic legal system influenced by religious and cultural factors. The Juvenile Justice (Care and Protection of Children Act, 2015) harmonizes adoption practices by providing clear guidelines and ensuring that all children have equal access to adoption, irrespective of their religion. The United Kingdom provides another instructive model with the Adoption and Children Act 2002 demonstrating the critical role ensuring that any legal framework for adoption prioritizes the Child's emotional and psychological well-being over other interests. The experience of South Africa showcases how a country with complex history of discrimination incorporated principles of equality into its adoption laws. The Children's Act 2005 ensures that adoption is free from any kind of discrimination. Countries that have ratified the Hague Convention on Interlocutory Adoption, such as France and Germany, offer examples of how international framework can guide domestic adoption practices. While developing a legal framework for adoption Bangladesh should learn from these countries how to align with international standards and serve the best interest of the child at the same time.

Enactment of a Uniform adoption law following all these above mentioned recommendations will not only harmonize the country's pluralistic legal system but also a necessary step to fulfill its obligations under

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<sup>34</sup> *Golak Chandra v Kritibas* AIR (1979) p 205

international human rights law.

## CONCLUSION

The proposed framework of law for adoption in Bangladesh aims to develop a complete and secular approach to adoption, taking inspiration from the legal precedents established by Malaysian and Indian legislation. This program seeks to provide parental safety and social security to the multitude of homeless children in Bangladesh, while also accommodating the wide range of religious beliefs common in the country. Detractors of this proposition may argue that implementing a standardized adoption legislation would violate Article 41 of the Bangladesh Constitution. Nevertheless, it is crucial to acknowledge that adoption laws do not inevitably interact with the fundamental principles of any religious philosophy. The core concept of adoption, which is essentially in line with the improvement of mankind, aligns with the humanitarian values advocated by all faiths. Therefore, a secular adoption legislation, which promotes the well-being of humanity, does not conflict with any core religious tenet.

Moreover, it is crucial to give serious regard to the particular concerns voiced by some segments of the Muslim community, which apply to matters such as the hijab and inheritance rights. It is crucial to emphasize that the Islamic value of modesty, as shown by the hijab, should not hinder the honorable act of adopting a child who has been orphaned. The need of modesty in clothing, as mandated by Islamic beliefs, is distinct from the legal and ethical obligations associated with adoption. Furthermore, with relation to the entitlement to inheritance, it is quite possible to provide care and assistance to a child who has lost their parents without necessarily bestowing upon them the rights to inherit property or assets. The main goal of adoption is to provide care and a supportive atmosphere to children who need it, without imposing inheritance rights.

The Hindu community goes against the idea of uniform law of adoption on the sole ground of it going against the primary sources of Hindu religion. It should be remembered that the primary source of Hindu religion is Vedas<sup>35</sup>. The Vedas never introduced the notion of adoption. The notion of adoption originated in early patriarchal societies as a means of fulfilling the need for a male heir. Therefore, implementing a standardized legislation that permits adoption by individuals of both genders would not contradict the fundamental principles of the Hindu faith. Moreover, Bangladesh has signed and ratified the Convention on the Rights of the Child, (CRC) 1989.<sup>36</sup> CRC is a legal instrument that protects and promotes rights and welfare of the children. According to Article 20 of CRC, children deprived of family environment, have a right to special care, and must be looked after properly by people who respect their culture, language etc. Article 39 states that, children who have been neglected, abused or, exploited should receive special help and be reintegrated in the society. Bangladesh has become part of an international commitment to take necessary measures and initiatives for the betterment of the children. So, Bangladesh is under international obligation to ensure dignified life for the orphaned child and for this nothing other than adoption can be more appropriate measure.

It is both legally possible and morally necessary to construct a consistent and non-religious adoption legislation in Bangladesh that takes into account the many religious views in the nation. This is crucial to safeguard the well-being of numerous children who are without a home. Adoption is the optimal method for finding a suitable family for the destitute children who have been forsaken and subjected to mistreatment by society. By providing an appropriate and stable home environment for impoverished children, we can secure a prosperous future for them and harness their potential as valuable assets for the nation. Bangladesh urgently needs a comprehensive and standardized legislative framework for adoption that guarantees adoption rights for all individuals, regardless of their religious affiliation. The Government should set aside social and religious prejudices and make efforts to revise outdated laws that are discriminatory and outside the scope of the Constitution. They should also pass new laws that guarantee equal rights and opportunities to all people, regardless of their caste, creed, and religion. Subsequently, Bangladesh will really transform into an independent, socialist, secular, and democratic nation.

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<sup>35</sup> Veda is the divine revelation of God. Veda is the final authority of Hindu religion. God's eternal knowledge is known as Vedas. There are four Vedas. Rig Veda, Yajur Veda, Atharva Veda and Sama Veda.

<sup>36</sup> Mohammad Ataul Karim, *Hindu Law in Bangladesh: intersecting religion, tradition and law* (Oriental Law Publication, Dhaka, 2020), p 108