

Gender and Adoption: A Comparative Study of Bangladesh and Malaysia

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Introduction

Islamic Family Law system is being practiced by the states where Muslim community is dominated. In some states, there is legal pluralism.¹ It is suggested by authors that the area of personal status of women comes to be the leading position as being a breeding ground for legal pluralism.² The rights of adoption of women are best suited for this kind of study as they are issues of legal pluralism. There is plurality of sources based on Islamic notions and statutory laws. In the context of the present study, particular emphasis should be given to Islamic Family law, which is based primarily on the religion of Islam.

The idea in reforming the Muslim law began when the authorities of certain Muslim countries felt that it is unsuitable to cope with several problems faced by the women of those communities. Several Muslim countries have started to promulgate their Family Law in a codified form. Not every aspect of Family law was subject to reform. Polygamy, *Talaq*, minimum age of marriage was among the matters of concern to the reformers. Other areas such as custody, guardianship and adoption seemed to remain untouched by the reformers and were left to be governed by the classical law.

Women's rights of custody and guardianship are related with adoption and will be highlighted in this article. Custody and guardianship are already granted in the *Sharia* law and under official law. However, after several decades of the implementation of the legal provisions at the courts, various problems have been encountered by women especially in their ways to get justice and their rights. Islamic Law recognizes that a mother is of all persons most desirable to have the custody of their small children in their infant or tender years, so that proper care and attention should be given to it. But for guardianship where it is involved with the property of the minor mother is not given the right. As those rights are not given

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¹ Legal pluralism in this article means the existence of principles or rules other than those enacted by the state to govern the conduct of the people. Here it means Islamic Law and Statutory Law.

² Nassar, Nagla, Hashem, Ibrahim & Tawfik: "Legal plurality: Reflections in the status of women in Egypt." In *Legal Pluralism in the Arab world*. The Hague, London, Boston, 1999, pp.191-204, at p.192.

women are actually deprived of economic empowerment. Adoption is not recognised by the law and society in Bangladesh and adoption by women is a taboo.

With the growth of women studies, many authors have identified labour, power and sexuality as the main structural elements shaping the relationship between gender and power.³ The economic position of women in a society is reflected according to an eminent author as ability to own, or inherit and control, income earning assets; ability to participate in economic activities; control over their husband's income and right and ability to control property.⁴

Women in Bangladesh are, marginalised within an intensely hierarchical system of gender relations which continually challenge to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled.⁵ Female employment in Bangladesh did not provide women control over main production, landownership or income earned.⁶ Thus women in Bangladesh needs to be more economically empowered. However, Muslim women in Malaysia seem to have a better position than Bangladesh. In view of our premises, we shall need to focus particularly on the question whether judges protect women from abuse and exploitation. Thus, the central theme of this article is to assess comprehensively to what extent the legislative enactments in family law, especially on custody, guardianship and adoption have contributed to giving women in Bangladesh and Malaysia better protection from economic deprivation and violence.⁷

The Government of Malaysia through the National Policy of Women in 1989 has underlined strategies for women advancement. Women were given equal opportunities to higher education, better access to health-care and encouraged women to participate in workforce not only on the insignificant occupations but also in professional and managerial positions.⁸ The government developed several programs to improve the legal and socio-economic status by providing greater opportunities in education, employment and monitoring programs for integration of women in development. Despite of industrialization and modernization, Muslim women in Malaysia did not abandon their religion, culture and tradition to improve their status.⁹

³ See for example R.W Connell, *Gender and Power: Society, the Person and Sexual Politics* (Stanford University Press, 1986) 104.

⁴ Alia Ahmad, *Women and Fertility in Bangladesh* (SAGE Publications Pvt. Ltd, 1991) 31.

⁵ Naila Kabeer, 'Subordination and Struggle: Women in Bangladesh' (1988) 168 *New Left Review* 95-121, at 101.

⁶ Zarina Rahman Khan, *Women, Work and Values: Contradictions in the Prevailing Notions and the Realities of Women's Lives in Rural Bangladesh* (Dana Publishers, Dhaka, 1993) 198.

⁷ Taslima Monsoor, *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (University Press Limited, Dhaka, 1999).

⁸ Roziah Omar, 'Negotiating Their Visibility: The Lives of Educated and Married Malay Women'. In *Women in Malaysia: Breaking Boundaries* (2003, Kuala Lumpur) 124.

⁹ Roziah Omar, 'Negotiating Their Visibility: The Lives of Educated and Married Malay Women'. In *Women in Malaysia: Breaking Boundaries* (2003, Kuala Lumpur) 125.

The practice of law in Muslim majority countries like Malaysia and Bangladesh is shared to propose a reduction in improper application of *Sharia* law, particularly affecting women. The difference of social attitude of women in Bangladesh and Malaysia is the main reason for comparison of this analysis. Therefore, this article will highlight the legal justice system by reviewing the relevant judicial system and mechanism in the legal framework and processes for the enhancement of enforcement of laws on women. The article aims to evaluate the potentiality of *Sharia* law for better protection of women in relation to her rights of custody, guardianship and adoption. The impact of legal practice is exposed by the cases, from which the views of the judiciary about the application of the laws for the empowerment of women of Bangladesh and Malaysia can be analysed.

This study also focuses on the question whether women in Bangladesh and Malaysia stand to benefit from judicial activism. Along with the trend for more modern legislation in Bangladesh and Malaysia, this indicates an apparent sensitivity in issues involving the welfare of women, particularly protecting them from abuse.¹⁰

Bangladeshi Legal System

The legal status of the Muslim women in Bangladesh is defined by the principles of *Sharia* through Muslim Personal Law along with the general law which is non-religious and secular in its character. The Muslim Family law covers the field of marriage, divorce, maintenance, guardianship of children and inheritance whereas the general law covers the rights under the Constitution, Penal Code, the Civil and Criminal Procedure Code and Evidence Act.

There are quite a few statutes dealing with family matters in Bangladesh the 1929 Child Marriage Restraint Act, the 1939 Dissolution of Muslim Marriage Act, the 1961 Muslim Family Laws Ordinance (hereinafter, MFLO), the 1985 Family Courts Ordinance, the 1980 Dowry Prohibition Act, the 1974 Muslim Marriage and Divorce Act. This article is focused on the main areas of concern as the right to custody, guardianship and adoption as understood in the prevalent *Hanafi* School in Bangladesh. In modern national legislation of Muslim states, the traditional approach is dominant. However, various procedural measures are often introduced with the aim to mitigate possible negative consequences for women.

It is necessary to examine the legal status of the Muslim women in Bangladesh in the context of these two sets of law as in both cases women are supposedly fortified with thematic legal rights, but there is a gulf of difference existing between theory and its actual application. Most important of all, it must be seen that some of these laws though excellent in theory prove largely elusive in practice. The main hurdle that lies in the way of the practical application of the legal rights of women in

¹⁰ Shahdeen Malik, 'Saga of Divorce Women: Once again Shah Banu, Maintenance and Scope for Marriage Contracts' (1990) 42 *Dhaka Law Report Journal*, 34-40, at 39.

Bangladesh is obviously the inherent contradiction of attitude that permeates the male oriented society considerably supported by religious beliefs. In this discussion, however, I shall mainly refer to those statutes or those provisions of a statute which treat men and women differently in the matters of custody, guardianship and adoption.

In the matter of guardianship of children, a Muslim woman is definitely at odds.¹¹ Under Muslim Law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian either of the person or property of the child; the father alone, or if he is dead, his executor is the legal guardian. Salma Sobhan points out that in Islam a careful distinction is made between being entitled to the custody of one's children and being their guardian and one would be tempted to compare the difference between these two concepts to the difference between possession and ownership.¹²

Article 28(4) of the Constitution permits favourable laws to be enacted regarding children even though it might be otherwise discriminatory. Article 28(4) provides as follows:

“Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”

The Children Act, 1974 has promulgated succinct provisions aimed at giving special treatment for children. The UNCRC goes further to provide more beneficial provisions dealing with children. It is stated in the preamble of the UNCRC that the child for the good and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding. It is also stated in the UNCRC, quoting from the Declaration of Rights of the Child, “the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth.” In Article 3(1) it is stated as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” [emphasis added].

Under normal circumstances any child ordered by the Court to be enlarged on bail would go to the parents; normally the best interests of any child would demand that

¹¹ Sultana Kamal, *Law for Muslim Women in Bangladesh* (Publication Author, 1988). <<http://unstats.un.org/unsd/vitalstatkb/Attachment390.aspx>> accessed 10 August 2015.

¹² Salma Sobhan, *Legal Status of Women in Bangladesh* (Bangladesh Institute of Law and International Affairs, Dhaka 1978) 20.

it be kept in the custody of the parents.¹³ In this regard we get some guidelines from the United Nations Convention on the Rights of the Child (UNCRC). Bangladesh was one of the first signatories to the Convention but has not yet incorporated all the provisions of the UNCRC into its national laws i.e., The Children's Act of 1974. On the other hand, our domestic laws do not contain the beneficial provisions of the UNCRC and they also are not in conflict with our domestic laws, save and except Article 21 regarding adoption. They may, therefore, be considered if it would be in the best interests of the child.

Article 20.1 of the UNCRC provides as follows:

“20.1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, *Kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”

In any event, in Muslim Law, the mother is never entitled to the guardianship of her children. However, a mother is always entitled in the first instance to the care and custody of her young children. Her sons she may keep till they are seven, and her daughter's till puberty. The father is responsible for their maintenance during that period. A mother may lose custody of her children, particularly her daughters, if she re-marries a stranger, someone that is, who is not barred to the children by the rule of consanguinity. These are the basic rules, but they have been modified, not only by the Guardian and Wards Act, but there is also a fairly substantial amount of case-law on the subject, which overall has been very sane. It is laid down by the Guardian and Wards Act, 1890 that these provisions are for the benefit and protection of the child, and that it is the courts paramount duty to consider the welfare of the children over the rights of the parents.¹⁴

According to Salma Sobhan again, "Thus, remarriage of the mother outside the permitted degrees has not been held an absolute reason for depriving her of the custody of her children."¹⁵ Were the children having been all along in the custody

¹³ *State v Metropolitan Police Commissioner, Khulna and others* (2008) 37 CLC (HCD) 5264.

¹⁴ 20 Dhaka Law Report (1968) 1.

¹⁵ Salma Sobhan, *Legal Status of Women in Bangladesh* (Bangladesh Institute of Law and International Affairs, Dhaka 1978) 20.

ceased, it was still considered advisable to let them continue in her care and control, as the father had re-married and it was felt that the children's interests would not be so well looked after by their step-mother. The father is only free from the burden of maintaining his children where they are being withheld from him illegally. The mother's poverty is never a sufficient reason to deprive her of her right to the custody of her children.¹⁶ Under the Guardian and Wards Act, 1890 further, a mother can always apply to the court to be appointed as the guardian of her children.

Malaysian Legal System

In Malaysia like Bangladesh Islamic Law was regarded as the law of the land before the British invasion. There is no single family law system that applied to the whole country. There exist two different family law systems: one is for Muslims and the other for non-Muslims. The Law Reform (Marriage and Divorce) Act 1976, which was enforced throughout Malaysia from 1st March 1982, governs the Chinese, as well as Hindus and other religions. Muslims, on the other hand, are governed by the Islamic Family Law system. For Muslims, family affairs are closely related to their way of life. This is due to its connection to areas like marriage and divorce, and matters arising there from, such as maintenance, matrimonial property, custody and the relationship between children and parents. This aspect of life is always given great attention and draws the interest of researchers who seek answers to many questions that arise from the implementation and practice of Islamic Family Law.¹⁷ The *Shafi'i* school of law is predominantly followed in Malaysia but in Bangladesh the majority of the population follows the *Hanafi* school of thought.

Malaysia is a unique country in that its political, sociological and legal systems reflect quite clearly the country's multi-racial and multi-religious culture. By virtue of Article 3 of the Malaysian Federal Constitution:

"Islam is the religion of the Federation of Malaysia but other religions may be practiced in peace and harmony in any part of the Federation".

Further, **Article 11 Federal Constitution** states that:

"(1) Every person has the right to profess and practice his religion, and subject to Clause (4) [regarding propagation of religions other than Islam amongst Muslims], to propagate it."

The Civil High Courts (secular courts) have jurisdiction over family matters relating to non-Muslims in Malaysia, whereas *Syariah* Courts (so named under Islamic Law) have jurisdiction over family matters relating to Muslims. By an amendment to the

¹⁶ *ibid.*

¹⁷ Raihana Abdullah, 'A Study of Islamic Family Law in Malaysia: A Select Bibliography' (2007) Issue 3 Winter, Volume 35 *International Journal of Legal Information*, 514-536, at p.514.

FC, that is Article 121(1A), which came into force on 10th June 1988, the Civil High Courts in Malaysia have no jurisdiction in respect of any matter that falls within the jurisdiction of the *Syariah* Courts. This dual system of laws works perfectly well when lines are clearly demarcated and families stay within those lines; indeed, members of one family who practise the same religion would therefore be governed by one set of laws and come under the jurisdiction of one court.

In Malaysia, the Federal Territory Islamic Family Law Act 1984 provides ten parts. The parts are dealing with different issues of family law and penalties for not applying the statute.¹⁸

The Islamic Family Law 2000s has included two additional provisions to the previous ones. Similar provisions regarding procedures and processes still stand in the application for polygamy. The husband must fulfil certain conditions before the court grants permission for contracting another marriage. However, significant amendments in the new laws relating to polygamy are seen in the summoning of the prospective wife and her guardian (*Wali*) to be present during the hearing. The promulgation of the detailed Islamic Family Laws received support from society as well as women's groups.

Adoption and Muslim Law

The word “adoption” comes from the old French word “*adopt are*”, meaning “to choose for oneself.” Today, adoption refers to the act of legally taking another person's child into your family to raise as your own. Adoptive parents may decide to adopt for many different reasons: some adopt due to infertility, some to help a specific child and others for social justice. Whatever the reasons, adoption should be done lawfully and legally. This is to protect the best interests of the adopted child.

Under the *Shari'ah*, adoption (*tabanni*) in its real sense is prohibited.²⁷ This is based on the Quranic ruling which states to the effect;

Allah has not made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the (right) way. Call them (adopted sons) by (the names of) their fathers; that is more just with Allah. But if you know not their father's (names, call them) your brothers in faith and *Mawalikum* (your freed slaves).²⁸

Adoption is prohibited since it destroys the Islamic family system. Adoption

¹⁸ In Part I – Preliminary; Part II – Marriage; Part III – Registration of Marriage; Part IV – Penalties and Miscellaneous Provisions Relating to the Solemnization and Registration of Marriages; Part V – Dissolution of Marriages; Part VI – Maintenance of Wife, Children and Others; Part VII – Guardianship; Part VIII – Miscellaneous; Part IX – Penalties; and Part X – General.

²⁷ Mahmud Shaltut, al-Fatawa 2001; Atiyah Saqar, al-Fatawa n.d.

²⁸ Qur'an, Al-Ahzab: 4–5.

in its real sense contradicts with many rules in the Quran such as rules relating to prohibited degree of marriage.²⁹ It also contradicts with the truth³⁰ since adoption changes the status of the adopted child from being the child to his natural parents to the child of the adopter, whilst the truth is that he is not the child of anybody except his natural father and mother. Adoption also severs the relationship between the adoptee and his natural parents and families. This clearly contradicts the teaching of Islam which forbids the Muslim from severing relationship among them. The Qur'an states to the effect:

Would you then, if you were given the authority, do mischief in the land, and sever your ties of kinship?³¹

On the other hand, Islam reminds its followers to help one another in doing righteousness and piety. Lending a helping hand in bringing up others children is a way to help a Muslim brother. The Quran states to the effect;

Help you one another in Al-Birr and At-Taqwa (virtue, righteousness and piety); but do not help one another in sin and transgression.³²

Whilst the Prophet tradition states to the effect:

He who helped in alleviating suffering of a believer from the distress of the world, Allah would relief him from distress of the day of Resurrection. He who makes things easy for one who is hard pressed, Allah will make things easy for him in both in this world and the hereafter, and he who covers (the failing of) a Muslim, Allah would provide him covering in this world and in the hereafter. Allah would come to help of a servant as the servant had been coming to help his brother.³³

The above verse of the Quran and tradition of the Prophet (pbuh) reflect that Islam encourages its believers to help one another in doing righteousness where the benefits will return to themselves whether in this world or in the hereafter. Allah says:

And whoever strives, he strives only for himself. Verily, Allah stands not in need of any of the 'Alamin (mankind, jinn, and all that exists).³⁴

Therefore, prohibition of adoption (*tabanni*) in Islam does not in itself prohibit

²⁹ Islam prohibits marriage e.g. among those who are related to one another through blood but not those who are in adoptive relationship. See for e.g. the Qur'an, an-Nisa': 4: 23 and al-Maidah: 87

³⁰ Wahbah Al-Zuhayli, Tafsir al-Munir, Dar al-Fikr, 1998, vol. 21 at 240.

³¹ Muhammad, 47:22.

³² Qur'an, Al-Maidah: 2.

³³ Muslim, Sahih Muslim, kitab al-zikr wa al-du'a wa al-tawbah, bab fadhil al-ijtima' 'ala tilawat al-Qur'an wa al-zikr. Dar al-Fikr, vol. 4, at 233.

³⁴ Qur'an, Al-'Ankabut: 6.

us from helping children or family who are in need of help. Islam has laid down clear rules as to anyone who wishes to help a child in adoption, i.e. one of the rules is that the adopter should not change the adoptee's natural status, e.g. his paternal and maternal lineage. Furthermore, both the adoptive family and the adoptee should interact within the limitation prescribed by the *Shari'ah*, especially when the adoptee reaches the age of puberty.³⁵

With regard to the Islamic Family Law (Federal Territories) Act 1984 (IFLA), even though it deals directly with personal laws of a Muslim, there is no specific provision for adoption. The Islamic Family Law (Federal Territories) Act 1984 (IFLA) seems to provide general provisions for protection of the rights of ordinary children to custody, guardianship³⁶ and maintenance³⁷. With the availability of the Registration of Adoptions Act 1952 (the RAA) that is in line with Islamic principle, it might have been felt unnecessary to have a pure Islamic law of adoption. On the other hand, this assumption should be replaced as Islamic principles need to be clearly provided in written legislation so that it can be applied and practised to the fullest and without any doubt.

Firstly, Islam requires that the child's original identity and the identity of his birth parents be kept on record for disclosure to the child at a suitable age. In practice of "open adoption", the adopted child is eventually told that he or she was adopted. The purpose is to ensure that the adopted child does not enter into non-permissible (*Muhrim*) relationships with blood relatives.

Secondly, Islam does not recognize any change to a child's inheritance rights despite the adoption. The rules of Islamic inheritance law (*Fareid / Faraiz*) apply to Muslims but the adoption can be applied for life without disturbing inheritance.

Adoption in Bangladesh- Tabani or Kafala?

Adoption in Bangladesh is a taboo as it is not permitted in Islam. But there is another concept of Islamic Adoption for life or *Kafala*. Where a child is adopted without any change of status or inheritance is not provided to him but he is maintained for life and can be given gift or *Hibah*.

The style of Islamic adoption is similar to a guardianship. If the guardian considers, the child may get ownership of the property through *Hibah* /donation/ gift/ will etc, but no adopted/orphan child under the Muslim law can claim inheritance in Bangladesh like Hindus. So, adoption is prohibited/not allowed under Muslim Laws of Bangladesh but it is practically not impossible as any person can apply to the

³⁵ Qur'an, an-Nur: 31.

³⁶ See Islamic Family Law (Federal Territories Act 1984) Act 303, ss. 81–105.

³⁷ See Islamic Family Law (Federal Territories Act) 1984, ss. 72–80.

Court or by Law (Guardianship Act 1890) may become guardian of the body and property of a child.

There are various reverse opinions of the writers of Muslim law about the question whether Adoption is permissible or not.³⁸ Some authors have the view that adoption is unknown to Mohammedan law.³⁹ In Mulla's Principles of Mohammedan Law it was observed that the Muslim law does not recognize adoption as a mode of filiations.⁴⁰ But some of them have the view that where custom is given priority by legislation over general Mohammedan law as in India in the states of Punjab, Oudh and some other places a special family or tribal custom of adoption will, if proved, prevail over that law. B.R. Verma in his commentary on Mohammedan Law has stated that Adoption shall not confer upon any person the status of a child except in the cases where subject to the provisions of the *Shariat* Act (XXVI) of 1957 there is valid custom of adoption and where it is permitted by the provisions of any law for the time being in force.⁴¹

The Muslim Personal Law (*Shariat*) Application Act, 1937 to make Provision for the application of Muslim Personal Law (*Shariat*) to Muslims Section 2 of this Act Provides as under –“ Notwithstanding any Customs of usage to the contrary in all questions (save question relating to agricultural Land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal Law, marriage, dissolution of marriage, including *Talaq, Ila, Zihar, Lian, Khula* and *Mubarat*, maintenance, dower, guardianship, gifts, trusts and trust properties and *Wakfs* (other than Charities and Charitable institutions and Charitable and religious endowments) the rule of decision in cases when the parties are Muslim shall be the Muslim personal Law (*Shariat*).” Thus, these are to be governed by Muslim Personal Law notwithstanding any custom or usage to the contrary. However, the matters enumerated in this section do not include adoption.

Interestingly, a significant number of guardianship cases are filed in the Family Courts, especially in Dhaka, for guardianship of children abandoned by their biological parents. Couples not having any issue of their own generally file this type of case, as an alternative to adoption. It appears that the scope for such applications has opened due to the manner in which Section 7 of the Guardian and Wards Act, 1890 is being construed. Liberal interpretation and application of this provision has allowed individuals within a broad category to file such guardianship applications.

³⁸ See Amir Ali, Wilson, Abdur Rahman etc.

³⁹ Dr. Md.Fayaz Khan, *Adoption under Muslim Law* (Dept. of Law, Patna University, Patna) 2009, 1.

⁴⁰ Justice M. Hidayat-ullah and Arshad, *Mulla's Principles of Mohamedan Law* (Tripathi Pvt. Ltd. 19th ed, 1990), 220.

⁴¹ B.R. Verma, *The Mohammedan Law in India & Pakistan* (Allahabad: Law Book Co., 3rd ed, 1962) 228.

Such practices can be seen as an example of creative application and extension of existing legal provisions to cover real needs, in the absence of express provisions to deal with such matters. However, it needs to be mentioned that these processes do not amount to adoption per se, because they do not provide the child with the same legal security or rights. Muslim personal law as applied in Bangladesh does not yet permit adoption. We consider that a lasting solution to this issue would be to enact a separate secular law on adoption to fill up the gap that currently exists in this area.⁴²

The Specific Law on Adoption in Malaysia

Malaysia is practising a dual legal system, one of which is the Civil law and the other is Islamic law. This is to accommodate its people the majority of which are Muslims and non-Muslims. The Civil law on many occasions is also applicable to Muslims but the Islamic law is exclusively applicable to Muslims. The matters in which Islamic law is totally applied are matters relating to personal law of Muslims, for example Islamic Family law. Therefore, the personal law of the people in Malaysia is basically governed by Civil law for non-Muslims and Islamic law for Muslims.

Adoption falls under personal law of the people. Basically, there are two kinds of adoption that are recognized in Malaysia; namely, adoption that affects the status of adopted child⁴⁴ and adoption that does not affect the status of adopted child. It follows that the first kind of adoption can be defined as to take a child of another as one's own child. Meanwhile, the second kind of adoption can be defined as to take the child of another in one's care and custody without affecting the status of the child. As regards the nature of adoption, it involves new placement of a child where the child will be placed with a new family permanently. The responsibilities of the biological parents will also shift to the adoptive parents. These two kinds of adoption are manifested in two statutes governing adoption in Malaysia, namely The Adoption Act 1952 (the AA)⁴⁵ and The Registration of Adoptions Act 1952 (the RAA).⁴⁶ These two statutes are applicable in West Malaysia,⁴⁷ while in Sabah, adoption is governed by the Adoption Ordinance 1960⁴⁸ and in Sarawak, Adoption Ordinance 91⁴⁹ is applied. The status of the child adopted under the Adoption Act

⁴² Nowrin Tamanna, et.al, 'Muslim Women's Rights under Bangladesh Law: Provisions, Practices and Policies Related to Custody and Guardianship' (2011) *The South Asian Institute of Advanced Legal and Human Rights Studies (SAILS)* 14.

⁴⁴ For example, the adopted child paternity status that changes and transfer from the birth parents to the adoptive parents See Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (London: Butterworth's, 9th ed, 1998) 611.

⁴⁵ Act 257.

⁴⁶ Act 253.

⁴⁷ See Adoption Act 1952 s. 1(2) and Registration of Adoptions Act 1952, s. 1(2).

⁴⁸ No. 23 of 1960

⁴⁹ Ed. 1958 of the Laws of Sarawak

1952 as well as under the Sabah Adoption Ordinance 1960 and the Sarawak Adoption Ordinance 91 are basically similar. Adoption under these Act and Ordinances reflect the first type of adoption while adoption under the Registration of Adoptions Act 1952 reflects the second type of adoption. For the purpose of this article, discussion will concern only with the adoption under AA and the adoption under the RAA.

Statutory Law of Adoption in Malaysia⁵⁰

There are two separate but concurrent legislative schemes in Malaysia for the adoption of children:

1. Adoption Act 1952 (“**Adoption Act**”); and
2. Registration of Adoptions Act 1952 (“**Registration of Adoptions Act**”).

The Adoption Act is applicable to non-Muslims only while the Registration of Adoptions Act caters for adoption by Muslims (although its application is not restricted to Muslims only).

Registration of Adoptions Act 1952⁵¹

Registration of Adoptions Act 1952 (the RAA) came into operation on 1st January 1955. Like the AA, the RAA is applicable only to West Malaysia. On the other hand, it is different to the AA as it is of general application and is applicable to both Muslims and non-Muslims.⁵² The RAA basically provides for registration of a de facto⁵³ adoption, including customary adoptions.⁵⁴ However, failure to register the adoption shall not affect the validity of the adoption after all the necessary requirements are fulfilled.⁵⁵

In general, a de facto adoption denotes an informal adoption which is done personally, or an adoption which is done through the DOSW before registration. It can also include fostering. Although fostering is not an adoption, it shall give the foster parent a de facto control over the foster child.⁵⁶ The

⁵⁰ Raymond Mah & Liow Pei Xia, *Adoption in Malaysia*

⁵¹ Azizah Mohd, ‘Adoption as a Means of Child Protection: The Law and Practice in Malaysia’ (2012) *Asia Pacific Journal of Social Work and Development*.

⁵² See Registration of Adoptions Act 1952, s. 1.

⁵³ The whole objective of the enactment seems to cater for de facto adoptions. See comment by James Foong J in *Tang Kong Meng v Zainon bte Md Zain* [1995] 3 MLJ 408 at 414.

⁵⁴ Customary adoptions refer to adoptions which have been practiced since a long time ago especially before introduction of the law on adoption. For further details, see Shamsuddin Suhor, *Anak angkat dan undang-undang* (Kuala Lumpur, MY: DBP, 2008) 1 – 7.

⁵⁵ Registration of Adoptions Act 1952, s. 11. See also Mimi Kamariah Majid, ‘Family Law in Malaysia’ (1999) *Malayan Law Journal: Kuala Lumpur* 222.

⁵⁶ O.S. Khoo, *Parent–Child Law in Singapore* (Singapore: Butterworths. 984).

RAA describes a de facto adoption as a situation where a child is in the custody of a person, being brought up, maintained and educated by him as his own child for a period of not less than two years continuously.⁵⁷ The fact that an adopted child is under the custody, care and control of adoptive parents reflect a de facto control over the child and this becomes the first condition to be fulfilled for adoption to be registered under the RAA.⁵⁸ In order to prove this, the adoptive parents have to produce evidence, either oral or documentary, that the adoption really took place.⁵⁹ Accordingly, consent from the biological parents or the child's guardian is a must for the validity of the adoption. The RAA requires that the parents or one of the parents or in absence of the parents, the guardian of the child, to appear before the Registrar and express his consent to the adoption.⁶⁰ Nevertheless, the Registrar may dispense with parental consent or the adopted child custodian if it is just and equitable to do so and for the welfare of the child, for example, in the case where the parents of the child are not known or cannot be found or in the case of illegitimate child.⁶¹ In the case of *Sean O'Casey Patterson vs. Chan Hoon Poh & Ors*,⁶² the consent of the father who was not known to be the father of the child at the time of adoption was irrelevant. In giving the evidence upon adoption, the parties and witnesses are bound to speak the truth or otherwise they will be liable to a punishment under Chapter XI of the Penal Code.⁶³

The RAA further requires that the adopted child is less than 18 – years-old, and the adoptive parents must be over 25 years of age or at least 18 years older than the adopted child in a case where they are strangers to the adopted child. If one of the adoptive parents is the child's relative, such as a brother, sister, uncle or aunt, whether by consanguinity or affinity, of the child, or if the child is illegitimate, a person who would be so related if the child were legitimate; they must be at least 21-years-old. Nevertheless, if one of the adoptive parents is either the mother or father of the adopted child, then no age requirement is imposed.⁶⁴

⁵⁷ Registration of Adoptions Act 1952, s. 6.

⁵⁸ Registration of Adoptions Act 1952, s. 6(1).

⁵⁹ Registration of Adoptions Act 1952, s. 6(1) (a). Example of the evidence includes the letter of consent from the natural parents of the child or from its mother in the case of an illegitimate child, or a letter on the custodial right of the child from the court or the DOSW in the case of an abandoned child. See also Kamaruddin Abd Ghafar, *Prosedur pengambilan anak angkat dan realitinya di Malaysia* (Bah. 3) 11.

⁶⁰ Registration of Adoptions Act 1952, s. 6(b).

⁶¹ Registration of Adoptions Act 1952, s. 6(1)(b).

⁶² [2011] 3 CLJ 722.

⁶³ Registration of Adoptions Act 1952, s. 8(1) & (2).

⁶⁴ Registration of Adoptions Act 1952, s. 10 (2)(a)(b)&(c).

Similar to the AA, the RAA also requires that the adopted child and parent must be ordinarily resident in West Malaysia.⁶⁵ Therefore, the RAA seems to negate the practice of inter country adoption. This is further emphasized by the fact that the applicant has to enclose the birth certificate of the child, if he is born in Malaysia or his traveling document if he is born outside Malaysia, for the purpose of registration⁶⁶. And finally, the adopted child must not be a subject of an adoption order made under the AA.⁶⁷

In order to determine whether the adoptive parent is qualified to adopt the child, the National Registration Department of Malaysia (NRD) will conduct an interview session. This is to examine the suitability of the applicant with the adopted child, the interest and welfare of the child as well as the ability of the applicant to bring up the adopted child. For this occasion, both applicant and the adopted child are required to attend the session.⁶⁸ The Registrar would approve the application if he is satisfied with the application where the applicant is required to pay a registration fee of 30 ringgit.⁶⁹

Different from the AA, adoption under the RAA is a mere registration for a legal adoption so as to prove that an adoption has taken place. The adoption would indirectly give the right of custody to the adoptive parents over the adopted child. Nevertheless, adoption would not render parental status over the adopted children. A child who is adopted under the RAA shall not gain the same status as the natural child of the adoptive parents in terms of his parentage and right to succession of the adoptive parent's property after their death as given by the AA etc. Rights of adopted children are fully protected under the AA, but to a certain extent are limited under the RAA. For example, the registration of adoption under the RAA will be limited among others to provide benefits to the adopted children in education, application for identity card and passport⁷⁰ and more importantly, the nationality or citizenship. The registration may also reduce the income tax of the adoptive parents as similar to adoption under the AA.⁷¹

The effect of the adoption under the RAA seems to comply with the concept of adoption recognized under Islamic Law which regards it as a means

⁶⁵ Registration of Adoptions Act 1952, s. 10(3).

⁶⁶ Kamaruddin Abd Ghafar, *Prosedur Pengambilan Anak Angkat Dan Realitinya Di Malaysia* (2002).

⁶⁷ Registration of Adoptions Act 1952 s. 10(4).

⁶⁸ See Registration of Adoptions Act 1952, s. 6(1)(a).

⁶⁹ Registration of Adoptions Act 1952, s. 6(1).

⁷⁰ Puan Sri Nurzan Mohd Wahie, *Pemeliharaan Anak Angkat, Satu Panduan, MKKM, Kuala Lumpur* (1997).

⁷¹ Kamaruddin Abd Ghafar. (2002) 167.

of helping a child in need of family or protection⁷². As it is not in conflict with Islamic law, it is made applicable to and governs the Muslims who wish to adopt children in Malaysia. At the same time, the RAA extends its application to non-Muslims who wish to adopt children with limited rights. Perhaps, due to the above reasons also, public demand for adoption under the RAA is more compared to the AA. Based on statistics by National Registration Department (NRD), in 2006, about 4355 children were adopted under the RAA and 2192 children were adopted under the AA.⁷³ In 2007, 4517 were adopted under the RAA and 2369 under the AA.⁷⁴ While statistic in 2010 demonstrates that about 5626 children were registered for adoption through the RAA and 1,901 children were adopted through the AA.⁷⁵ Meanwhile, in 2011, 6259 children were adopted under the RAA and 731 adoptions under the AA. These number of adoptions shows that adoption through the RAA is more compared to the adoption through the AA.

The existence of the AA and the RAA as specific laws on adoption actually describes the importance of adoption in Malaysia as one of the means to protect children. In order to make sure that children are fully protected through adoption, government of Malaysia has come out with different law and policy with a view to balance with the need and preference of the adopters. This seems to make adoption a more effective means of child protection. This is proven especially by the effect of adoption under the AA that guaranteed full protection to adopted children and the number of adopters which is increasing under the RAA. Even though the RAA is specially framed to cater the Muslim parents who wish to adopt children in line with Islamic law, non-Muslims parents are also allowed to adopt children under the RAA. Law cases seem to prove that non-Muslims do adopt children under the RAA for example in the case of *Re Loh Toh Met, (Decd), Kong Lai Fong & Ors vs. Loh Peng Heng*⁷⁶ and *Yeap Chan Aik vs. Yeap Chan Hoe & Ors*,⁷⁷ where in both cases, a child was adopted under the RAA by Chinese family. Similarly, statistic by NRD shows that in 2008 about 3460 children were adopted under the RAA by Malays (commonly Muslims) and 215 children by Chinese, 250 children by Indian and 1047 by races other than Malays with the total of 4972.⁷⁸

⁷² Puan Sri Nurzan Mohd Wahie. (1997) 171.

⁷³ Jabatan Pendaftaran Negara, *Laporan Tahunan* (2006) 2.

⁷⁴ Jabatan Pendaftaran Negara, *Laporan Tahunan* (2007) 31.

⁷⁵ Jabatan Pendaftaran Negara, *Laporan Tahunan* (2010) 136.

⁷⁶ [1961] MLJ 234.

⁷⁷ [2000] IMLJ 78.

⁷⁸ Jabatan Pendaftaran Negara, *Laporan Tahunan* (2008) 32.

Nevertheless, as regards the RAA, even though it complies with Islamic law (the *Shari'ah*),⁷⁹ the provisions are not extensive to provide protection to Muslim adopted children to the fullest. This is because the RAA simply provides provisions on procedures and conditions of adoption. Instead, for a full protection of adopted children under the RAA, the RAA requires more detailed provisions for example on rights of adopted children adopted under the RAA and duties of the adoptive parents among others to custody and maintenance. Furthermore, Islamic rules and guidelines on adoption were not clearly outlined by the RAA. For example, Islamic principles that enjoin help, kindness and good treatment to adopted children.⁸⁰ Failure to provide detailed provisions on effect of adoption under the RAA might also lead to misinterpretation and misunderstanding. Therefore, it is believed that Muslim children can be better protected if a new Muslim Adoption Act is introduced incorporating the provisions of the RAA and the Islamic principles and recommendation for adoption. Furthermore, this is in line with the constitution of Malaysia that provides that Islam is the religion of the Federation of Malaysia.⁸¹

Other Laws that Govern Muslims

Other than the RAA, the law that governs Muslims in adoption, is the *Shari'ah*, the Islamic law (Hukum Syarak)⁸² in its ordinary form and the law that is embodied in the Islamic Enactments of various States in Malaysia or Parliamentary Act that legislates Islamic Family Law for example the Islamic Family Law (Federal Territories) Act 1984 (the IFLA).⁸³

Effect of Registration of Adoption in Malaysia

The Registration of Adoptions Act considers Islamic law to make it possible for Muslims to legally adopt children. The Adoption Act does not apply to Muslims for two main reasons:

Accordingly, under the Registration of Adoptions Act, the fact that the child is adopted is not hidden. Although an adoption under the Registration of Adoptions Act does require the surrender of the original birth certificate, the original birth

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ See Federal Constitution of Malaysia, art. 3(1).

⁸² Hukum Syarak is defined under the Islamic Family Law (Federal Territories) Act as Hukum Syarak according to the Shafie Mazhab, or according to one of the Mazhab Maliki, Hanafi or Hanbali. See s.2, Act A1261.

⁸³ Act 303. In general, personal and family law relating to Muslims in Malaysia is governed by Islamic law which is administered in the Syariah Courts. See Ahmad Ibrahim, *The Administration of Islamic Law in Malaysia*, (2000, IKIM, Kuala Lumpur) 227. See also Farid Sufian Shuib, 'Powers and Jurisdiction of Syariah Courts in Malaysia' (2003, Kuala Lumpur) *Malayan Law Journal* 20–26.

certificate is replaced with a certificate of adoption. This contrasts with the Adoption Act where the birth certificate is re-issued to the adoptive parents.

Accordingly, the Registration of Adoptions Act is silent on the rights of inheritance. The result is that a child adopted under the Registration of Adoptions Act inherits from the birth parents and not the adoptive parents. Muslim adoptive parents can however use their discretion to write up 1/3 of their estate as a gift (*Hibah*) for their adopted child. In contrast, a child adopted under the Adoption Act inherits from the adoptive parents and not the birth parents.

The Registration of Adoptions Act is noticeably silent on the legal effect of the registration, especially when compared with section 9 of the Adoption Act, which provides that a court order for adoption deems the child to be born of the adoptive parents in lawful wedlock. It is, however, arguable that save for the issue of inheritance and the child's birth identity, a child adopted under the Registration of Adoptions Act enjoys the same rights as a birth child. After all, the intention of the Registration of Adoptions Act is to allow the adoptive parents to take care of the adopted child as their own.

Application for Registration of Adoption in Malaysia

The process of adoption under the Registration of Adoptions Act is commonly referred to as “departmental adoption” as the application is made to and processed by the National Registration Department. According to Section 6 of the Registration of Adoptions Act, the child must be in the custody of the adoptive parents for at least two years and express consent from the birth parents is required (although the Registrar of Adoptions has the discretion to dispense with consent in the best interests of the child).

The Registrar of Adoptions has the power to summon and examine witnesses for the purpose of deciding whether to register an adoption. Typically, the Registrar will interview the adoptive parents and require the parents to obtain a report from the welfare department on the adoption. In the event the application is allowed, an entry will be made in the Registration of Adoptions Register and a certificate of adoption will be issued.

Citizenship of Adopted Children in Malaysia

Both the Adoption Act and the Registration of Adoptions Act are silent on the issue of citizenship for adopted children. The unfortunate result is that where the child's original immigration status is uncertain or unknown, the National Registration Department will declare the child as a “permanent resident” or “non-citizen” on the re-issued birth certificate or the certificate of adoption. The National Registration

Department will disregard the fact that the adoptive parents may be Malaysian citizens.

In such circumstances, a judicial review application may be filed to challenge the decision of the National Registration Department for failing to recognise the adopted child's citizenship as Malaysian. The article on the case of *Lee Chin Pon & Anor vs. Registrar-General of Births and Deaths, Malaysia* [2010] (unreported) reports how such a judicial review application was allowed and the adopted child given Malaysian citizenship.⁸⁴

Reform of the law on custody and guardianship must take into account contemporary societal phenomena and thus reflect suitable solutions. Many rules on the issues of custody and guardianship are not provisions that are stipulated directly from the Qur'an, but are derived through Islamic scholarly processes. Thus, contemporary Muslim jurists must not be apprehensive about modifying these rules and should not feel hindered from creating alternative rules that are applicable to modern-day situations through similar intellectual methods. They must feel encouraged, for instance, to use the source methodologies of deriving legal rulings of *Fiqh* in the *Syariah*. One way is through *Ijtihad*, which may be described as a "creative but disciplined intellectual effort to derive legal rulings from [the Qur'an and Hadith] while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society" [emphasis added].⁸⁵

Concluding Analysis with Regard to Adoption in Malaysia

The above discussion shows that adoption serves as a means of child protection especially for children who are deprived of the right to live in a family environment or at least a good and conducive family life. Basically, the law and policy on adoption in Malaysia are adequate as they are able to accommodate both Muslims and non-Muslims in adoption. Nevertheless, since adoption may promise a happy family life to the adopted child, it is suggested that provision governing adoption especially that is done under the RAA, should extend to detailed outline of the adopted child rights and duties of the adoptive parents once an adoption is affected or registered. For example, rights to custody, maintenance and good treatment from the adoptive family. Similarly, more assistance to adoption should be provided. As regards adoption among the Muslims in Malaysia, it is further suggested that a new statute that specially governs the Muslims is enacted. This is due to the fact that, to guarantee full protection to adopted children, several Islamic rules under the *Shari'ah* should

⁸⁴ Please see: <http://www.mahwengkwai.com/citizenship-for-adopted-children-a-malaysian-perspective/>.

⁸⁵ Taha Jabir al Alwani (1993).

be included in the new statute. Proposal for having a Muslim Adoption Act should be seriously considered.¹⁰⁸ As adoption amongst Malaysians has been practiced for a long time, it is now timely to introduce a specific Act that governs adoption among Muslims. This Act will provide details on proper guidelines for a Muslim to adopt a child in line with the Islamic teaching (*Shari'ah*). The rules will include provision on adoptive parent duties to care and maintain the adopted child and provide him with a good treatment as well as rules on socialization and inter action among the members of adoptive families. These rules were not provided by the RAA, furthermore, even though they are part of the *Shari'ah*, they are not clearly written and stated in such statutes on adoption. It is believed that this new Act will better protect children in Malaysia through adoption.

Parents who are considering adopting a child are advised to carefully consider the options available, always keeping in mind the best interests of the child. If possible, we generally advise parents to obtain an order for adoption under the Adoption Act.

It cannot be said that the Holy Quran Prohibit adoption amongst Muslims in absolute terms. And the Custom of adoption amongst Muslims has been held also the Valid Muslim Personal Law (*Shariat*) Application Act, 1937 does not abrogate the custom of adoption prevailing amongst Muslims.

It is evident that the role of custom amongst the Muslims, unlike the Hindus, is practically non-Consequential. A custom where is in derogation of Muslim Personal Law, is of no effect. Accordingly, the status of an adopted son, even when it is fully established under a custom, is no better than Stranger, because he does not become ipso facto an heir of his deceased adoptive father. Realizing the relevance of the institution of adoption, especially in the case of Childless Couples, the customarily adopted son needs a better deal in the realm of Muslim Personal Law, which can be remedied and improved only through statutory intervention.

Concluding Analysis with Regard to Adoption in Bangladesh

Adoption in Bangladesh is a taboo as it is not permitted in Islam. But there is another concept of Islamic Adoption for life or *Kafala*. Where the child is adopted without any change of status or inheritance is not provided to him but he is maintained for life and can be given gift or *Hibah*.

The style of Islamic adoption is similar to a guardianship. If the guardian considers, the child may get ownership of the property through *Hibah*/ donation/ gift/ will etc,

¹⁰⁸ This proposal was made in Bengkel Hak Dan Kedudukan Anak Angkat Mengikut Syariah Dan Perundangan Malaysia, 2002, organized by Hawa Negeri Selangor, Nazri & Nazri Associates Sdn. Bhd., Massa magazine and YADIM.

but no adopted or orphan child under the Muslim law can claim inheritance in Bangladesh like Hindus. So, adoption is prohibited or not allowed under Muslim Laws of Bangladesh but it is practically not impossible as any person can apply to the Court or by Law (Guardianship Act 1890) may become guardian of the body and property of a child.

Interestingly, a significant number of guardianship cases are filed in the Family Courts, especially in Dhaka, for guardianship of children abandoned by their biological parents. Couples not having any issue of their own generally file this type of case, as an alternative to adoption. It appears that the scope for such applications has opened due to the manner in which Section 7 of the Guardian and Wards Act, 1890 is being construed. Liberal interpretation and application of this provision has allowed individuals within a broad category to file such guardianship applications. Such practices can be seen as an example of creative application and extension of existing legal provisions to cover real needs, in the absence of express provisions to deal with such matters. However, it needs to be mentioned that these processes do not amount to adoption per se, because they do not provide the child with the same legal security or rights. Muslim personal law as applied in Bangladesh does not yet permit adoption as in Malaysia. We consider that a lasting solution to this issue would be to enact a separate secular law on adoption to fill up the gap that currently exists in this area.¹⁰⁹ This issue of adoption can be solved by making people aware about *Kafala* i.e. adoption for life as provided in Muslim law without the rights of inheritance and name of the adopted parents and provide good life to plenty of children who are in need.

¹⁰⁹ Nowrin Tamanna, et.al, Muslim Women's Rights under Bangladesh Law: Provisions, Practices and Policies Related to Custody and Guardianship (2011) *The South Asian Institute of Advanced Legal and Human Rights Studies (Sails)* 14.