

Foundling and Abandoned Children: A Critical Analysis in The Light of Islamic and Pakistani Law

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ABSTRACT

The history of children and the family includes the study of foundlings and abandoned children. The terms "foundlings" and "abandoned children" are substitutable. This work highlights the children who are abandoned at the time of birth including children who are a result of rape. Rape is one of the most widespread sexual assaults against women in Pakistan. Pregnancy is a potential result of rape. The author through the light that Rape is not the only issue, but there are several other problems associated with it. One of them is children born as a result of rape and that need to be addressed. The children born as a result of rape must be recognized as a victim. So such children must be discussed under the topic of abandoned children. This paper also analyses the law regarding the maintenance of illegitimate children and its interpretation by the courts. The paper promotes the idea that explicit legislation must be established to guarantee the rights and safety of abandoned children. In addition to making substantial efforts to raise public awareness about the rights of abandoned children, it is important to channel and regularise the concept of kafalah. In this research paper, pertinent Islamic and Pakistani legal rules are discussed and examined.

Keywords: *Abandoned, Rape, Child, Status, Illegitimate, Kafalah, Pakistan Law, Compensations, Islamic Law.*

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1. Introduction

The concept of rights on earth started with the evolution of human beings. Human rights are of great prominence as evident from the fact that it is receiving a distinct place in every religion that existed in the contemporary world. Pakistan's society is mostly professing the Islamic religion and pursues its injunctions in their daily lives. It is the right of every individual living in the country to be protected from all sorts of things which can affect him and for that reason strict legal and administrative measures should be taken. Therefore, it is the duty of the concerned authorities to make sure that vulnerable sections of the community are specially secured, profited, receiving sufficient care and have proper accommodation¹. Prior to the 1947, children's related legislation already existed which ensured protection against all sorts of abuses to this vulnerable section of the society, which then rulers (Britishers) set-up to provide children protection and to punish the violators. Subsequently, at the separation's time, the nation acquired a legacy of child welfare committed principally to curative administrations. In Pakistan, the Constitution of 1973 was the main document that guaranteed the fundamental rights for every citizen without any discrimination of language, color, creed or caste, etc. The children Rights Convention (CRC) Article 1 defines, "A child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier²." Child Rights may be defined as "The rights, which are concerned both with the protection of the individual child and with the creation of the conditions in which all children can develop to their full potential³. Islam is the state religion of Pakistan⁴, which is controlled by Islamic laws. As a result, Shariah standards and principles apply to the rights and obligations of Pakistan's citizens. Pakistan has obligations under international law and is a party to international agreements like the Convention on the Rights of the Child (CRC). "The child shall be registered immediately after birth and has the right to a name and nationality and to know and be cared for by his or her parents," according to Article 7 of the CRC. Similar to Article 18, Article 19 requires member states to take appropriate legal, administrative, educational, and social action to protect children from abuse, whether they are in the care of parents or guardians, from all types of exploitation. According to Article 2, a child who loses his or her familial environment either temporarily or permanently is entitled to particular protection and help from the State. States Parties shall ensure alternative care for such a child in line with their national laws, which may include adoption, foster care placement, kafalah under Islamic law, or necessary placement in competent institutions for child care. The desire for continuity in a child's upbringing as well as the child's ethnic, religious, cultural, and linguistic background must be taken into consideration when coming up with solutions. The CRC is the only international document that specifically discusses Islamic law. A facility to care for children who have been abandoned by their relatives is referred to in Article 20 as the kafalah. Kafalah is mentioned in this article in relation to adoption and foster care. Children adopted under kafalah do not adopt the adoptive family's name, but they are still entitled to care, support, and education. Such a youngster won't receive an inheritance from the

adopted parents. Since Article 20 specifically specifies *kaflah* as an Islamic alternative to adoption.⁵

1.1 Abandoned Children in Pakistan

The Pakistani government established the National Commission for Child Welfare and Development (NCCWD) in 1979. It operated under various administrative structures until being located under the Ministry of Human Rights. Monitoring and assessing whether children are obtaining their legal, administrative, and constitutional rights is the responsibility of the NCCWD. Additionally, it makes recommendations for constitutional and statutory modifications and develops national policies and laws for the welfare, advancement, and protection of children. The NCCWD has suggested a number of amendments and improvements to current laws and regulations, some of which have been incorporated into the Pakistan Penal Code (PPC) and the Constitution, but their actual execution still leaves a lot to be desired. The Pakistani Constitution mandates free education for all children aged 5 to 16 and outlaws child labour and child marriage. This objective is far from being accomplished, despite these laws and the ongoing efforts of numerous state and non-state agencies. The government of Pakistan ratified the Convention on the Rights of the Child (CRC) as a legal document for children's rights that establishes standards in health care, education, security and legal services, civil and social services, as the following significant event in the history of child welfare. Since then, the nation's dialogue around children's rights has begun to gain momentum. To address child sexual abuse, exploitation, child pornography, prostitution, health, housing, poverty, child labour, education, and child mortality, the National Plan of Action (NPA) for Child Protection was established. In order to establish an institutional framework for child abuse prevention, child abuse protection, and child abuse rehabilitation, a child protection bill was drafted in 2006. Child Protection Courts (CPC) are a provision of the Punjab Destitute & Neglected Children Act 2007, which stipulates that the government may, by notification, create one or more such courts under this Act as warranted. The situation on the ground is unchanged notwithstanding the aforementioned initiatives. Recent occurrences covered by the media also emphasise.⁶

Children born as a result of rape who are abandoned by their families and society need to be addressed as a big issue. Abortion is prohibited in Pakistan, so it creates a circumstance where children born outside of marriage are clandestinely murdered every year. According to the "Edhi Welfare Foundation", more than 1,100 infants were killed and dumped in the garbage in 2014 only, and this is the figure only from the big cities of the country, and the figure can be much bigger nationally. According to the manager of the Edhi Foundation, Anwar Kazmi, a child who was six-days old was burnt to death. There have been cases where corpses of babies have been found hanged or eaten by animals. There was another case in which a child was left in front of a mosque by a woman expecting that someone would take him but that child was stoned to death by the people on the order of the cleric of the mosque.⁷

Under Pakistani Law, a mother is authorized to the custody and guardianship of illegitimate children. The father has no legal tie with such a child, even though he is the biological father. However, an illegitimate child has a complete legal tie with his mother and there is no hindrance in the way of the child inheriting from his mother.⁸

In **Nadeem Masood v. The State**⁹ case, a revolutionary decision was made by Lahore High Court that has a potential to economically empower children born as an effect of rape. The court ordered the appellant, Nadeem Masood, to pay Rs. 1,000,000 to his illegitimate daughter born as an outcome of rape. By dispensing such an order, the LHC invoked the right of appellate courts to order compensation to be paid under Sections 544-A and 545 of the Criminal Procedure Code 1898. The illegitimate children born as a consequence of rape have never been specifically compensated by the Pakistani courts and their mental anguish and psychological damage was never been considered before. Justice Anwaarul Haq established that it is a legal right of such children to be compensated for the trauma they suffer. The Lahore High Court justifies this right to compensation in two ways. Firstly, the judgment looks at the precedents set by the “Supreme Court of Bangladesh” and the “Indian Supreme Court” to conclude that a child holds an unquestionable right of life and that has to be secured by the biological parents and the State. This right also covers the children given birth as an outcome of rape and cannot be rejected due to the inauspicious circumstances of their birth that they had no control over. Secondly, the judgment elucidates Sections 544 and 545 of the Cr.PC to conclude that an appellate court can pass an order in favor of a child born as a consequence of rape committed by the accused. The analysis of Section 545-A makes it absolute that the court directed compensation is not limited to the victim or legal heirs of the victim, but can be stretched to any individual who has undergone the mental agony or psychological impairment triggered by the crime. Furthermore, under section 544-A (5), the appellate court has a right to modify judgments concerning the compensation allocated to all entitled parties. Thus, appellate courts can apply these provisions to modify the trial court’s judgment and order compensation to be paid to any person i.e. the child born as a consequence of rape¹⁰. The monetary compensation for illegitimate children can help in financially empowering women who raise them and get rid of some social stigma attached to their birth. This small glimpse into the psychological torment that blights the life of a rape victim and any child born as a consequence is simply aggravated by the fact that rape is not a ground on which Pakistani law allows abortion. While that doesn’t preclude those who seek out the option, granting monetary compensation is only humane for women and children trapped in such situation, especially when the State doesn’t even provide rape victims the choice of abortion. Therefore, this judgment has established a precedent for other courts to follow and it can financially and socially help the rape victims. In Pakistan, no legislative action has yet been taken to specifically protect the rights of children born due to rape.

The maintenance of a child under Pakistani Law is an obligation which is primarily upon the father. Although it is not defined in the statutes, it can be concluded from the

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precedents that maintenance consists of the provision of food, clothing, housing, and other indispensable expenses to promote the mental and physical wellbeing of the child.¹¹ This definition of maintenance is not decisive and exhaustive, and may vary in specific circumstances. The law relating to the maintenance of a child is contained in sections 488-490 of the Code of Criminal Procedure 1898 (Cr.P.C.). According to the Section 488 of Cr.P.C it is obligatory upon the father to maintain his wives, and children: both legitimate and illegitimate. Under this section, the monthly allowance for maintenance is not to be exceeded than four hundred rupees. If the order of the court to pay maintenance has not fulfilled it will result in imprisonment. For a legitimate child, it is an established right, which cannot be disputed. However, the liability of the putative father to maintain his illegitimate child under section 488 of Cr.P.C is greatly criticized by different sects. The Federal Shariat Court ("FSC"), which enjoys the authority to declare a law null and void if it is against the injunctions of the Qur'ān and Sunnah,¹² has defended this provision as follows:

It was said that there is no concept of a putative father in Islam, but the law as envisioned above does not give any right to the person who has a adulterous relationship with the mother of the child resulted in his birth. According to the Sunnah, the child is considered the child of his mother and does not inherit from the person who is responsible for his earthly existence, nor does such a person inherit from the child. The above subsection does not, in any manner, belittle or make any invasion on this well-known principle. For the limited purposes of the Act, it merely makes him responsible for bearing the expenses of the child. The Shari'ah proposition (the parentage is determined by the conjugal bed, and the person committing adultery has only disappointment,) applies to the right of being a parent. It does not concern itself with liability. The words 'putative father' does not mean that any paternal right is to vest in him. This is only a manner of description to make him responsible for the maintenance. The same liability is fixed in S. 488 Cr. P. C., which was not held to be invalid by the Council of Islamic Ideology vide its report on Criminal Procedure Code.¹³

The Federal Shariat Court seems to take the duty to maintain an illegitimate child as a punishment for the father. According to this interpretation, such a father does not have any rights on the child but should have responsibilities. Despite this defence, the law was abrogated by considering it to be against traditional Islamic law. These sections were repealed in 1981 during the period of Islamization of laws and it was held that under Islamic law, illegitimate children have no right of maintenance and inheritance from their fathers, and no other alternate legislation was introduced to guard the rights and benefits of illegitimate children.¹⁴ This is very ironical because the teachings of Islam direct that state and lawmakers should care for the rights of children and women and protect them against physical and moral humiliation. There is a need to draft a law to encompass all aspects of child maintenance. In Pakistan, after the annulment of the above-mentioned sections, the Muslim Family Laws Ordinance 1961 and the West Pakistan Family Courts Act 1964, deal with issues related to the maintenance of the child. However, these statutes give very few rules regarding maintenance. Cases related to the maintenance of children are decided in light of legal precedents.

In Pakistan, the documents known as Form B and the computerized national ID card (CNIC) are the backbone of every person's right to survival in their country. The registration of Form B and CNIC is a major issue for the illegitimate child, the difficulty arising due to the names of their parents being unknown to authorities. There must be a special consideration for such cases the Parliament need to bring forward any bill in this context. Starting from the process of obtaining basic ID documents, therefore, it is very difficult for the illegitimate child to survive in society. In the case of **Levy vs Louisiana**, the US Supreme Court held that the illegitimate child is not a "Non-person." They are human, alive and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the US Constitution. This judgment provided a milestone toward the equality of the illegitimate child with the legitimate child. Many of the enactments from this point onwards made discrimination against the illegitimate child unconstitutional. In the US, a child born out of wedlock enjoys all legal rights as a legitimate child, except inheritance from the father. During the tenure, former President Asif Ali Zardari, he took a positive step in favour of children of unknown parentage and directed the NADRA authorities to use his name as a father's name in official documentation for any abandoned child. This step provided legal status to many unknown children.¹⁵ Therefore, the purpose of above debate is that the author wishes to underline that anytime there is discussion on children rights protection, rape victims' children must be considered, and there must be major and distinct laws that address the welfare of such children. According to article 25 of the constitution of Pakistan, the state is required to make special provision regarding child protection. The "Child Protection Welfare Bureau" (CPWB) is a self-governing body which was set up under the "Punjab Destitute and Neglected Children's Amendment Act-2007". Its centers are in different cities of Punjab, and its purpose is to provide amenities for children once it adopts them.¹⁶ The alternative care which is provided by the state and private sector for abandoned and illegitimate children are clearly insufficient and very low. There is a heavy deal of fear involving the handling of children in the institutions. The societal prejudice against illegitimate children is yet more. Even in adoption, there is a strong inequitableness against such children. In Pakistan, the Edhi Foundation has a scheme of accommodating the disown babies called jhoola since 1952. There are two most important and appreciated adoption centers in Karachi named as "Kashana-i-Atfal's Naunihal Baby Centre" and the "Bilquis Edhi Foundation". In Lahore and Rawalpindi there is an "SOS Children's Village."¹⁷

1.3 Foundling/Abandoned Children in Islamic Law

It is an established fact that in the early period of Islam adoption existed and was practiced by Muslims. Later, when the Prophet exhorted the Arabs to give up the unreasonable, unnatural and inhuman practices of pre-Islamic Arabia, he also gave them higher ideas of the domestic relationship and explained to them in full that adoption similar to what was practiced in the "Days of Ignorance" created no such ties between the adopted son and the adopting father as resulted from blood relationship. Under the classical Muslim Law adoption gives no right of inheritance to the adopted child in the property of the adoptive

parents, nor to the adoptive parents in the property of the adopted child.¹⁸ Islam fully supports the concept of helping the orphan and poor, and taking them under the wings. If there is no one to take care of the orphan and poor children, then this responsibility falls upon the Islamic government. Islam differs on the implications and legal consequences of adoption. It is this part of the adoption procedure that Islam does not accept. However, changing the family name of the adopted child is not allowed. If the child is two years old or less and is also breast fed directly by the adoptive mother for at least a day and a night (or fifteen times consequently), then the child will become mahram to the new family. If the child is not breastfed as mentioned above, then he or she will remain non-mahram to the new family. Adoption in *rizâ`i* or non-*rizâ`i* form does not give the adopted child a right to inherit the estate of the adoptive parents nor does it deprives him or her from inheriting the estate of the real parents.¹⁹ (However, the adoptive parents have the option of writing up to one-third of their estate for their adopted child.) Islam focuses on *kafalah* as an alternative care option for children deprived of a family environment in comparison with other forms of alternative childcare. The inclusion of *kafalah* in the Convention on the Rights of the Child (CRC) is the first time an exclusively Islamic concept is recognized in a binding international instrument. Prior to this development, however, *kafalah*, as a subject of international law was first mentioned in the 1986 United Nation Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration). The 1986 Declaration contains the first internationally agreed upon standards of care for children whose parents are unavailable or inappropriate. *Kafalah* is also recognized in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. It is provided as one of the measures that can be taken to ensure the protection of the person or property of the child. In the United Nation Guidelines, *kafalah* is recognised as an 'appropriate and permanent solution' for children who cannot be kept in, or returned to, their original families.²⁰

Consequently, caring for orphans and vulnerable children generally is a key tenet of Islam in order to provide them with the safety and security that a family environment offers. Indeed, there is greater agreement between the major Islamic sects on the matter of caring for such children than on any other matter of law, and the Qur'an provides specially for the subject. For instance, upon taking in a 'foundling' (*laqit*), the child must never again be abandoned. There is a moral duty and an obligation to render social assistance to children (and adults) who lack the basic necessities of life, whether or not they ask for it.²¹ In Islam, it makes no difference whether or not these children have parents. The emphasis is on ensuring their sustenance through the provision of basic needs. Poverty is thus a cause for concern in relation to the proper care of children. The Islamic law defines the magnificent advantages and blessings that one receives in adopting and caring for a foundling. The term *laqit* is used in Islamic Law, which means taking into custody. Taking child into custody is recommended as in this, there is a survival of the child and it becomes

obligatory if the person is convinced that the child will die. The Bayt al-mal is responsible to maintain the foundling because he is the person who is unable to earn and has no wealth and relatives. If any person takes foundling into custody, then no other person has a right to take such child away from him. Furthermore, foundling is a free person and if some wealth is found tied to him, then it belongs to the foundling, the finder of the child has the authority to hold onto it and to buy things necessary for the foundling. But, he does not have authority to undertake transactions in the wealth of the foundling. He can accept a gift on behalf of the foundling. The person who finds a child has no authority to marry her.²²

Most of the jurists believe that collecting the abandoned and neglected children and taking care of them is a collective or communal act. It is obligatory to collect the unattended and abandoned children, shelter them, and fulfill their needs. There is larger unanimity among the Muslim Jurists on the subject of taking care of foundling children than on any other problem of law, and the Qur'an provides clearly for this issue. The taking upon foundling known as laqit and it is required that such child should not ever again be left alone. There is a liability and moral responsibility to provide social support to such children. The concept of kafalah is there in Islamic law under which there is a pledge to willingly take care of a minor in the equal manner as a father would do it for his son. There is no right of inheritance of a child who is adopted under kafalah from the adoptive family, but inheritance can be assigned to such child through testamentary succession²³. According to some Shafi'i jurists, the presence of a witness is necessary when picking the abandoned child because such child must remain secure both in terms of life and parenting. While some jurists argued that the presence of a witness is not obligatory. A group of jurists also believes that if the founder of the child (multaqit) is a just person, there is no need for holding a witness, however, if his or her justice is not manifest, taking a witness is obligatory, as this would produce more confidence in that individual.²⁴

In Europe, from at least the 12th century in the middle ages, societies have established means to shelter the abandoned babies. There was a crib system known as "baby hatch" placed outside a hospital or any other area where people could securely drop off a baby. This was because Catholic Church did not allow the abortion and so required a place for undesirable babies. There used to be a circle in a wall in which a baby could be placed and be safe, known as foundling wheel. In the United States, there were laws known as safe haven and their purpose was to put the welfare of the infant at priority. In some states, a woman was allowed to give birth to an illegitimate child in the hospital safely and secretly leave without the baby. These unlucky children are usually found deprived of shelter, inhabitation, starving in the streets under the relentless open sky. The society due to its carelessness and acute indifference dispossess the human rights of such children and in the end, lead them towards baneful destructive activities like begging and drug addiction.²⁵

Conclusion

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The proper and complete support system should be offered by the government that should include financial help for raising such children and most importantly the respectable status in society. As far as the rights of children born due to rape are concerned, no legislative action has yet been taken in Pakistan. The infanticide is on the rise in Pakistan, the number of children murdered has escalated gradually over the past five years. According to welfare organizations "The Edhi Foundation", Pakistan's leading welfare agency, the number of dead babies its ambulances pick up has augmented by almost 20 percent every year since 2010. Every year in Pakistan, thousands of children go missing or are abandoned on the streets. Some are found dead on the streets amid piles of trash. All religious scholars in Pakistan should consider the authentic descriptions of Islamic law on the issue and have to bring these into confidence in parliamentary procedure to solve these matters. Pakistani Law is failing in protecting the lives and rights of abandoned children. As said earlier, a system of kafalah should be established to take care of such children. The rehabilitation and welfare institutes should be established to ensure the housing, education and healthcare of such children. The hundreds of unwanted children that are born in Pakistan each year will seem to have no purpose in life as long as they are homeless, without a family, and without a reason to live. Since all children are equal, they have a right to the same necessities of life. Each year, Pakistan sees the disappearance or abandonment of thousands of kids. However, there are fewer social and legal initiatives to protect them.



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