

# ANALYTICAL, CRITICAL AND COMPARATIVE STUDY OF LEGAL FRAMEWORK OF CHILD ADOPTION IN PAKISTAN AND AT GLOBAL LEVEL

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## ABSTRACT

This research addresses the present legal and ethical dilemma surrounding child adoption in Pakistan, a Muslim-majority country where doctrinal restrictions rooted in Islamic jurisprudence prohibit Western-style adoption. The central problem lies in the legal invisibility and welfare gaps affecting orphaned and abandoned children due to the absence of a codified, child-centric adoption framework. The study aims to evaluate whether Islamic law, when interpreted through the lens of *maqāṣid al-sharīʿah*, permits functional adoption equivalents that safeguard lineage while fulfilling the child's best interests. Employing a doctrinal and comparative legal methodology, the research examines primary Islamic sources, Pakistani statutes, and adoption laws in the UK, US, France, and Indonesia. The analysis reveals that while classical Shariah prohibits *tabannī*, Islamic law contains legal mechanisms such as *kafala*, testamentary wills, and guardianship that can be adapted to serve similar protective purposes. Key findings suggest that a hybrid, welfare-oriented model of adoption rooted in Islamic values yet responsive to contemporary child rights norms is both possible and necessary. The study recommends legislative reform to establish a Shariah-compliant, rights-based adoption framework in Pakistan that ensures legal identity, permanence, and dignity for every child.

**Keywords:** Child adoption, Islamic law, Kafala, Guardianship, Pakistan legal system, *Maqāṣid al-Sharīʿah*, UNCRC, Child welfare, Legal identity, Comparative law, Hybrid adoption models, Lineage preservation..

## INTRODUCTION

### RECONCILING FAITH AND WELFARE: THE LEGAL AND ETHICAL IMPERATIVES OF ADOPTION IN PAKISTAN

#### 1.1 BACKGROUND OF THE STUDY

The issue of child adoption is a tough legal and humanitarian issue for many Muslim majority nations in general and for Pakistan in particular, as no codified system is available to ensure the legal identification and long term care for orphaned or abandoned children. The Islamic tradition differs from the prevailing ones in Western legal systems which admit adoption (adopting a child as one's

own) to the extent that the full right to parental responsibility and rights to the adopted is accepted as a legal status, whilst this position is, generally, prohibited (*haram*) because of the way in which it can change lineage (*nasab*) and the line of inheritance therefrom. As a result of this prohibition, *kafala*, a system of guardianship on which care for the child relieves the child from

effect of altering his or her legal identity or ties with the family, has been coincided with<sup>1</sup>.

The Guardianship framework primarily posited in the colonial era Guardians and Wards Act, 1890 as Pakistan's existing regime that seeks to protect underage children however outdated and inadequate, still remains ineffective at meeting the social and legal needs of this vulnerable demographic group that requires just and penetrating social/ legal assistance<sup>2</sup>. The lack of a formal adoption law characterizes informal or institutional care systems for children; such children remain legally invisible, lack the right to identity documents, rightful inheritance, adequate family environments. To the contrary, this legal vacuum contrast its the sharp departure from international standards, especially, those enshrined in the United Nations Convention on the Rights of the Child (UNCRC) which Pakistan has ratified<sup>3</sup>.

The doctrinal distance between the religious tradition and child welfare widened. While Islam law already prescribes the need for preserving lineage, a modern legal system is one that prioritizes the right of a child to identity, protection and permanency. It aims to reconcile this seeming contradiction by ascertaining whether, when understood through maqāṣid al-sharī'ah (objectives of the law), Islamic law can accept functional equivalents to adoption to protect the rights of the child as well as one's faith<sup>4</sup>.

## 1.2 CHILD WELFARE AND THE ADOPTION DILEMMA IN PAKISTAN

Thousands of orphaned, abandoned and undocumented children in Pakistan are deprived both of family care and legal identity, protection of basic rights. As adoption law in Turkey is not (yet) clear, these children often slip through the formal welfare mechanisms. Rather, care is given through informal or institutional arrangements but without legal permanence and recognition. The fact that

there is no birth certificates or national identity cards in these cases renders them legally invisible and socially marginalized<sup>5</sup>.

The Pakistan's Islamic framework that dominates reflects guardianship through kafala, and allows caring for the children without changing their lineage or legal status. The result is a relatively doctrinally pure system that does not derive the benefits of the legal security provided by adoption elsewhere. On the other hand, adoption laws exist for the Western legal systems that confer all parental rights such as inheritance and change of name to the adopted child and thereby, create a permanent and legally binding family<sup>6</sup>.

The scenario that this divergence generates a burning question of what are the best ways to meet the child welfare needs without violating religious norms in Pakistan. On the one hand, Islamic law prohibits any kind of disturbance in transfer of (nasab) and inheritance rules. On the other hand, there is an international obligation in terms of UNCRC that requires states to ensure every child's right to legal identity and protection. Therefore, Pakistan's legal system is constantly forced between two different obligations: religious fidelity and the child-centric justice<sup>7</sup>.

In the case of Jamshed v Saleemuddin, for example, a young man looking for correction of his identity documents to contain his biological parentage found himself caught in a dilemma. Although the court recognized his predicament, there was no meaningful legal redress that he could access to his plight since both adoption and long term caregiving beyond guardianship was not recognized in letter of the law<sup>8</sup>.

This is done in a lack of uniformity among provinces and inadequate institutional coordination. National Commission for Child Welfare and Development (NCCWD) is yet to suggest laws for holistic reforms which when implemented have not been done completely and

<sup>1</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>2</sup> Guardians and Wards Act 1890 (Pakistan).

<sup>3</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 21.

<sup>4</sup> Jamshed v Saleemuddin [2014] PLD 120 (Sindh HC).

<sup>5</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>6</sup> Adoption of Children Act 1926 (UK); Guardians and Wards Act 1890 (Pakistan).

<sup>7</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 21.

<sup>8</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

consistently<sup>9</sup>. Therefore, despite an increase in recognition of such children's parental rights, they still face barriers in education, healthcare, inheritance, and in civil recognition.

The humanitarian aspect of this adoption dilemma in Pakistan therefore the argument is not religious or legal, it is deeply humanitarian. The first and foremost is to address it and to do so we need a legal model that adheres to Islamic values while preserving intact the rights, dignity and security of vulnerable children.

### 1.3 ISLAMIC PERSPECTIVE ON GUARDIANSHIP AND LINEAGE

The subject of adoption is taken by Islamic law with great concern as to not harm the preservation of the lineage (nasab) and inheritance rights and the family structure. The Qur'an states "call them by [the names of] their fathers; that is more just in the sight of Allah" (Qur'an 33:5), which clearly forbids the altering of a child's biological identity and to call children by the name of the father of biological father<sup>10</sup>. This verse is the reason why Islamic jurists have always denied the legal assimilation of the adopted child into the family of the people adopting him from the culture of the West (tabannī).

In Islam, adoption is not permitted but a kafala, or guardianship arrangement; that a child is given in care for a family without changing name, identity and inheritance rights. This arrangement permits for caregiving as well as affiliations, but prohibits legal transformations that clash with religious doctrines. Under this system, the child has his or her original name and lineage, does not necessarily inherit from the guardian any other than where such an amount appears in one third of the estate through a wasiyyah (testamentary bequest)<sup>11</sup>.

Listed are a couple of the key concerns that are legitimate reasons for the prohibition of adoption. Cadrilla first defends inheritance laws (mirāth)

keeping the integrity of them (i.e. they bequeaths according to the Qur'anic scheme), and second, protects the right to dispense with adult guardianship and marry without a guardian (khusūs). Second, it prevents unlawful marriage (mahrams such as adopted children are not mahram) by keeping family relationships clear. Third, it serves to maintain the social and legal identity of the individual as the just price of the individual in the Islamic society<sup>12</sup>.

Yet this did pose some problems for modern Muslim societies. Although under Shariah, the system of kafala has been valid, children do not enjoy the legal certainty and a permanent familial bond for emotional stability and civil integration. As Nadjma Yassari and others have argued, adoption is prohibited in full but Islamic law allows for "functional equivalents" that can protectively serve as adoption without violating core religious principles<sup>13</sup>. These include the use of acknowledgment of paternity (istilḥāq), milk kinship (raḍā'a), structured guardianship agreement as a way to provide care and limited inheritance rights in a reformed framework<sup>14</sup>.

These religious constraints really determine in Pakistan how legal policy is governed. In this regard, Guardians and Wards Act, 1890; i.e., inheritance based approach of guardianship had no provision for integration of a child permanently into the family of the guardian. However, cases like *Jamshed v Saleemuddin* show the adverse consequences of this approach, whereby informal adoptions become documentation problems, with the result that the family is legally excluded<sup>15</sup>.

Lineage, however, is a fundamental enshrinement of the Islamic law and has long been upheld by it despite being challenged in modern times by many jurists and scholars who, while acknowledging that lineage is sacrosanct under Islamic law, cannot help reviewing the same under the matrix of maqāṣid al-sharī'ah – especially ḥifẓ al-nafs (preservation of

<sup>9</sup> Younus S, Chachar AS and Mian A, 'Child Protection in Pakistan: Legislation and Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<sup>10</sup> Qur'an 33:5.

<sup>11</sup> Naik Z, *Islamic View on Adoption* (Islamic Research Foundation 2019).

<sup>12</sup> Aladdin, 'Comparison between the Position of Adopted Children in Islamic Law Inheritance Based on Islamic Law Compilation (KHI) With the Book of Civil Law' (2018) 5(1) *Jurnal Akta* 1.

<sup>13</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>14</sup> Muzakkir Z, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42.

<sup>15</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

life) and *hifz al-nasl* (preservation of lineage). In this framework, legal mechanisms can be read and developed in such a way as to allow the welfare of children, without infringing on the religious integrity.

#### 1.4 LEGAL STATUS OF ADOPTION IN PAKISTAN

Thus far Pakistan has not had a codified adoption law. Guardianship provisions of the Guardians and Wards Act, 1890, which is a colonial era statute, act to regulate child care mostly. In addition, this law is based on appointing guardians of minors only in few cases mostly agreeing to administer its property or temporary custody instead of its permanent welfare or legal identity modification. It therefore provides no recognition of an adoption type of parent child relationship akin to adoption as the term is understood within the Western legal frameworks<sup>16</sup>.

This law views guardianship as revocable and a temporary and conditional authority by the guardian over the child. Still after years of care taking, the provision is not made for conferring inheritance or changing surnames, and the biological lineage of the child remains unchanged. In other jurisdictions adopted children do become legal members of the new family formed by the adoption, but the child does not become a legal member of the guardian's family in this way<sup>17</sup>.

As a consequence of this lack of a formal adoption framework, there are tremendous legal implications for children in Pakistan. The one out of every ten children who become orphans or are abandoned by their biological parents rarely get registered with the state and remain unregisters, with absence of the birth certificates, B Forms and the Computerised National Identity Cards (CNICs). This prevents these children from attaining legal identity and as a result, they cannot obtain access to education, healthcare or civil rights. The lack of a court order or biological proof, institutions like NADRA (National Database and

Registration Authority) do not accept to recognise adoptive claims or surnames<sup>18</sup>.

Additionally, interpretation of guardianship by the judiciary remains therefore largely procedural in a cautious manner. Take for instance, as in *Jamshed v Saleemuddin*, the Sindh High Court found the petitioner having been raised by relatives for his whole life, yet not being recognised legally by virtue of the fact Pakistan does not recognise legal adoption<sup>19</sup>. The absence of an adoption law in this case requires that the judiciary decide by deferring to old procedural barriers that caught children in legal limbo.

Because Pakistan has ratified international instruments like the United Nations Convention on the Rights of the Child (UNCRC), which mandates states to protect and provide legal identity to every child, domestic law that does not adhere to these obligations remains disconnected. Though Article 21 of the UNCRC specifically says there should be safeguards in adoption procedures, Pakistan's legal framework for adoption does not<sup>20</sup>. Policy bodies like the National Commission for Child Welfare and Development (NCCWD) have proposed reforms, including drafting a national child protection law. However, these efforts have faced delays due to definitional conflicts, lack of provincial coordination, and limited political will. Implementation has remained fragmented, with no effective legal mechanism in place to support vulnerable children outside of guardianship<sup>21</sup>.

In effect, Pakistan's legal position on adoption remains passive and unclear. The result is a state-sanctioned silence that denies children permanence, identity, and protection. The absence of a formal adoption framework, rooted in both doctrinal caution and legislative inertia, leaves millions of children in precarious, undocumented, and unprotected conditions.

#### 1.5 CONTRASTING ADOPTION MODELS IN THE WEST

<sup>16</sup> Guardians and Wards Act 1890 (Pakistan).

<sup>17</sup> Muzakkir Z, 'Bridging the Gap: Islamic Ethics and Adoption Reform' (2023) 19(2) *Journal of Islamic Family Law* 88.

<sup>18</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>19</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

<sup>20</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 21.

<sup>21</sup> Younus S, Chachar AS and Mian A, 'Child Protection in Pakistan: Legislation and Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

Western legal systems, particularly those of the United Kingdom and the United States, have developed adoption frameworks that offer a stark contrast to the Islamic kafala-based approach. In these systems, adoption is not merely a caregiving arrangement it is a legal transformation of the child's status. Through adoption, a child becomes, in law, the son or daughter of the adoptive parents, with equal rights and responsibilities, including inheritance, name change, and social identity<sup>22</sup>.

In the United Kingdom, adoption is governed by the Adoption and Children Act 2002, which prioritizes the "welfare of the child throughout his life" as the paramount consideration. Once an adoption order is issued, it legally severs all ties with the biological family and integrates the child fully into the adoptive family. The child receives the family name, becomes a legal heir, and enjoys the same rights as a biological child<sup>23</sup>.

Similarly, in the United States, adoption law varies by state but follows a common approach that centres on the "best interests of the child." Courts consider emotional, psychological, and developmental needs when deciding on adoption. The case *Emma v Evans* is a leading example, where the court prioritized the child's emotional wellbeing in a post-divorce naming dispute, emphasizing that decisions regarding a child's legal identity must reflect the child's welfare, not parental preference<sup>24</sup>.

Western courts have shown increasing willingness to treat the child as an autonomous rights-holder. For instance, in *MP v Wife*, the Scottish court declined to return children to Poland under The Hague Convention on the Civil Aspects of International Child Abduction, citing the children's maturity and strong objection to relocation. The court used the "grave risk" exception to prioritize the children's psychological and emotional security<sup>25</sup>.

They are based in a belief that a child's well-being, stability, and sense of belonging are a core part of what is most important. As such, adoption in the West is not just a legal matter but a way to bring

about emotional integration, legal protection and identity recognition.

However, Islamic guardianship systems will not allow this transformation. Kafala means to keep the child's lineage, disallows a change in surnames, and as a rule excludes inheritance unless the will so stipulates. It doesn't only keep religious doctrine, but also it reduces legal security and social integration of the child<sup>26</sup>.

Some of the Western model, while at odds with the form of Islam, still has lessons to offer. It calls attention to the need for a permanent rights and based approach to caregiving. According to the scholars like Nadjma Yassari, Muslim societies could adopt the protective substance of Western models stability, care, and dignity without adopting their structure by finding the alternatives in accordance with Islamic principles<sup>27</sup>.

Hence, the contrast lies not just in law but in philosophy. The majority of Islamic legal system places the emphasis on maintaining the family structures and doctrinal continuity while the western adoption models put much more focus on the child as a rights bearing individual. Pakistan has a big challenge before it to protect the child and at the same time maintain such values which are based on faith.

### 1.6 LEGAL INVISIBILITY AND MAQASID AL-SHARI'AH

Legal invisibility is a critical challenge in Pakistan's current approach to child guardianship. Children who are placed informally under guardianship or into institutional care are also reluctant to acquire birth registration, identification documents and enforceable civil rights. While unintended, this legal exclusion disallows them from attending school, receiving healthcare, inheriting, and even proper citizenship recognition. The problem is compounded by the fact that there is no legal pathway that will allow them to become securely who they are without going against Islamic principles<sup>28</sup>.

<sup>22</sup> Conn P, *Adoption: A Brief Social and Legal History* (Palgrave Macmillan 2013).

<sup>23</sup> Adoption and Children Act 2002 (UK).

<sup>24</sup> *Emma v Evans* 213 NJ 389 (NJ 2013).

<sup>25</sup> *MP v Wife* [2023] CSOH 58.

<sup>26</sup> Naik Z, *Islamic View on Adoption* (Islamic Research Foundation 2019).

<sup>27</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>28</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

There must be an assessment of this legal invisibility in light both of the maqāṣid al-sharīʿah the higher objectives of Islamic law as even at that level, Shariʿah must be applied. The object of these objectives are preservation of life, lineage, intellect, property, and faith. When taken as a whole these principles are not antithetical to child welfare, paediatrico justice, protection for ourselves and all who might be vulnerable including children<sup>29</sup>. The doctrinal and moral justification for the models of care which protect children's interests while still remaining compatible with Islamic values, is thus, provided.

Several scholars have also argued that Islamic law as well as reason are not static but are dynamic and depend on contextual interpretation. For example, Nadjma Yassari considers how guardianship arrangements like kafala are compatible with maqāṣid when they are designed in such a way as to benefit the child's welfare without contradiction of lineage and inheritance<sup>30</sup>. Zubair Muzakkir also notices that avoiding changing child basic identity does not require modifying Muslim frameworks, but expands legal safeguards through testamentary bequests and documentation mechanisms<sup>31</sup>.

Yet in Pakistan, such alternatives failed to be implemented and there was a failure to fill significant jurisprudential and humanitarian gaps. In *Jamshed, v Saleemuddin*, we have a legal system without the tools to align social realities as they exist in lived reality with definite legal scales. While the petitioner was not adopted and had been raised as a son, he could not be legally recognized unless it caused the disruption of line of the records of the doctrine which ignore emotional and social ties<sup>32</sup>.

The right of the child to security, identity and social recognition fall under the scope of the principle of ḥifẓ al-nafs protection of life. This is different because a narrow reading of ḥifẓ al-nas, giving priority over the lineage to the child's welfare, may contradict the spirit of justice which Shariah strives out to nurture. This is the view supported by contemporary Islamic jurists such as Quraish Shihab who claim that to protect both the

morals and laws, Islamic principles should be contextualised in contemporary realities for the protection of orphans and children abandoned as well<sup>33</sup>.

The example of a maqāṣid based interpretation large of adoption provides a long term hybrid model that both maintains inheritance but also gives the child some form of permanence and identity. It is not just procedural an inadequacy, in legal invisibility but a denial of rights. If Islamic law is interpreted through its own ethical framework, there is sufficient ground to fill this gap, while not compromising what is fundamental in its beliefs.

### 1.7 CONCLUSION

The adoption in Pakistan is a controversial issue that arises from the tension between the doctrinal preservation of lineage under Islamic law and the urgency of protecting and integrating orphaned and abandoned children into society. The lack of a formal adoption law has turned innumerable children into legal voids whose existence remains unacknowledged through the lack of documentation, civil and familial security. While kafala is equipped as an acceptable religious model, it lacks the permanency, identity change, and security of legal safeguards offered by Western jurisdictions such as UK, US full adoption models.

These models put the child's interest forward and ensure that the child is emotionally stable, or has inheritance rights and is fully included in the legal and economic system. If maqāṣid al-sharīʿah, the ends of the Islamic law, is used to understand Islamic jurisprudence, then it provides interpretation space for child centric reforms that abide by the religious boundaries but meet the humanitarian obligations. Convergence of these legal, doctrinal and ethical concerns speaks for the need for Pakistan to ponder a balanced paradigm of Islamic values and the core right and dignity of the most vulnerable children.

### DOCTRINAL DIVERGENCE AND REFORMIST THOUGHT: A

<sup>29</sup> Naik Z, *Islamic View on Adoption* (Islamic Research Foundation 2019).

<sup>30</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>31</sup> Muzakkir Z, 'Bridging the Gap: Islamic Ethics and Adoption Reform' (2023) 19(2) *Journal of Islamic Family Law* 88.

<sup>32</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

<sup>33</sup> Muzakkir Z, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42.

## COMPARATIVE REVIEW OF ADOPTION DISCOURSES IN ISLAMIC AND WESTERN JURISPRUDENCE

### 1.8 INTRODUCTION

The work on Islamic adoption that has taken place in recent years, although focused more on theoretical questions than on law, can be of help to legal and moral debates in Islamic contexts in which its adoption is a matter of state law and of international human rights instruments. Adoption is a form of child protection for many legal systems but classical Islamic jurisprudence is hesitant to adopt for the sake of lineage, inheritance, and identity. The purpose of this literature review shall critically explore the historical development of adoption in Islamic law, and the kafala system, present and future juristic interpretations. It presents the complexity of developing Islamic legal principle based adoption model within a child centric perspective making use of doctrinal, comparative, and reformist perspectives.

### 1.9 EVOLUTION OF ADOPTION AND KAFALA IN ISLAMIC JURISPRUDENCE

According to Islamic law, what is understood as traditional, it is not directly possible to adopt, as it is understood in Western legal systems. And in fact, this vacuum has been traditionally filled by the concept of kafala (a form of guardianship that has no biological lineage and no privileges of inheritance). The theological and legal traditions embedded the concept of lineage far beyond mere blood relations if not inherently, and they rejected formal adoption (tabannī) because of the distortion it introduced, causing lineage to run afoul.

Prohibition of marriage to adoptive relations is the foundation of this prohibition mainly upon the revelation after the adoption of the Prophet Muhammad (saws) to Zayd bin Haritha. These verses allow them to call the believers by means of their fathers' names, preserving their genealogical identity and denying inherited rights for adopted children equal to natural heirs (Qur'an 33: 5)<sup>34</sup>. Hadith literature reinforces this prohibition with a warning of not claiming lineage or inheritance not based on biological connection.

<sup>34</sup> Qur'an 33:5

<sup>35</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927

Yassari's compelling explication starts from a prohibition on the term tabannī, but notes that while tabannī is formally banned, Islamic law has 'functional equivalents' which means that, through legal devices such as istikhabar (admission of paternity) or ra'ayat (caretaking), 'un-related' parties can nonetheless develop 'deep, parental bonds' with each other<sup>35</sup>. By adopting these mechanisms, parental care does not incur any violation of core Islamic tenets.

Aladdin's comparative study of Indonesian Islamic law shows that some jurisdictions have reconciled civil and religious law by establishing protections for children's welfare while maintaining boundaries of the lineage through the means of mandatory wills that favour adoptions.

In Muzakkir's analysis on Muhammad Quraish Shihab and Zakir Naik, the debate goes further. Naik takes a strict, textualist stance that views adoption as against inheritance and marital laws, and hence totally opposes adoption; Shihab proposes a contextual, child-centric reinterpretation of which justice and welfare are central. The contrast poses these as the extremes of thought in contemporary Islamic scholarship, a discourse that is ongoing as it must accommodate new scenarios which arise from modern day threats to child welfare<sup>36</sup>.

### 1.10 WESTERN LEGAL MODELS OF ADOPTION: UK, US, AND FRANCE

Historically the social values, institutional reforms and judicial priorities have had an impact on the development of adoption in the Western legal systems of United Kingdom, United States and France. The key point of these systems is reliance on the legal transformation of the status of a child for their welfare and integration into a family, but through different procedural and philosophical frameworks.

The adoption that matured over the years in the Anglo-American tradition was based on private ordering grounded in the best interests of the child. In England and Wales the introduction of formal adoption was introduced in 1926 through the Adoption of Children Act 1926 after wartime

<sup>36</sup> Zubair Muzakkir, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42

orphan hood by voluntary child welfare organisations, but it was not universal for many decades<sup>37</sup>. Thus, while the British legal system had begun severing biological ties by means of the adoptive relationship only beginning in the mid twentieth century, it was not until that time that biological ties were severed fully and in favour of adoptive parenthood in a regulated process accompanied by the growing intervention of state authorities in family law matters<sup>38</sup>. In the United States, adoption had already started earlier in 1851, starting with the enactment of the first modern statute in Massachusetts. Although federalised, the American system broadly converged on principles of full adoption, because such a child is recognized as a biological child in terms of legal status including name, inheritance, and parental rights<sup>39</sup>. These historical developments are not only legislative in nature but also judicially mediated. In *Emma v Evans*, the Supreme Court of New Jersey reaffirmed the centrality of the best-interests-of-the-child test in post-divorce naming disputes. The Court rejected presumptions in favour of either parent and emphasized that major decisions, such as surname changes, must prioritize the emotional and social welfare of the child rather than custodial convenience<sup>40</sup>. This case demonstrates the American judiciary's commitment to equality of parental responsibility and child-centric adjudication, a feature that resonates across much of its adoption jurisprudence.

The comparison serves to fill out the British and French model. Both systems have full (plénrière) and simple (simple) adoption since the early 20th century, but the French one is more evolved under civil law. The former is a severing of all biological ties, the latter preserves them (the biological ties), and especially in the case of inheritance. As Jean-François Mignot notes, these differences have not only legal but sociological effects: the UK's prioritization of domestic adoptions contrasts sharply with France's tendency toward intercountry adoptions, driven in part by the limited availability of adoptable children within France<sup>41</sup>. This divergence reflects deeper national

philosophies one favouring openness and integration within national borders, the other reflecting a civil code orientation toward lineage preservation and external sourcing.

But what they share, is the legal and legislative recognition of the child as a rights bearing person. In *FPS v Mother*, a Scottish court interpreting The Hague Convention on Civil Aspects of International Child Abduction gave significant weight to the views of a child who actively resisted returning to Spain, recognising that the child had reached a degree of maturity warranting legal consideration<sup>42</sup>. This signals a crucial shift: while The Hague Convention seeks swift returns of abducted children, courts are increasingly tempering its objectives with a nuanced appreciation of children's evolving capacities and individual agency.

In this sense, whether based on the English Corporeal Theory of the Common Law's emphasis on social and welfare realities and the civil law's codified balance between family integrity on the one hand and state intervention and oversight on the other, the Western adoption models merge on the assumption that the child is no longer a passive object of legal transactions but, through his or her rights, identity, and voice, remains an active subject in any durable diversion of the family and its particulars.

### 1.11 COMPARATIVE ADOPTION SYSTEMS IN HYBRID JURISDICTIONS

Several Muslim majority jurisdictions have tried to generate functional hybrids situated between Islamic laws and western adoption frameworks. Indonesia is a particularly instructive case among them, showing how legal pluralism can both open new opportunities as well as leave their process of adoption reform vulnerable.

The adoption landscape in Indonesia operates in a tri layered legal system of Islamic law, customary norms (adat), and positive statutory law that each of those laws wields dependence on context. Comparative analysis by Suyatno, however, shows that Regulation No. 54 of 2007 officially regulates

<sup>37</sup> Adoption of Children Act 1926 (UK).

<sup>38</sup> Jean-François Mignot, 'Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

<sup>39</sup> Dan Priel, 'Conceptions of Authority and the Anglo-American Common Law Divide' (2017) 65 *American Journal of Comparative Law* 1.

<sup>40</sup> *Emma v Evans*, 213 NJ 389 (NJ 2013).

<sup>41</sup> Mignot (n 1).

<sup>42</sup> *FPS v Mother* [2024] CSOH 45 (Court of Session, Outer House).

adoption procedure whereas communities tend to revert to informal customary practices, not following legal procedures at all, eroding both rights of the child and enforceability of adoptive responsibilities<sup>43</sup>. Even so, this was rather notable in the approach to Indonesia, acknowledging the need to maintain nasab (lineage) under Islamic law and accommodated caregiving arrangements that are in the best interests of the child.

Ridwan's research also further reveals that even in rural areas like the Tadu Raya Subdistrict, the adoption often occurs without court intervention, even if an oral agreement is enough to transfer children into new families, motivated by infertility, economic need, or cultural maintenance but without any formalization, the adopted children remain with a precarious legal status<sup>44</sup>. Most notable among these informal adoptions is that they very often blur the differences between guardianship and parenthood in unifying families while providing no statutory protection in areas like inheritance and legal identity.

The transplantation of foreign legal model raises the broader concern over cultural adaptability and legal integrity of the context and is in tune with this tension between the legal integrity and the cultural adaptability. Samanta's analysis of how what she calls 'corporate governance transplants' were economically analysed can indeed be criticised for encouraging the wholesale adoption of Western regulatory frameworks in developing countries without local adaptation<sup>45</sup>. pointing as they do to the shaky bases of effectiveness, and indeed, legal design, in finance, and more generally, with important implications for family law effectiveness depends as much on sociocultural compatibility, enforcement mechanisms and public trust as on design itself.

As courts have done with the instability of family reality and the need for doctrinal rigidity, so too have they struggled here. The Scottish court in *MP v Wife* recognised, in acknowledging the views of two children who opposed return to Poland under the Hague Convention, that carved from

Convention interpretation both the circumstance of "grave risk" and the child's objection require judicial flexibility; and even though this was not in any way an adoption case per se, the doctrinal point is simply a reminder of legal system's responsibility in today's world for contextualising harm in accordance with best interests even when doing so is to step away from a clear and literal treaty understanding<sup>46</sup>.

A second pillar of reform which the Sindh High Court's judgment indirectly suggests upon in *Govt. of Punjab v Kamina* is state accountability. However, even despite being the case regarding damages from an accident caused by institutional negligence that led to death, it reaffirms the wider principle that the state can be held responsible for not protecting individuals under its care<sup>47</sup>. This premise, when extended to adoption, challenges Pakistan's current legal inertia by inferring that public institutions will have a duty of care to children in such cases of informal or unregulated adoption arrangements, which fail the children.

In all, these examples indicate that hybrid adoption systems are both possible and necessary in Muslim majority societies. However, their success hinges on local legitimacy, procedural clarity, and a sustained commitment to child welfare. Where reform is tried without adaptation at the local level, only with the transplantation of Western adoption principles, these may be rejected or not implemented effectively. Given the thinking of the members of the court, the most promising path forward may be in the legal hybridity, cleverly shaped and judicially endorsed.

### 1.12 CHILD IDENTITY, LINEAGE, AND LEGAL RECOGNITION

Adoption discourse within Islamic societies has rendered the question of identity an important one. Informal guardianship systems such as kafala do care and protect, but remain focused on not maturing a child's legal identity, specifically, his or her lineage (nasab). Compliance to biological lineage is neither cultural nor terminological, but

<sup>43</sup> Suyatno, 'Comparison of Child Adoption from Perspective of Islamic Law, Western Law, and Customary Law' (2019) 84 *Journal of Law, Policy and Globalization* 78.

<sup>44</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>45</sup> Navajyoti Samanta, 'Transplantation of Anglo-American Corporate Governance and Its Impact on Financial Market Growth' (2019) 19(5) *Corporate Governance* 884.

<sup>46</sup> *MP v Wife* [2023] CSOH 58.

<sup>47</sup> *Government of Punjab v Mst Kamina* 1990 CLC 404 (Sindh High Court).

doctrinal: Islamic law and codified ways of life adopted in numerous jurisdictions where Muslims predominate. However, this commitment never posts along with the practical needs of a child who is trying to feel at home and get legal recognition from society.

It is most apparent in the context of judicial settings. In another instance, *Jamshed v Saleemuddin*, the applicant was adopted by his sister and brother in law at the age of four and sought the court direction to restore official records of his biological father's name including his CNIC and Matriculation certificate. The adoption was undertaken in good faith, but Islamic law does not permit severing the child's lineage even in the consensual informal adoption, the Sindh High Court recognised. This case also highlights the effect that informal adoption can have on legal documentation, state identity and inheritance rights, a right which was ultimately granted to the applicant by the Court<sup>48</sup>.

The second example comes from *Hameedan Bibi v State*, where a born child to a jail mother was incarcerated along with her. While the child was innocent, he was imprisoned for his mother based on his rights' association with hers because such children lacked institutional safeguards. Both the national and international human rights frameworks such as, the UNCRC and the Cairo Declaration on Human Rights in Islam are referred to by the court to uphold the system which acknowledges the independent personhood of children in even morally complex contexts, which indirectly reemphasizes the role identity and status play independently for the welfare of the child in Pakistani law<sup>49</sup>.

At the institutional level, the National Commission for Child Welfare and Development (NCCWD) of Pakistan has long lobbied for more deferent laws to define the proper shore of child protection and identity. Though policies have been drafted and constitutional amendments made, the implementation of them misses the mark in many

provinces. Discrepancies between the Constitution, Penal Code, and provincial enforcement create significant challenges for children attempting to assert a coherent legal identity, particularly those without a birth certificate or stable guardianship<sup>50</sup>.

Scholarly work also supports this concern. Aladdin's comparative study of adopted children in Islamic inheritance law demonstrates that while care and upbringing are encouraged, full legal assimilation particularly in terms of name, inheritance, and family registration is barred under most Islamic systems<sup>51</sup>. The child may live as part of the family but remains legally external, complicating questions of schooling, legal custody, and public documentation.

On a broader theoretical level, Jan and Akram offer a useful metaphor in their study on Pakistan's biogas adoption policy. They argue that policy reforms must account not just for infrastructure but also for the public's readiness to accept, internalise, and utilise new systems<sup>52</sup>. This analogy mirrors adoption law: without public and institutional alignment, attempts to formally recognise adoptive identity will remain partial and ineffective.

The current system therefore leaves children caught between social reality and legal invisibility. Having no mechanisms to formalise emotional bonds with legal recognition, Pakistan risks denying countless children of the very place in the formal structure of the state not to mention of their basic rights without such a safeguard. It is both urgent and necessary to have a reformed, welfare-oriented model that protects lineage, while letting a form of recognisable identity.

### 1.13 GAPS IN THE PAKISTANI LEGAL FRAMEWORK

Despite being a signatory to the United Nations Convention on the Rights of the Child (UNCRC), there exists no unified and child centric legal adoption framework in Pakistan. Our current

<sup>48</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh High Court).

<sup>49</sup> *Hameedan Bibi v State* [2001] PCrLJ 1296 (Lahore High Court).

<sup>50</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation and Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<sup>51</sup> Aladdin, 'Comparison between the Position of Adopted Children in Islamic Law Inheritance Based on Islamic Law Compilation (KHI) With the Book of Civil Law' *Jurnal Akta* 5(1) (2018) 1.

<sup>52</sup> Inayatullah Jan and Waqar Akram, 'Willingness of Rural Communities to Adopt Biogas Systems in Pakistan: Critical Factors and Policy Implications' (2017) *Renewable and Sustainable Energy Reviews* 73, 59.

legislative infrastructure is heavily fragmented, reactive by nature, and deficient at the root level: namely, to effectively address the at issue core problem of creating legal identity, security, and permanence of children in need of care. Also most importantly, Pakistan's Guardians and Wards Act 1890, that governs guardianship, was never meant to offer support for the realities of the modern world, much less adoption. This therefore means that the informal care of children is meted out without due oversight or guarantees of rights.

Several state have tried to fill this vacuum. The Ministry of Human Rights had operated through the National Commission for Child Welfare and Development (NCCWD) on the drafting of the child protection legislation, legislative amendments and policy changes. However, even several decades of work have not yet made implementation patchy and inconsistent. In as much as Younus et al point out, the NCCWD had been unable to standardize child protection as a result of definitional conflict between the Constitution of the Republic of Pakistan, the Pakistan Penal Code and the provincial regulations, which has delayed implementation of the rights of children<sup>53</sup>.

The South Asia Child Protection Review successfully supported by the UNICEF lays further stress on Pakistan's institutional fragmentation. The gap between provincial and federal norms of laws often results in province's legislating without reference to federal norms, which leads to jurisdictional overlap and procedural ambiguity, which discourages formalisation of care arrangements and which leaves vulnerable children in precarious situations<sup>54</sup>.

Judicial hesitation is also noteworthy. In *Noora v State*, the Supreme Court wrestled with the extent of its authority to intervene in a capital punishment case, ultimately ruling that courts must avoid substituting their views for those of the trial court unless grave injustice is proven<sup>55</sup>. While this case did not directly concern adoption, it underscored the judiciary's general reluctance to

take socially activist stances, even where broader principles of justice were involved.

A more relevant socio-legal analysis appears in *Brooke Bond v Conciliator*, where the Supreme Court examined whether administrative actions taken by a state-appointed arbitrator could be judicially reviewed<sup>56</sup>. Though situated in a labour law context, the Court's reasoning reinforced the view that when executive functions affect human welfare be it worker rights or child protection judicial scrutiny is justified. This precedent could support future arguments that informal and unregulated child placements demand stricter legal oversight.

A thematic parallel emerges from Areneke et al.'s study on the adoption of Anglo-American governance models in Pakistan. The authors found that governance reform efforts often failed due to a mismatch between externally imposed norms and local institutional realities<sup>57</sup>. This critique resonates deeply in the child protection domain, where foreign models of adoption cannot simply be imported without cultural adaptation and legal harmonisation.

There is a yawning chasm between legislative theory and actual on the ground reality. There are fragments of laws, courts are not talking about adoption and the policy bodies are in silos. Until Pakistan creates a single unitary, rights-based adoption law that blends Islamic values and child welfare tenets, vulnerable children will continue to be left to their care but not to their protection.

#### 1.14 FUNCTIONAL EQUIVALENCE MODELS AND REFORMS IN ISLAMIC CONTEXTS

The demand for change in adoption models in Muslim societies and the requirements for its functional needs have compelled legal scholars and policymakers to search for Islamic models of child care that comply with Islamic doctrine. Although called "adoption" (tabannī) is not, these models are typically depicted through 'functional equivalence' legal structures that ensure, without violating

<sup>53</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation & Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<sup>54</sup> Venkat Pulla, Maliha Gul Tarar and Amber Ali, 'Child Protection System and Challenges in Pakistan' (2018) 5(3) *Space and Culture, India* 54.

<sup>55</sup> *Noora v State* [1973] PLD 469 (SC).

<sup>56</sup> *Brooke Bond (Pakistan) Ltd v Conciliator* [1977] PLD 237 (SC).

<sup>57</sup> Geofry Areneke, Fatima Yusuf and Danson Kimani, 'Anglo-American Governance Adoption in Non-Anglo-American Settings: Assessing Practitioner Perceptions of Corporate Governance Across Three Emerging Economies' (2019) *Managerial Auditing Journal*

religious norms, comparable protection, care and permanence for children.

Yassari's comparative work articulates the widespread ignorance that Islamic law prohibits all forms of adoption and puts children irremediably in legal limbo. Instead, she discovers that in Muslim jurisdictions there are plenty of legal tools that have sprung up with the effects of adoption, without breaching of lineage or inheritance principles<sup>58</sup>. Long term kafala, mandatory wajib and wala (affiliation) to formalize the social parenthood. The alternatives discussed here are on substance, rather than title: narcotics or slavery, rather than a stable, emotionally secure and legally meaningful parent-child relationship meant to fulfill the child's best interests to the extent religion allows<sup>59</sup>.

For instance, Indonesia takes a pragmatic way of combining Shariah, adat (customary law), and civil codes in order to accommodate plural realities of the society. While the Compilation of Islamic Law (KHI) prohibits formal adoption, in fact, local courts often uphold practical equivalents by dictating the provision of funds and educational obligation by means of regulated guardianship, which implement provisions from a legal system that is otherwise in direct conflict with religious doctrine<sup>60</sup>. These evolutions of a flexible legal space wherein child protection can be effected within an Islamic framework.

Samanta's empirical critique of legal transplants as a policy adaptation comes however at a critical juncture of complementarities between legal designs and the unfolding of the policy process; a point denoting the dangers of transplanting foreign legal constructs to underperform when not calibrated to adequate local context. Taking this to family law reform, for instance, his findings in corporate governance reform show that transplanted frameworks of corporate governance

tend to underperform when they are transplanted without sufficient infrastructure (institutional or socio-cultural) in the country of transference<sup>61</sup>.

Functionally equivalent models are viable according to judicial developments in both the West and the Islamic world. In *FPS v Mother*, a Scottish court interpreting the Hague Convention chose not to return two children to Spain despite wrongful retention, on grounds that the children had matured enough to object and were emotionally attached to their new environment<sup>62</sup>. Similarly, in *MP v Wife*, another Scottish court invoked the "grave risk" doctrine under Article 13 of the Convention, recognizing the psychological harm that repatriation could cause<sup>63</sup>. These rulings reinforce that child welfare can supersede formalistic legal claims a logic that could extend to reconceiving adoption equivalents in Islamic settings.

Domestic example of how Islamic principles can be reconciled with state responsibility is found in Pakistani case of *Hameedan Bibi v State*. When face to face with an already detained infant with his mother, the court based on Islamic tradition and Pakistan's international human rights responsibilities argued the infant needed separate independent state mechanisms to care of him<sup>64</sup>. The case, of detention, was one of many consent to give the state a duty moral and legal to provide care beyond biological ties which has been a central argument in the reforming the care models of a child in Islamic countries.

This is combined with these sources in order to show that functional equivalence is not only a theoretical solution, but must be considered a legal and social necessity. Both divine principles and the best interest of the child can be resorted to by countries dedicated to Islamic jurisprudence and must be explored by them in flexible models.

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<sup>58</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>59</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>60</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>61</sup> Navajyoti Samanta, 'Transplantation of Anglo-American Corporate Governance and Its Impact on Financial Market Growth: A Comparative Analysis of Nineteen Developing Countries' (2019) 19(5) *Corporate Governance* 884.

<sup>62</sup> *FPS v Mother* [2024] CSOH 45 (Court of Session, Outer House).

<sup>63</sup> *MP v Wife* [2023] CSOH 58.

<sup>64</sup> *Hameedan Bibi v State* [2001] PCrLJ 1296 (Lahore High Court).

### 1.15 CONCLUSION

This part reviews the literature that demonstrates that there is a rich though fragmentary discourse of adoption in Islamic, Western and hybrid settings of law. Yassari and others have persuasively argued that when Islamic law is traditionally considered unadoptable because of lineage and inheritance concerns, there are alternative functional channels for the adoption of kafala and testamentary provisions<sup>65</sup>. This view is reinforced by comparative studies from Indonesia that show how Islamic values and civil laws may be reconciled in children's protection regimes<sup>66</sup>. However, convergence among scholars fails to exist on the level of the extent of reforming matters as some scholars support for reinterpretation with respect to maqāṣid al-sharī'ah, where others warn from the legality of any innovation which can distort basic Islamic principles<sup>67</sup>.

Adoption in its full sense, by contrast, has been embraced for a long time in the West as a rights based, stability and identity of the child tool. Landmark rulings such as *Emma v Evans* and *MP v Wife* show the courts tending more and more to focus on the child's voice, well-being and their psychological security rather than procedural technicalities<sup>68</sup>. However, Pakistan has not crossed its jurisprudential crossroads. No coherent legal adoption framework means courts are left to work with identity correction in cases such as *Jamshed v Saleemuddin*<sup>69</sup>. The commendable policy recommendations made by bodies like NCCWD, however, has not been encapsulated in a codified statute of adoption that respects the sensibilities of Islam on child welfare.

This research goes one step further to propose a child centered, legally viable and Islamically sensible adoption model, which will fill this void existing in adoption arena today. Specifically, it is based on both doctrinal analysis and comparative jurisprudence to address how to protect children's rights without violating religious boundaries. The study, in doing so, is not only addressing an academic gap, but also directly addressing the legal

reform discourse in the socio religious landscape of Pakistan that is currently undergoing a constitutional reform.

### STRUCTURE OF GUARDIANSHIP AND ADOPTION: MAPPING LEGAL NORMS IN PAKISTAN, ISLAMIC LAW, AND WESTERN JURISDICTIONS

#### 1.16 INTRODUCTION

It can be seen that the legal handling of child adoption embodies a sharp contradiction between religious values, legal obligations, and welfare imperatives. The traditional kafala system has been adopted, instead of the full adoption, in Muslim jurisdictions such as Pakistan, reflecting Islamic injunctions, which insists that in lineage and inheritance should be preserved. Yet, modern legal needs and international conventions on child rights have raised critical questions about whether Islamic law offers space for reform. This chapter outlines the legal structures relevant to adoption and guardianship across Islamic, Western, and Pakistani systems, while also examining comparative models and international frameworks like the UNCRC and Hague Convention.

#### 1.17 KAFALA SYSTEM UNDER ISLAMIC JURISPRUDENCE

The concept of kafala (guardianship) in Islamic jurisprudence emerged as a theological and legal alternative to full adoption (tabannī), which is expressly prohibited in Islamic law due to its implications on lineage (nasab), inheritance, and marriage impediments. The basis for this prohibition is verses from the Qur'an, namely, Surah Al-Ahzab (33:4-5), which command the believers to "call them (their wives) by the names of their fathers," thus giving legal identity the character of biological parentage<sup>70</sup>. This took the form of a foundational narrative concerning Zayd bin Harithah who was initially referred to as "Zayd ibn Muhammad" but rejected as an illegitimate son, and accordingly was a doctrinal stance.

Everywhere across the systems of Islamic jurisprudence, the majority of the schools are

<sup>65</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>66</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>67</sup> Zubair Muzakkir, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42.

<sup>68</sup> *Emma v Evans* 213 NJ 389 (NJ 2013); *MP v Wife* [2023] CSOH 58.

<sup>69</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh High Court).

<sup>70</sup> Qur'an 33:4-5.

agreed to interpret this as a restriction on creating legal fictions that erase biological lineage. As a consequence, in order to grant equal treatment to adopted children with natural children of the same parents, they are not permitted to assume the surname or inheritance rights of the adoptive parents. Kafala, on the contrary, is a caregiving system through which a child is raised and protected but without changing the child's identity or its ties to kinship. Most Muslim major legal systems have kept this position consistent and the policy stance has been affected in countries like Pakistan.

Although Nadjma Yassari argues that this interpretation still leaves space for functional adoption equivalents in Islamic legal tradition, other scholars disagree. Using a comparative approach, Yassari emphasizes mechanisms as acknowledgment of paternity, milk kinship (*raḍā'a*) and legal guardianship, which achieve the same child welfare results without concordance with Islamic principles. This is where she emphasizes that classical jurisprudence allows for, among other things, creative devices of legal devices that respect both form and function of child protection measures without infringement of lineage rules<sup>71</sup>.

The view taken in modern scholarship which addresses the rights to children abandoned in an Islamic context parallels this reformist view. Aladdin's work on inheritance entails that adopted children can inherit up to one-third of an estate under specified Islamic codification (such as Indonesia's KHI) if they are not full heirs using *wasiyyah*, as well<sup>72</sup>. Ali and Nazir's comparative analysis of Islamic and Pakistani laws demonstrates that minor of unknown parentage legal stencils making documentation and being true to their identity is a long and difficult road that keeps them out of civil rights protection rights<sup>73</sup>.

These issues are starkly seen in the case of *Jamshed v Saleemuddin* (Pakistani). It is a case of a man who grew up being raised by relatives, with records that do not reflect the fact of his being born under a false paternity. The fact that adoption is not formally recognized in law in Pakistan, however, the Sindh High Court's recognition of the reality that adoption has consequential identity outcomes, demands responsible change and a child-focused Islamic framework<sup>74</sup>.

Taken together, these sources show that while classical Islamic law puts a great deal of emphasis on lineage and the clarity of inheritance, the lines of kafala jurisprudence are not closed and remain room for interpretation of kafala in welfare-oriented, less formal terms that do not cross the bounds of religious norms.

### 1.18 ADOPTION UNDER ANGLO-AMERICAN LAW

The Anglo-American legal tradition has long embraced adoption as a formal, statutory process, one that provides a complete legal transformation of the parent-child relationship. Its development was neither uniform nor immediate, but it evolved in response to social, moral, and legal pressures to protect vulnerable children and redefine family in law. In England and Wales, the introduction of the Adoption of Children Act 1926 marked the beginning of state-sanctioned adoption. It was shaped by concerns over child exploitation, illegitimacy, and the need for confidentiality and legitimacy in the adoptive relationship<sup>75</sup>. In the United States, Massachusetts passed the first modern adoption law in 1851, emphasising the "welfare of the child" and laying the groundwork for the best-interest standard that would dominate future judicial decisions<sup>76</sup>.

Both jurisdictions eventually converged on the principle of full adoption a legal arrangement that not only transfers custodial rights but also severs

<sup>71</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>72</sup> Aladdin, 'Comparison between the Position of Adopted Children in Islamic Law Inheritance Based on Islamic Law Compilation (KHI) With the Book of Civil Law' *Jurnal Akta*.

<sup>73</sup> Ali A and Nazir T, 'Status of Abandoned Children: A Comparative Study of Islamic and Pakistani Law' *Journal of Islamic Legal Studies*.

<sup>74</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

<sup>75</sup> Jean-François Mignot, 'Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

<sup>76</sup> Peter Conn, *Adoption: A Brief Social and Legal History* (Palgrave Macmillan 2013).

the legal ties between the child and their biological parents. The change in this transformation is extended to inheritance rights, name change and legal identity so that the adopted child is treated on the same basis as the child born of biological parents. Priel points out that the Anglo American framework takes the combination of legal formalism and judicial discretion and has prevailed in Priel<sup>77</sup>.

Perhaps the most doctrinal flexibility of this system is demonstrated in *Emma v Evans* where the New Jersey Supreme Court considered whether or not a custodial mother could change the surname of her child post-divorce<sup>78</sup>. The Court did reject automatic presumptions in favour of either parent, instead evidencing its reasoning on grounds of the emotional and psychological welfare of the child, to conclude that identity decisions should be based on what is in the best interests of the child, not parental power.

A similar application of the 'grave risk' doctrine under the Hague Convention, however, drove the Scottish court in *MP v Wife* to refuse to repatriate children to Poland because of their mature objections and the risk of future trauma; although technically a repatriation case, its legal impact in Anglo-American systems had far reaching implications in adoption law there where 'the child's voice' once took second place to other interests of parents or the State<sup>79</sup>.

However, while the model is to be commended for being so essentially child centric, the uncritical transplanting of the model into culturally alien contexts poses certain problems. According to Samanta's research, legal transplants rarely work when they are separated from the institutions to which they belong: it is not about legal content but 'embedded' values, and this even goes on food hygiene<sup>80</sup>. Adoption, he says, is a process of more than just legislative content. Thus, the warning is particularly apt in Islamic contexts like Pakistan, where importing the whole of the Anglo-American model might adversely interact with primary tenets on descent and identity.

This is part of what the Anglo-American experience can teach us about rights based adoption law to inspire us, but to warn us when we are to be wary of adapting political legal reform to social and religious environments.

### **1.19 GUARDIANSHIP AND CUSTODY IN PAKISTAN (GUARDIANS AND WARDS ACT, 1890)**

The Guardians and Wards Act of 1890, the primary legislation governing child care and custody of Pakistan addresses the regime of the custodial rather than child welfare and the concept of family structure. The statute was originally enacted under British India and designed to tackle inheritance and guardianship disputes among landed families, as well managing property of minor children. Its structure and language express an age when the child was in effect regarded as a piece of property and a subject of succession rather than of rights and of emotional wellbeing.

The permanency and identity are two of the fundamental differences between guardianship under this Act and adoption. There is no such thing as guardianship of a person in Pakistan that makes the person being considered a legal, permanent relation. The guardian only has temporary power over the child and only ends when the child comes of age. Further, the child maintains biological identity, surname, and lineal succession meaning that there is no capacity to change the status of the child under the 1890 Act or transfer the status of the child, to create a change in inheritance rights, or to generate a new familial legal bond<sup>81</sup>. Unlike adoption particularly as carried out in Anglo American systems, guardianship under 1890 Act does not seek to fully assimilate the child into the family.

Moreover, both international and national bodies have severely criticised these doctrinal limitations. Indeed, the National Commission for Child Welfare and Development (NCCWD) has lobbied long for a child protection law that adheres to contemporary standards of care. Yet these reports as shown in the commission did highlight lack of

<sup>77</sup> Dan Priel, 'Conceptions of Authority and the Anglo-American Common Law Divide' (2017) 65 *American Journal of Comparative Law* 1.

<sup>78</sup> *Emma v Evans* 213 NJ 389 (NJ 2013).

<sup>79</sup> *MP v Wife* [2023] CSOH 58.

<sup>80</sup> Navajyoti Samanta, 'Transplantation of Anglo-American Corporate Governance and Its Impact on

Financial Market Growth' (2019) 19(5) *Corporate Governance* 884.

<sup>81</sup> Shagufta Omar, 'Child Protection Legislation in Pakistan: Challenges and Recommendations' (2020) *Pakistan Journal of Social Policy and Administration* 12(1) 45.

child-centred and in which the Guardians and Ward's Act neither a child about nor is developed which may consider the child's needs and security and mainly it consider the rights of the parents about inheritance preservation in aspects where it may not provide an explanation to deserted, children unknown parents or informal placed children in care long even for relatives<sup>82</sup>.

Similarly, UNICEF-SAARC regional review has also observed that Pakistan is lags behind other South Asian states when it comes to incorporating Article 21 of UNCRC, which promotes legal mechanism involving the best interest of the child<sup>83</sup>. While Pakistan, be a signatory to UNCRC, still lacks modern approaches towards taking heed of those points, as the guardian model in Pakistan is still ruled with the tongue of procedural formalism and patriarchal premises that provide little scope to face the new head of modern child welfare issues.

This legal stagnation is practical in the case of the Jamshed case which tells of a man that was raised by relatives but put up many impediments in rectifying his identity documents. The impact of the case was that, although the petitioner did ultimately succeed, it highlighted the embodied gaps that informal guardianship cannot resolve in the absence of adoption laws.<sup>84</sup>

Therefore, while the Guardians and Wards act, 1890 is still in operation, it is not fit to manage the new needs of child protection<sup>85</sup>. However, the children are left in precarious legal positions having failed to provide permanency, legal identity transformation, or inheritance rights for them. Pakistan's guardianship system, unless reformed, will remain a stopgap that is neither capable of performing its discharge of obligation to Islamic moral duties nor to international rights obligations.

## 1.20 COMPARATIVE LEGAL MODELS (FRANCE, UK, US, INDONESIA)

<sup>82</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>83</sup> UNICEF and SAARC, *Regional Overview: Child Protection Systems in South Asia* (2016).

<sup>84</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC).

<sup>85</sup> *Guardians and Wards Act 1890* (Pakistan)

<sup>86</sup> *Adoption and Children Act 2002* (UK); see also Jean-François Mignot, 'Full Adoption in England and

The form and function of adoption are found to be conditional on legal tradition: with sharp differences in outcomes across the child's identity, inheritance rights and legal stability. In Western jurisdictions of the United Kingdom and France, adoption intrinsically involves legal procedures whereby the child is integrated in a new family in a total way. But the degree to which they are integrated is quite different in these two systems.

The law of adoption in the UK is underpinned by common law principles and has grown incrementally in accepting the severance of all biological ties. According to the model of the *Adoption and Children Act 2002* is that once an adoption order is made under it, the child is treated as if born to its adoptive parents and is subject to all legal rights and duties as if the child had been born, including inheritance, surname and citizenship<sup>86</sup>. The courts in making adoptive placements adopt a flexible but structured approach to the best interests of the child. On the other hand, the French model takes two forms of adoption: adoption plénière (full adoption), similar to the British system, and adoption simple, whereby there is no complete severance from the birth family, but the adoption is legal, and thus reflects the civil law tradition with its dual track structure of adoption as a balance between lineage preservation and adoption integration<sup>87</sup>.

That paradigm does not necessarily move beyond the Western one; rather, they present an example of a unique comparative lens. A pluralistic legal system shapes its adoption laws which are a result of the intersection of Shariah, adat (customary law) and civil statutes. Full adoption is not recognised under *Compilation of Islamic Law (Kompilasi Hukum Islam)* within the Islamic legal sense. While informal guardianship models such as adoption in function exist but courts and communities often implement these practices which are inherently legitimate culturally but not legally consistent and can impede children's status

Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

<sup>87</sup> *Adoption and Children Act 2002* (UK); see also Jean-François Mignot, 'Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

ambiguities, particularly in relation to inheritance and civil documentation<sup>88</sup>.

The field research of Ridwan in Tadu Raya Subdistrict shows the reliance of such agreements on the oral and undocumented ones forced upon the sake of the economic hardship or the familial reciprocity, even if these practices are acceptable socially, they do not confer the child with legal recognition and protection in the long term<sup>89</sup>. Yet Indonesia's somewhat imperfect reconciliation between Islamic values and state-driven child welfare frameworks represents a practical, if imperfect, trajectory that Pakistan has not yet put into institutional form.

This comparative exercise also alerts of cautionary notes. Samanta's research on corporate law transplants shows that corporate governance legal reforms in the third world often fall short because successful legal design is often misaligned with local socio-legal reality<sup>90</sup>. Though narrow in focus, corporate law, his suggestions carry over to adoption: laws based outside local cultural, religious, and familial contexts rarely succeed during implementation.

Further recent judicial decisions in the Western courts underscore how such doctrines are actively and increasingly perceived and applied to be child-centric. In *FPS v Mother* the Scottish court declined to return a child to Spain under the Hague Convention on the basis of the child's maturity and clear opposition<sup>91</sup>. In *MP v Wife* the Scottish judiciary chose to rely on the 'grave risk' doctrine, prioritising psychological wellbeing over strict procedural conformity, demonstrating that in the West the voice of the child is viewed as a relevant factor in international child abduction cases<sup>92</sup>. Whereas in Pakistan, even though the voice of the child is mentioned by the lawmakers, it is not firmly enshrined in the family law.

Thus, while the Western and hybrid legal systems have evolved into structural and substantive

protection of adoption children, Pakistan's guardianship framework is doctrinally static and culturally fragmented. The comparative models of UK, France, and Indonesia not only guide Pakistan in developing a coherent child-centred system, which is not only respectful of Islamic principles, legal identity but can also meet the needs of the community.

## 1.21 INTERNATIONAL INSTRUMENTS (UNCRC, HAGUE CONVENTION)

There have been international legal instruments, especially the United Nations Convention on the Rights of the Child (UNCRC) and the Hague Convention on the Protection of the Child and Co-operation in Respect of Intercountry Adoption (1993), respective standards which have been unequivocally set for the protection of the welfare of children and safeguards in the adoption process internationally. Article 21 of the UNCRC commits state parties explicitly to 'ensure that the best interests of the child shall be the paramount consideration' in all forms of adoption<sup>93</sup>. It also encourages the establishment of national laws that grant legal recognition, procedural fairness and after adoption monitoring and in so doing confirms an obligation to protect the interest of the child rather than the family out of which an adoption occurs.

While Pakistan is a signatory to the UNCRC, it is not a contracting party of the Hague Convention. This selective engagement is a more general aversion to taking an internationalist approach concerning aspects of international framework that do not align with domestic religious norms. As was discussed before, Islamic jurisprudence prohibits adoption in the Western sense (changing lineage or inheritance structures) under which terms adoption would be impermissible. As a result, even today, there is a formal legal framework in Pakistan which largely takes the form of the guardianship model rather than a codified adoption system<sup>94</sup>.

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<sup>88</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>89</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>90</sup> Navajyoti Samanta, 'Transplantation of Anglo-American Corporate Governance and Its Impact on

Financial Market Growth' (2019) 19(5) *Corporate Governance* 884.

<sup>91</sup> *FPS v Mother* [2024] CSOH 45.

<sup>92</sup> *MP v Wife* [2023] CSOH 58.

<sup>93</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 21.

<sup>94</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation and

However, there have been well documented concerns expressed by scholars and practitioners concerning this divergence. Pakistan's acknowledgement at the policy level has been repeated advocacy from the NCCWD in partnership with UNICEF to bring domestic frameworks in line with international standards, particular in relation to orphaned and abandoned children<sup>95</sup>. A 2018 review registered gaps between ratified obligations and actual practice due to the inconsistency of Pakistan's provincial legislations which similarly encompassed different and numberless visions of adoption and long term care<sup>96</sup>. The absence of an adoption law also limits Pakistan's ability to regulate or engage in inter-country adoptions a critical concern in an increasingly globalised world.

Other judges have interpreted in practice the domestication of international norms through judicial interpretations from other jurisdictions. *FPS v Mother: Five*, a Scottish court, applied the applicability of The Hague convention to a cross border custody case; but refused to return the child, favouring her objection and emotional

welfare and thereby signified that even within convention frameworks, domestic courts can apply flexible child-centric reasoning<sup>97</sup>. In *Emma v Evans*, the New Jersey Supreme Court also started by grounding its opinion on the UNCRC's best interest principle, emphasizing the principle that identity changes after adoption must be done only in the child's best interest and not in the parent's interests<sup>98</sup>.

Pakistan's legal system, however, remains caught between its international promises and constitutional realities. The gap is not merely legal but cultural. As Younus and Chachar argue, reconciling Pakistan's Islamic framework with global rights discourse requires not abandonment, but reinterpretation a calibrated synthesis that neither compromises faith nor abandons the child<sup>99</sup>. Until such a balance is legislated and judicially endorsed, Pakistan will remain a signatory with limited practical compliance.

#### Comparison of Adoption and Guardianship Models: Pakistan, Islamic Law, and Western Jurisdictions

Table 1 Comparison of Adoption and Guardianship Models

Feature	Pakistan (Guardianship System)	Islamic Law ( <i>Kafala</i> )	Western Law (UK, USA)
Legal Identity Change	No	No	Yes
Inheritance Rights	Only via <i>wasiyyah</i> (1/3 of estate allowed)	No (except through bequest)	Yes (equal to biological children)
Recognition of Adoptive Parent-Child Bond	Not formally recognized	Caregiver only; no legal child status	Fully recognized
Use of Biological Surname	Biological surname retained	Biological surname retained	Changed to adoptive surname
Focus of Legal System	Guardianship/property management focus	Preservation of lineage and welfare	Child welfare and rights-centered
Religious Compliance	Yes (aligned with Islamic principles)	Fully compliant	Secular, not based on religious frameworks
Permanence of Relationship	Temporary and revocable	Temporary caregiving	Permanent and irrevocable

Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<sup>95</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>96</sup> Venkat Pulla, Maliha Gul Tarar and Amber Ali, 'Child Protection System and Challenges in Pakistan' (2018) 5(3) *Space and Culture, India* 54.

<sup>97</sup> *FPS v Mother* [2024] CSOH 45 (Court of Session, Outer House).

<sup>98</sup> *Emma v Evans* 213 NJ 389 (NJ 2013).

<sup>99</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation and Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<b>Governing Law</b>	Guardians and Wards Act, 1890	Qur'an, Hadith, and Islamic jurisprudence	Adoption and Children Act 2002 (UK), State laws in the USA
<b>Child's Best Interests as Legal Standard</b>	Partially considered	Implicit through <i>maqāṣid al-sharī'ah</i>	Yes (core legal principle)

## 1.22 CONCLUSION

This part attempts to map on the legal frameworks on child guardianship and adoption within Islamic, Pakistani and western legal orders. The Islamic model of kafala is evaluated as doctrine based in preserving lineage and inheritance rules, but is unwise and not legally permanent or identity for the child. Further Pakistan is tied to the Guardians and Wards Act, 1890, by which only very little room is found for legalising secure and lasting family bonds. While in the UK, and many other Western jurisdictions such as the USA, adoption allows the child a full legal identity, inclusion in rights of inheritance and integration into otherwise long term familial ties. These systems prioritize the welfare of the child and enable their full legal transformation into a family unit. Through comparative analysis, it becomes evident that Islamic law contains space for functional adoption equivalents, but such models remain underutilized in Pakistan. The chapter concludes that the current legal structure lacks the coherence and responsiveness needed to protect vulnerable children and that a rights-based, religiously sensitive reform is essential to bridge these doctrinal and legal gaps.

## BRIDGING LEGAL INVISIBILITY AND CHILD WELFARE: CRITICAL REFLECTIONS ON ADOPTION, IDENTITY, AND MAQASID AL-SHARI'AH

### 1.23 INTRODUCTION

The preceding part laid out the legal foundations, comparative structures, and normative principles governing adoption across Islamic, Western, and hybrid jurisdictions. This part now turns to a critical analysis of those findings, exposing the practical and doctrinal tensions that arise when child protection is filtered through divergent legal paradigms. By focusing on the Pakistani context, this chapter highlights the persistent legal vacuum,

the unresolved conflict between lineage and legal identity, and the psychological harm inflicted on children caught in a system that offers care without recognition. It also evaluates jurisprudence and reform possibilities through a synthesis of scholarly and judicial perspectives.

### 1.24 LEGAL VACUUM IN PAKISTANI LAW

Pakistan's failure to develop a child-centric legal adoption framework continues to pose serious challenges to the protection and recognition of orphaned and abandoned children. While Islamic reservations regarding full adoption are well known, the complete absence of any codified system for alternative care leaves children in prolonged legal uncertainty. Even so the country continues to operate under the colonial Guardians and Wards Act of 1890, which served to manage and safeguard properties and custodial rights rather than to effect a general family integration. The Act recognises guardianship as a temporary revocable arrangement that provides no way to permanence, legal identity change or inheritance rights for the child<sup>100</sup>.

Similarly, use of kafala in an informal sense that families and institutions have adopted for caring for children is not overseen by any legislative oversight. It offers none of the guarantees of legal security, acceptance in civil records or enforceable rights. Consequently, children brought up on kafala arrangements have no valid documentation, are not registered under the caring family's name, and have many difficulties related to education, health, and inheritance<sup>101</sup>.

However, state institutions have not missed these shortcomings. Repeatedly, the National Commission for Child Welfare and Development (NCCWD) has commented upon Pakistan's inability to align its domestic child protection systems with the UNCRC, of which it is a signatory. The biggest obstacles, according to

<sup>100</sup> Guardians and Wards Act 1890 (Pakistan).

<sup>101</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation and

Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

reports, include ‘policy stagnation, definitional inconsistency, and legislative inertia despite the constant drafting of Child Protection bills that have not been followed by any domestic authority coordination, as there is no political drive and little judicial engagement<sup>102</sup>.’

Judicial reluctance is evident in the case of *Noora v State*, where the court, though sympathetic to the petitioner, ultimately refrained from venturing into a socially progressive interpretation of justice<sup>103</sup>. In contrast, *Jamshed v Saleemuddin* showcased the real-life implications of the absence of adoption law: a man raised by his relatives struggled for years to correct his CNIC and academic certificates, as the legal system lacked the framework to validate his familial reality<sup>104</sup>. These cases reflect a broader institutional discomfort with engaging in social reform through the judiciary.

In conclusion, Pakistan’s legal vacuum does not merely represent a gap in technical law it embodies a systemic neglect of child rights and a failure to bridge religious tradition with modern legal need. Without legislative courage and doctrinal reinterpretation, millions of children will remain invisible in the eyes of the law.

### 1.25 PROBLEMS OF IDENTITY AND LINEAGE

The preservation of lineage (*nasab*) is a cornerstone of Islamic jurisprudence, but it has increasingly come into tension with the legal and emotional identity of children raised outside biological families. This tension becomes particularly stark in adoption debates, where the doctrinal insistence on maintaining biological naming, inheritance limits, and family separation often collides with the child’s right to social belonging, legal recognition, and psychological security.

For instance, in the classical Islamic thought, lineage is protected to conserve family order, inheritance lines and marital prohibitions. The verse of the Qur’an found in Surah al-Ahzab (33:5)

‘Call them by [the names of] their fathers’ is often cited as the *ahadith al-thaqil* (‘proof of the text’) for the claim against formal adoption. While there are differences in the interpretation of this verse among the contemporary scholars, the scope of the verse is taken to be relatively narrow. In another debate between Muhammad Quraish Shihab and Zakir Naik, Shihab proclaims the adoption of a contextual, *maqāṣid* based reading of the law, that is, child welfare and dignity should shape the legal interpretation<sup>105</sup>. While, with a literalist stance, Naik insists the legal reform in adoption law must not be messed it, and insists that any biological lineage must be saved in all legal respects, even at the expense of the social inclusion of the child<sup>106</sup>. It means a great deal of legal exclusion because of doctrinal rigidity. In Pakistan, children brought into the informal *kafala* system typically encounter systemic documentation barriers, such as not having CNICs, passports, or the ability to enroll in school, and the system is meant to be based on biological parents having their name on official measures such as passports or CNICs and not having the adoptive or the guardian’s name included on those papers<sup>107</sup>. The legal identity of the child is lacking, and this affects both the accessibility of services by the child as well as his or her sense of belonging and social integration.

*Jamshed v Saleemuddin* is illustrative of the case. Petitioner had been abandoned by his father and raised by his relatives who struggled for years till he was able to correct his father's name on academic and civil records. However, the Sindh High Court admitted the human dimension of the case as facts but was not sufficiently persuaded by the absence of statutory recognition of adoption<sup>108</sup>. As in *Hameedan Bibi v State*, where a child was held in jail with his mother, because there existed no alternative care provision<sup>109</sup>. The court did sympathise but the ruling exposed that identity and welfare are so neglected in law and practice.

<sup>102</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>103</sup> *Noora v State* [1973] PLD 469 (SC).

<sup>104</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh High Court).

<sup>105</sup> Muhammad Quraish Shihab, ‘*Maqāṣid al-Sharī‘ah and Adoption*’ in *Dialog Islam dan Hak Anak* (Jakarta: Lentera Hati 2020).

<sup>106</sup> Zakir Naik, *Islamic View on Adoption* (Islamic Research Foundation, 2019).

<sup>107</sup> Aladdin, ‘Comparison between the Position of Adopted Children in Islamic Law Inheritance Based on Islamic Law Compilation (KHI) With the Book of Civil Law’ (2018) *Jurnal Akta* 5(1) 1.

<sup>108</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh High Court).

<sup>109</sup> *Hameedan Bibi v State* [2001] PCrLJ 1296 (Lahore High Court).

These are not inherently incompatible contradictions between Islamic lineage preservation and modern legal identity. Islamic legal systems including that of Indonesia have provided ways for honorary guardianship and testamentary wills to save biological lineages at the same time preserving society parenthood<sup>110</sup>. However, Pakistan's legal system has failed to carry these bridges and children ended in between tradition and statelessness.

### 1.26 PSYCHOLOGICAL AND LEGAL IMPACTS ON CHILDREN

Pakistan's legal oversight of formal adoption mechanism isn't merely a legal oversight; it is psychologically and socially at play when the children are left unprotected. Identity for a child is not just a name on a document, it is a sign of belonging, legitimacy and security. If not recognised, many children of both sexes remain 'permanently marginalised' in their odds of development, confidence and integration into society.

Failure to adopt child friendly legal framework results in one of the most damaging among what Pakistan has failed to that is legal invisibility and often with emotional trauma. However, as National Commission for Child Welfare and Development reports indicate, especially children orphans and abandoned infants raised outside biological families end up with adulthood without having valid documents such as the birth certificate and Computerised National Identity Cards (CNIC), as noted<sup>111</sup>. But that absence not only deprives them of enrolling in school or accessing public services, it also reinforces the already felt outsider status that they have in wider society<sup>112</sup>. In effect, these children are present physically, but absent legally.

Hameedan Bibi v State is a particularly tragic example of this case. A mother, an under-trial prisoner, was prevented as a result of this system from taking her newborn out of jail because no

state facility was willing, or legally obliged, to take responsibility for his care<sup>113</sup>. The sympathy of the court was limited to the systemic failure to provide institutional alternatives. Indifferent to the law, the child, innocent and defenseless, was not regarded as a rights holder but more of an appendage to the legal status of his mother.

Similarly, in Noora v State, the court's inability to intervene meaningfully in a case concerning a juvenile offender underscored the judiciary's cautious stance in addressing social vulnerabilities<sup>114</sup>. These rulings, though procedurally sound, expose a deeper reluctance to develop child-sensitive jurisprudence that could mitigate the stigma and emotional damage these children face.

As Zubair and Aladdin argue, the conflation of legal identity with lineage creates a legal environment where vulnerable children are permanently marked by their origin<sup>115</sup>. Without reform that acknowledges both their emotional and legal needs, these children remain caught in a system that recognises neither their trauma nor their humanity.

### 1.27 COMPATIBILITY BETWEEN ISLAMIC AND WESTERN MODELS

The perceived incompatibility between Islamic law and Western-style adoption often dominates discourse around child welfare reform in Muslim-majority countries. At a doctrinal level, Islamic jurisprudence firmly prohibits full adoption (tabanni), especially where it alters lineage, inheritance rights, or marital boundaries. It appears on the face of it to be an unyielding contest with western models of complete legal assimilation of children adopted. While this appears to afford functional equivalence, further analysis shows that there is an opportunity for both juridical innovations in line with Islamic principles, and bolstering the argument for Islamic legal principles being the preferred embodiment of such legal innovations.

<sup>110</sup> enkat Pulla, Maliha Gul Tarar and Amber Ali, 'Child Protection System and Challenges in Pakistan' (2018) 5(3) *Space and Culture, India* 54.

<sup>111</sup> Government of Pakistan, *NCCWD Child Protection Policy Review Report* (Ministry of Human Rights 2021).

<sup>112</sup> Sana Younus, Aisha S Chachar and Ayesha Mian, 'Child Protection in Pakistan: Legislation and

Implementation' (2018) 13(2) *Pakistan Journal of Neurological Sciences* 50.

<sup>113</sup> *Hameedan Bibi v State* [2001] PCrLJ 1296 (Lahore High Court).

<sup>114</sup> *Noora v State* [1973] PLD 469 (Supreme Court).

<sup>115</sup> Aladdin, 'Comparison between the Position of Adopted Children in Islamic Law Inheritance Based on Islamic Law Compilation (KHI) With the Book of Civil Law' (2018) *Jurnal Akta* 5(1) 1.

This argument relies on Nadjma Yassari's scholarship. She argues that while Islamic law prohibits formal adoption, it contains functional devices, such as kafala, istilhaq (acknowledgment), and testamentary bequests, which can result in similar stability, care, and inheritance without compromising the child's biological identity in creative legal arrangements<sup>116</sup>. Finally, Yassari uses these mechanisms to place them in the context of maqāṣid al-sharī'ah higher objectives of Islamic law specifically hifz al-nafs protection of life and hifz al-nasl protection of lineage. From this view, protecting child welfare does not contradict the Islamic law, rather it is in line with the deeper ethical purpose of Islamic law.

Zubair Muzakkir goes a step further, demonstrates this idea by comparing Muhammad Quraish Shihab vs Zakir Naik. Shihab calls for contextual reinterpretation, arguing that adoption, if regulated to maintain Lineage and avoid confusion in inheritance could be Islamically permissible<sup>117</sup>. In contrast, Naik adheres to doctrinal impurity, ruling that to change the Qur'anic lineage laws wherever there is deviation from them, is a doctrinal invalidity. This divergence illustrates the broader tension within Islamic scholarship: whether the law must remain frozen in form or evolve in response to societal needs.

This debate translates into policy in the case of Indonesia. Noting that Indonesia's legal system is a mixture of traditional customs (adat), Islamic and civil law, Ridwan explains that full adoption is barred under the Compilation of Islamic Law (KHI), but courts allow for guardianship arrangements which establish legal security and enforceable obligations<sup>118</sup>. In practice, this system functions long term care without severing lineage, just as Yassari wanted to have functional equivalence.

Jean-François Mignot's comparative work can be used to support this synthesis. He shows that although France and the UK legally cut all biological ties in adoption, they prioritize child

wellbeing and emotional integration while non-Muslim majority states can adopt these principles without replicating the structure but adapt it through maqāṣid lens and socio legal realities<sup>119</sup>.

Zubair Muzakkir's work, reviewing the compatibility issue, comes to the conclusion that compatibility is not with form but with intent<sup>120</sup>. If adoption enables protecting and dignifying a child without breaching the very basic Islamic principles, then, a legal model which is capable of accomplishing this purpose can be justified.

Therefore, the appearance of divide between Islamic and Western systems might be less divided as it looks. Rather than polarization adoption discourse, policymakers and jurists ought to concentrate on pursuits of ethical shared permanence, protection, and a place called belonging, and build legal system which respect scriptural integrity and human dignity.

### 1.28 CASE-BASED ANALYSIS

The tension between the child's moral imperative concerning his proper interests and the procedural mantra of the need for consistency is presented in a comparative analysis of the way in which courts respond to such tension in other jurisdictions. With statutes, a structural framework, it is in the courtroom where real world complexities of lineage, custody, identity, among other things, are given voice and argued. These rulings reveal that the cultural, religious, and doctrinal contexts influence greatly what legal reasoning is about in child welfare but converge underneath one common ethical centre: The protection of the vulnerable.

This is in line with the American trend of putting substantive justice over formalism in identity matters such as naming, borne out by the New Jersey Supreme Court decision in *Emma v Evans* when the court rebelled against presumptions that each parent would be in the best interests of child based on psychological welfare and identity of the

<sup>116</sup> Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>117</sup> Zubair Muzakkir, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42.

<sup>118</sup> Mahlil Ridwan, 'The Practice of Child Adoption without Court Determination' (2024) 10(1) *Gender*

*Equality: International Journal of Child and Gender Studies* 27.

<sup>119</sup> Jean-François Mignot, 'Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

<sup>120</sup> Zubair Muzakkir, 'Bridging the Gap: Islamic Ethics and Adoption Reform' (2023) *Journal of Islamic Family Law* 19(2) 88.

child<sup>121</sup>. *MP v Wife* is a similar case in which a Scottish court refused to return children back to Poland under the Hague Convention because the children objected and had acquired emotional attachments to their new environment, again invoking 'grave risk' doctrine, which is indicative of the fact that European modern jurisprudence tends to favour granting the child a voice<sup>122</sup>.

This fundamentally differs from Pakistani case law, which, as is the norm with courts, is inclined to remain tethered to procedural rigidity. The Sindh High Court in *Jamshed v Saleemuddin* recognised the emotional truth that the petitioner had been brought up as a son by his guardians but could not legally help him only on account of the absence of legislation extending statutory recognition to adoption<sup>123</sup>. In *Hameedan Bibi v State* the court empathized with an infant detained with its mother and was sympathetic, but of no legislative utility<sup>124</sup>.

Like in *Noora v State*, the Supreme Court did not go beyond its scope in a case of juvenile conviction, even with clear social vulnerabilities, and the rulings demonstrate the limits of the Pakistan's law in facilitating child friendly justice at times at the expense of humanitarian concerns in doctrinal rule of engagement<sup>125</sup>.

The case of *FPS v Mother* justifiably demonstrates how the Hague Convention's judicial interpretation is flexible enough to serve child welfare even in cases where procedural breaches occurred, and that this can be achieved without compromising domestic sensibility, as the Pakistani courts have failed to do yet<sup>126</sup>.

Collectively, these cases illustrate larger challenge: ethical development generally leads procedural law. Particularly in systems that are still tied to form versus function, it is important for identities, dignity, and voice of a child to be recognized not only as empty legalities but as defined legal obligations.

### Legal and Social Barriers in Pakistan's Adoption Framework: Challenges and Solutions

Table 2 Legal and Social Barriers in Pakistan's Adoption Framework

Issue Area	Current Situation in Pakistan	Recommended Reform Approach
Legal Identity	Children under guardianship often lack CNICs or birth certificates; no legal surname change possible.	Create CNIC and birth registration frameworks that recognize legal guardianship.
Inheritance Rights	No automatic rights; only possible through limited testamentary bequest ( <i>wasiyyah</i> ).	Legally recognize structured guardianship and inheritance rights through <i>wasiyyah</i> or hybrid Islamic-civil law.
Judicial Treatment	Courts are bound by rigid statutes; e.g., <i>Jamshed v Saleemuddin</i> shows lack of support for informal caregiving.	Train judiciary to apply child-sensitive, <i>maqāṣid</i> -oriented interpretations.
Social Legitimacy	Children raised outside biological families often lack social recognition and status.	Legally acknowledge long-term care relationships with appropriate social status.
Documentation Access	Children often face exclusion from education, healthcare, and civil rights due to lack of legal documentation.	Ensure access to legal documentation for all children under formal guardianship.
Emotional/Psychological Impact	Children experience identity crises, marginalisation, and trauma due to lack of formal recognition.	Adopt legal frameworks that secure identity, belonging, and emotional well-being.

<sup>121</sup> *Emma v Evans* 213 NJ 389 (NJ 2013).

<sup>122</sup> *MP v Wife* [2023] CSOH 58.

<sup>123</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh High Court).

<sup>124</sup> *Hameedan Bibi v State* [2001] PCrLJ 1296 (Lahore High Court).

<sup>125</sup> *Noora v State* [1973] PLD 469 (Supreme Court).

<sup>126</sup> *FPS v Mother* [2024] CSOH 45 (Court of Session, Outer House).

<b>Compliance with UNCRC</b>	Pakistan is a signatory to the UNCRC but domestic law does not meet international standards.	Enact adoption laws compatible with both Islamic principles and international child rights obligations.
<b>Lineage Conflict</b>	Preservation of lineage is prioritized over child welfare, limiting reform possibilities.	Balance lineage with welfare through hybrid models respecting both doctrine and rights.
<b>Religious Flexibility</b>	Conservative interpretations hinder reform, despite support from modern Islamic scholars for child welfare-centric models.	Promote reinterpretation through <i>maqāṣid al-sharī'ah</i> to harmonise faith with legal protection.

### 1.29 CONCLUSION

This part critically examined the real-life consequences of Pakistan's inadequate adoption framework, focusing on issues of legal invisibility, identity denial, and the psychological impact on children deprived of familial and social recognition. The analysis showed that while Islamic jurisprudence emphasizes lineage preservation, its rigid application has led to gaps in protection and recognition for children placed in non-biological care. The chapter demonstrated that legal invisibility—where children lack birth registration, inheritance rights, and state recognition—creates systemic harm that contradicts the spirit of justice in Islamic law. Through the lens of *maqāṣid al-sharī'ah*, particularly the objectives of *ḥifẓ al-nafs* (protection of life) and *ḥifẓ al-nasl* (preservation of lineage), the chapter argued that Islamic principles can support child-centric reforms when interpreted contextually. The discussion concluded that Pakistan must urgently adopt a hybrid legal model—one that aligns religious integrity with modern child welfare standards—to ensure that no child is left without identity, security, or dignity under the law.

### CONCLUSION AND RECOMMENDATIONS CONCLUSION

However, this research has demonstrated the existence of a persistent and troubling legal vacuum in Pakistan as to the adoption and the long-term welfare of abandoned and orphaned, as

well as undocumented, children. Islamic jurisprudence, however, forbids the full adoption (*tabannī*) on doctrinal bases specifically in lineages and inheritance, but this prohibition has led to the over use of guardianship arrangement in the Guardians and Wards Act of 1890 to which they are, nonetheless, predominate, are temporary, revocable and fail to provide the child legal identity; right of inheritance or social legitimacy<sup>127</sup>. Through comparative analysis, the study has shown that while Western legal systems in the UK, the United States and France that adopt a rights based approach of full assimilation of the child, Islamic frameworks in that regard give more emphasis to the preservation of lineage and familial integrity. But this thesis in turn demonstrated that, through the work of scholars such as Yassari, there are functional equivalents to adoption, like *kafala*, or testamentary wills, or long term guardianship that replicate adoption's protective elements compatible with Islamic norms<sup>128</sup>. While the Indonesian model, drawing from civil, Islamic, and customary law actually provides a real life example of how adherence to doctrine and child welfare can function in tandem<sup>129</sup>.

Critical insight was expressed through case law coming from both Pakistan as well as Western jurisdictions in terms of how courts read and apply the principles of child welfare in practice. As courts in the US (*Emma v Evans*, *MP v Wife*) and UK (*FPS v Mother*) used the “best interests of the child” doctrine in a relatively flexible manner, even within procedural limits<sup>130</sup>. The Pakistani courts in

<sup>127</sup> Guardians and Wards Act 1890 (Pakistan).

<sup>128</sup> Nadjma Yassari, ‘Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law’ (2015) 63(4) *American Journal of Comparative Law* 927.

<sup>129</sup> Mahlil Ridwan, ‘The Practice of Child Adoption without Court Determination’ (2024) 10(1) *Gender Equality: International Journal of Child and Gender Studies* 27.

<sup>130</sup> *Emma v Evans* 213 NJ 389 (NJ 2013); *MP v Wife* [2023] CSOH 58; *FPS v Mother* [2024] CSOH 45.

Jamshed v Saleuddin, Hameedan Bibi and Noorah v State were procedurally bound but in some cases unable to provide justice due to gaps in the law<sup>131</sup>. In other words, this thesis holds that Pakistan's present day guardianship system does not fall in with either international UN CRC obligations or provides Islamically sustainable solutions for care. Legal reform is urgent and possible when guided by maqāṣid al-sharī'ah, comparative legal pragmatism, and a rights based and child centric philosophy.

## LEGAL AND POLICY RECOMMENDATIONS

To bridge the existing doctrinal, legal, and welfare gaps, the following legislative and policy recommendations are proposed:

1. **Enact a unified Child Adoption and Guardianship Law** that formally recognises long-term care arrangements without violating Islamic lineage or inheritance norms.
2. **Codify functional equivalents to adoption**, such as kafala with legal safeguards (including civil documentation, education rights, and succession through wasiyyah).
3. **Amend the Guardians and Wards Act 1890** to include provisions for permanent guardianship, child consent, and judicial discretion guided by the best interest of the child.
4. **Create a CNIC registration framework** that allows children in non-biological care to receive legal identity without compromising nasab.
5. **Establish provincial child welfare boards**, in line with Article 21 of the UNCRC, with authority to oversee documentation, placements, and welfare monitoring.
6. **Encourage judicial training** on child-sensitive adjudication to move beyond rigid textualism in favour of maqāṣid-oriented interpretation.
7. **Engage religious scholars and legal experts** to collaborate on a "Shariah-compliant child welfare model" through fatwas and consensus-building.
8. **Launch public education campaigns** to reduce the stigma surrounding informal guardianship and promote legal care options.

## TOWARDS A HYBRID, WELFARE-BASED MODEL

Pakistan's legal system has neither to opt for doctrinal purity, nor for modern reform but to adopt a hybrid approach protecting Islamic values and child welfare imperative. To achieve that, one moves towards de rigueur binaries and thus the jurisprudential suppleness embodied by maqāṣid al-sharī'ah. Nevertheless, as Nadjma Yassari and others have shown, Islamic law already includes solutions that mirror the function of adoption as long as it is carried out in accordance with certain boundaries.<sup>132</sup>

Practically, a model for Pakistan to follow is Indonesia's pluralistic legal structure. In Pakistan, the dual track model offers the existence of Islamic and civil family law systems that allow families to choose mechanisms that preserve faith and welfare<sup>133</sup>. In Pakistan, too, the dual track system could permit formalisation of guardianship, CNIC registration, testamentary inheritance and Islamic prohibitions on name and nasab alteration.

The approach does not imply conveyance of the religious principles, but it is based on reinterpretation of the religious principles concerning current needs. Islam is a sacred tradition of justice, protection of vulnerable, and reverence with dignity. Such a child centric adoption framework does not violate Shariah but is actually shaped by its highest values.

## SUGGESTIONS FOR FUTURE RESEARCH

As this study concentrates upon doctrinal and comparative legal analysis, the subsequent research can explore empirics of guardians and identity of children in Pakistan. The legal gaps affecting real lives could gain ground if there were field work in orphanages, foster homes and state care facilities. The attitudes of family court judges, social workers and religious scholars may also be gleaned from interviewing them, as may institutional barriers to reform.

The area of intersection between Islamic bioethics and child law and related to surrogacy, donor identity and nasab in the digital age is another promising area for research. There should be a

<sup>131</sup> *Jamshed v Saleemuddin* [2014] PLD 120 (Sindh HC); *Hameedan Bibi v State* [2001] PCrLJ 1296; *Noora v State* [1973] PLD 469 (SC).

<sup>132</sup> Zubair Muzakkir, 'Debating Child Adoption: Muhammad Quraish Shihab vs Zakir Naik' (2021) *Al-Bayan Journal of Islamic Legal Studies* 42.

<sup>133</sup> Jean-François Mignot, 'Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)' (2017) 41(2) *Adoption & Fostering* 142.

constant evolution of the legal principles governing the evolving technologies and family structures. Finally, other Muslim-majority countries can be considered, such as Tunisia, Morocco, or Malaysia and such positive implementation of the hybrid adoption model could be studied in other future studies as a richer comparative frame for the policy and law transfer and of legislative innovation

