Journal of Law and Religion 34, no. 3 (2019): 336–355 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2019.39

ARTICLE SYMPOSIUM

FILIATION AND ADOPTION AMONG MUSLIMS IN INDIA: THE QUAGMIRES OF A RELIGIOUS MINORITY LAW

JEAN-PHILIPPE DEQUEN[1]
Research Associate, School of Oriental and African Studies, University of London

ABSTRACT

Filiation among Muslims in India is governed by Muslim personal law, a largely uncodified corpus of key Islamic legal treatises that has subsequently been interpreted and applied through the Common Law frame of British colonial courts and the post-Independence Indian judicial system by virtue of the Muslim Personal Law (Shariat) Application Act 1937. Muslim personal law recognizes only legitimate filiation resulting from a valid or irregular marriage, barring illegitimate children from maintenance and intestate succession and prohibiting adoption. However, a number of legislative enactments have modified key aspects of the law of filiation among Muslims: shifting the presumption of legitimacy arising from a valid marriage to the time of the wedding, rather than the time of conception; invalidating the doctrine of dormant fetus; and lifting certain disabilities incurred from illegitimacy. Further, although adoption based on customary law is somewhat common in India and has been recognized by courts, its effect among Muslims has tended only to lift the bar to paternal succession and seldom creates filiation with the adoptive family. Notwithstanding, following the enactment of the Juvenile Justice (Care and Protection of Children) Act 2000 and its subsequent amendments, an optional secular legal framework for adoption is now available to Muslim prospective parents. The procedure set forth by the Act is nonetheless unwieldly and implementation faces the very practical difficulties of the state in managing and protecting the vast number of destitute and abandoned children in India, for the most part with an unknown filiation.

KEYWORDS: Muslim personal law, Evidence Act, adoption, Juvenile Justice (Care and Protection of Children) Act, customary law, *fāsid* marriage, Constitution of India, legal pluralism

Despite being a secular state that does not recognize Islamic law as a general source of law, India nevertheless adjudicates disputes among its Muslim citizens in accord with Islamic norms in matters pertaining to familial relations and *waqf* (religious endowment) through a personal legal system

1 The author writes in his personal capacity. The opinions expressed in this article are the author's own.

inherited from the British Raj.[2] With a population of 172 million Muslims[3]—making it the second largest Muslim community worldwide after Indonesia, and on par with Pakistan—India is thus at the forefront of the evolution of state-administered Islamic family law, irrespective of its status as a minority law.

At the same time, one must not downplay either the social and legal impact of such non-majority status or the state's secular constitutional framework on the administration of Islamic law, especially in regard to the question of filiation. Indeed, given their long-standing presence in a predominantly Hindu-populated subcontinent, Indian Muslims have, over the centuries, embraced in some instances, and as a matter of custom, certain characteristics of the Hindu family structures. While the most notable example may remain that of the coparcenary familial organization, more specific to filiation is the question of adoption, which is recognized in Hindu law, and its recognition and effects among Muslims.

Furthermore, whereas Islamic law may remain the main legal source upon which filiation is established among Indian Muslims, its nature and scope have been altered through both British colonial rule and, more recently, its relative subjugation to the Indian legal order's hierarchy of norms and other secular legal provisions. As highlighted in the introduction to the symposium, India, although institutionally unified, lacks normative unification,[4] and this despite the constitutional goal of establishing a unified civil code for all its citizens regardless of religious affiliation. Although nonenforceable, this goal nonetheless guides the Indian judiciary's decision making in regard to the interpretation of Islamic family law in an attempt to progressively combine its principles with the Indian constitution's fundamental rights and provisions of other personal laws.[5] This instance of judicial activism—which has gained traction since the beginning of the twenty-first century—has also led the legislature to enact statutes that offer secular opt-outs to Indian Muslims, as is the case for adoption. Moreover, as with many of the jurisdictions under review, India has incorporated international standards such as the notion of the best interests of the child within its domestic legal framework,[6] furthering its legal arsenal in the protection of destitute children, and it has grappled with the emergence of new technologies, such as DNA testing, which have had an impact on the law of filiation.

India thus shares many of the experiences of Muslim majority jurisdictions regarding the growing involvement of the state in both administering Islamic law of filiation and offering new legal

2 For an example of the colonial conceptualization and application of Muslim personal law in South Asia, see Zubair Abbasi, "Islamic Law and Social Change: An Insight into the Making of Anglo-Muhammadan Law," *Journal of Islamic Studies* 25, no. 3 (2014): 325–49; Faisal Chaudhry, "Rethinking the Nineteenth-Century Domestication of the Shari'a: Marriage and Family in the Imaginary of Classical Legal Thought and the Genealogy of (Muslim) Personal Law in Late Colonial India," *Law and History Review* 35, no. 4 (2017): 841–79.

3 According the 2011 census, Muslims represent 14.2 percent of the Indian population, thus constituting the second largest religious community after Hindus (79.8 percent). Census of India, accessed November 24, 2019, http://www.censusindia.gov.in/2011census/C-01.html (select data for India).

4 For a comparative analysis of institutional and normative unification, see Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge: Cambridge University Press, 2013).

5 For an example of the evolution of the judiciary toward Muslim personal law in relation to post-divorce maintenance, see Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda," *German Law Journal* 9, no. 3 (2008): 221–50. Regarding unilateral divorce at the husband's behest, see Jean-Philippe Dequen, "Reflections on the Shayara Bano Petition, a Symbol of the Indian Judiciary's Own Evolution on the Issue of Triple Talak and the Place of Muslim Personal Law within the Indian Constitutional Frame?," *Sudasien-Chronik/South Asian Chronicle* 6 (2016): 37–60.

6 For an analysis of the incorporation of the notion of the best interests of the child within the Indian context in relation to guardianship, see Jean-Philippe Dequen, "India," in *Parental Care and the Best Interests of the Child in Muslim Countries*, ed. Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt (The Hague: Asser Press, 2017), 29–61.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

avenues when it remains silent or forbids certain remedies, thereby enhancing a pluralistic legal framework. However, the minority status of Indian Muslims and the secular nature of the Indian constitutional framework, as well as its drive toward a uniform civil code, render India unique regarding its application of the law of filiation. Further, the colonial legal legacy, coupled with the reliance on largely uncodified Islamic legal provisions, has tested the consistency in which Muslim personal law has been—and to a certain extent continues to be—administered. Given India's common law tradition, the resolution of the conflicts arising from the interplay of both secular and Islamic provisions has been laid largely on the shoulders of the judiciary, which, over the years, has made tremendous efforts to elaborate a coherent legal discourse on the matter.

This article describes the evolution of this legal discourse—how it draws on India's Islamic past, how the colonial legacy interfered with the classical provisions of Islamic law, and how these provisions were progressively interpreted in light of India's post-Independence secular goals. I first present Muslim personal law's sources regarding filiation, their interplay with India's secular provisions—notably in relation to the law of evidence—and the way the judiciary has elaborated mechanisms to solve the inherent conflicts between them. Next, I give a brief overview of how the law of filiation among Indian Muslims currently stands, the preeminence of the presumption of a valid marriage to establish *nasab* (filiation), and the legal remedies put in place to alleviate the burdens that fall upon a child with a defective or unknown lineage. I conclude on the issue of adoption, commenting on radical changes that have recently opened a secular avenue for Muslims parents seeking to adopt, but also pointing out that despite the new legal framework put forward by the state, the administrative apparatus continues to face problems regarding the care and protection of destitute children.

THE SOURCES OF FILIATION AMONG INDIAN MUSLIMS: AN INTERPLAY BETWEEN CLASSICAL ISLAMIC LAW AND SECULAR PROVISIONS

As mentioned above, family law in India falls within the remit of a personal legal system according to one's religious affiliation. Muslim personal law thus governs most familial relations amongst Indian Muslims, as embedded in the Muslim Personal Law (Shariat) Application Act 1937 (hereafter the Shariat Act).

Section 2 of the Shariat Act does not explicitly mention filiation as a subject within the scope of its application. Nonetheless, as it does include marriage, its dissolution (including *liʿān*, mutual repudiation), intestate succession, and guardianship—each having a direct relation to a child's status—filiation has been considered an integral, albeit implicit, part of Muslim personal law. Nevertheless, the lack of explicit reference to it within the Shariat Act has allowed Islamic norms regarding filiation to be easily superseded by secular provisions.

Sources of Muslim Personal Law

Despite the Shariat Act's "Statement of Object," Muslim personal law—unlike its Hindu counterpart—has never been formerly codified in India.[7] Its sources lie in a set of treatises and textbooks

7 In accord with article 25(2)(b) of the Constitution of India, in order to "[provide] for social welfare and reform … to all classes and sections of Hindus," the Indian Parliament actively codified Hindu law through a series of statutes in the 1950s, the most significant in terms of filiation being the Hindu Marriage Act 1955 (Section 16 having been

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

that the courts for the most part consistently uphold,[8] furthering their authoritative nature through the common law doctrine of precedent. Already in use during the Mughal period, compendiums such as *Al-Hidāya*[9] and *Al-Fatāwā al-ʿĀlamgīriyya* (only partially translated into English)[10] remain the two main sources of Indo-Islamic law. A certain number of digests summarizing the ever-growing body of case law have subsequently come into use and are regularly updated,[11] these serving alongside Syed Ameer Ali's treatise, which has had a lasting influence within the judiciary,[12] particularly because of the author's position as the first Indian national to become a member of Judicial Committee of the Privy Council in 1909. Whereas some contemporary authors are sometimes cited within judgments[13] and in more recent compendiums published by Muslim nongovernmental organizations,[14] the judiciary relies nonetheless predominantly on the well-established sources that have passed the test of time.

These sources are overwhelmingly part of the *ḥanafī* juristic school, the most prominent on the subcontinent and thus the primary focus of this article. However, Indian courts progressively recognized both the *shīʿa* and *shāfiʿī* legal traditions during the nineteenth century, as well as the right of Indian Muslims to change *madhab* (juristic school) during the course of their life.[15]

Secular Sources in Relation to Filiation

Nevertheless, both the status of Muslim personal law within a secular constitutional framework and the relative influence of Hindu majority culture on Indian Muslims have had a certain impact on the scope of application of Muslim personal law.

On the one hand, custom remains a relevant source of law regarding filiation among Muslims in India, specifically regarding adoption, as I discuss below. Customary adoptions have long been an

amended in 1976 to establish legitimate status of children born out of a void or voidable marriage) and the Hindu Adoptions and Maintenance Act 1956. On the other hand, Muslim personal law has seldom been the object of legislative enactments, these only partially codifying certain Islamic norms and done, moreover, at the Muslim community's request. See Mussalman Wakf Validating Act 1913; Dissolution of Muslim Marriage Act 1939; Wakf Act 1954 (most recently amended in 2013); the Muslim Women (Protection of Rights on Divorce) Act 1986.

8 It is only of late that the Supreme Court, as well as some High Courts, has ventured toward new interpretations of Islamic law, not always without controversy. See, in regard to post-divorce maintenance, Mohd. Ahmed Khan v. Shah Bano Begum and Ors 1985 SCR (3) 844; relating to unilateral divorce Mohammad Naseem Bhat v. Bilquees Akhter and Anr 2012 (4) JKJ 318; Shayara Bano v. Union of India and Anr. (2017) 9 SCC 1, especially regarding Joseph J.'s separate judgment.

9 Ali ibn Abi Bakr Marghinani, *The Hedaya: Commentary on the Islamic Laws*, trans. Charles Hamilton, 2nd ed. (New Delhi: Kitab Bhavan, 2008).

10 See Neil B. E. Baillie, ed., *Digest of Moohummudan Law on the Subjects to Which It Is Usually Applied by British Courts of Justice in India*, 2nd ed., 2 vols. (London: Smith, Elder, 1875), who includes it among other Islamic sources.

11 See Roland Wilson, *Anglo-Muhammadan Law*, 5th ed. (Calcutta: Thacker, Spink, 1921); Dinshah Fardunji Mulla, *Mulla Principles of Mahomedan Law*, ed. Iqbal Ali Khan, 21st ed. (Delhi: Lexis Nexis, 2016); Faiz Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan*, ed. Muhsin Tayyibji, 4th ed. (Bombay: Tripathi, 1968); Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law*, 5th ed. (New Delhi: Oxford University Press, 2005).

12 Ameer Ali, *Mahommedan Law: Compiled from Authorities in the Original Arabic*, 2 vols., 4th ed. and 5th ed. (New Delhi: Himalayan Books, 1985).

13 Such as Tahir Mahmood, *The Muslim Law of India* (Allahabad: Law Book Company, 1980).

14 See *Compendium of Islamic Laws* (New Delhi: All India Muslim Personal Law Board, 2002).

15 See Rajah Deedar Hosseen v. Zuhooroon Nissa (1841) 2 Moo. I.A. 441 in relation to *shīʿa* law; Mohamed Ibrahim v. Ghulam Ahmad (1864) I Bom. H.C.R. 236 in regard to *shāfiʿī* law and the possibility to change juristic school.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

established and recognized practice among certain Muslim sects, such as the Khojas,[16] and in specific territories, such as Awadh[17] and Kashmir.[18] Moreover, given that section 3 of the Shariat Act stipulates that Islamic law will be applicable to the subject matter of adoption only upon an individual voluntary declaration, in the absence of such a declaration (which is often the case), customary adoptions may be recognized by the judiciary throughout India. The burden of proof, however, rests with the claimant, who must establish a custom in accord with the definition laid down by section 3(a) of the Hindu Adoptions and Maintenance Act 1956, namely that of a "rule which, having been continuously and uniformly observed for a long time, has obtained the force of law … in any local area, tribe, community, group or family."

On the other hand, a certain number of legislative and constitutional provisions also have a direct effect on the administration of filiation among Indian Muslims. The Constitution of India provides for a right to equality (article 14), a right to life—including that of a family life—(article 21), and a prohibition of discrimination (article 15), to this end empowering the state to enact "special provisions for women and children" (article 15(3)). Further to these fundamental rights, the constitution also enumerates "Directive Principles of State Policy," which, although nonenforceable, are used as "the book of interpretation" upon which constitutional provisions are construed.[19] As such, article 39(f) commands that the state provide children with "opportunities and facilities to develop in a healthy manner," protecting them against both exploitation and their "moral and material abandonment." Moreover, having ratified the Convention on the Rights of the Child, India has incorporated most of its provisions into municipal law,[20] notably the notion of the best interests of the child.

It should furthermore be noted that already in the colonial era, municipal secular enactments had been made applicable to disputes among Muslims in relation to filiation. Section 112 of the Evidence Act 1872 thus displaces the presumption of legitimacy to a child born "during the continuance of a valid marriage … or within two hundred and eighty days after its dissolution," while section 114 provides for factual presumptions, "regard being had to the common course of natural events," thus invalidating the Islamic doctrine of the dormant fetus. Finally, section 125(1)(b) and (c) of the Code of Criminal Procedure 1973 provides for the maintenance of both legitimate and illegitimate children.[21]

Conflicts between Muslim Personal Law and Secular Law

As shown above, filiation among Indian Muslims is determined by a variety of sources that more often than not stand in conflict with one another. While the Shariat Act may create an exception to

16 See *Dastūr al-'amal* (Code of Conduct 1967), Section 18 (reproduced in Tahir Mahmood, *Muslim Law in India and Abroad*, 2nd ed. [Gurgaon: Universal Law Publishing, 2016], 257), whereby "an *Isma'ili* may adopt a child or children after obtaining the previous permission of the Council."

17 See Oudh Estates' Act 1869, Section 29 on the right of a *ta'luqdār* (landowner) to adopt.

18 The adoption (of a son) called *pisar parvardah*, has been recognized as customary law through the Shri Pratap Jammu and Kashmir Law (Consolidation) Act 1977 [1920 A.D.], Section 4 (d). Adoption not being one of the subject matters enumerated in the recent Jammu and Kashmir Muslim Personal Law (Shariat) Application Act 2007 would suggest such custom is still legally applicable in Kashmir.

19 See Ashoka Kumar Thakur v. Union of India and Ors (2008) 6 SCC 1.

20 Adopted November 20, 1989, entry into force September 2, 1990, 1577 UNTS 3 (CRC). It was ratified by India on November 12, 1992; however, it is worth mentioning that with India being a dualist system, the Convention on the Rights of the Child is not directly actionable before the courts. It was nonetheless implemented in multiple municipal statutes, most notably the Juvenile Justice (Care and Protection of Children) Act 2000, amended in 2006, and it has now been replaced by the Juvenile Justice (Care and Protection of Children) Act 2015.

21 Formerly section 488 of the Code of Criminal Procedure 1898.

the general application of Muslim personal law regarding adoption—to the benefit of custom—its compatibility with both constitutional and legislative provisions remains however unclear. Moreover, the scope of its territorial application is also constrained; as provided in the Act itself, it does not extend to the state of Jammu and Kashmir (section 1(2)), which enacted its own Jammu and Kashmir Muslim Personal Law (Shariat) Application Act 2007 with a few modifications of the central legislation (notably the absence of section 3). Further, for mainly historical reasons the Shariat Act does not apply in Goa or Daman and Diu, where the Portuguese Civil Code 1867 is still in force;[22] nor does it apply to the "Renoncants" of Pondicherry.[23]

Whether the Constitution of India affects the administration of Islamic law has been and continues to be a contentious issue. The constitution provides that all "laws in force" before its promulgation should be amended to be consistent with its provisions[24] and subsequently considered void if in derogation of fundamental rights.[25] The judiciary has been given extensive powers to enforce this normative hierarchy,[26] powers which have themselves been broadened following the introduction of public interest litigation in the 1970s.[27] Irrespective, given both the largely uncodified nature of Muslim personal law, as well as the lack of explicit reference to personal laws within the definition of "laws in force,"[28] the judiciary has from an early stage refused to consider Muslim personal law as falling within the scope of constitutional review.[29] This position continues to be contested, and a recent decision by the Indian Supreme Court banning the practice of unilateral divorce at the husband's initiative (*triple ṭalāq*) has signaled a possible evolution in that regard, falling short, however, of reversing this well-established precedent.[30]

22 See Goa, Daman and Diu (Administration) Act 1962.

23 "Renoncants" were Indian residents who had opted to be governed by French law during the colonial era and who retained this right after the territory's cession to India in 1962. See Pondicherry (Extension of Laws) Act 1968.

24 Articles 372 and 372A.

25 Article 13(1).

26 Article 32(A) provides that "[t]he Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred by this Part [i.e., Part III—Fundamental rights]." Article 226 provides equivalent powers to the High Courts within their jurisdiction.

27 For a review of public interest litigation in India, see Surya Deva, "Public Interest Litigation in India: A Critical Review," *Civil Justice Quarterly* 28, no. 1 (2009): 19–40.

28 Article 13(2)(b) defines "laws in force" as including "laws passed or made by Legislature or other competent authority," the term *law* including "ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law" (article 13(3)(a)).

29 See State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84, where Gagendragadkar J. states that the framers of the constitution "must have been aware that these personal laws needed to be reformed … yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression of 'laws in force.'" This position has been consistently upheld by the apex court, notably regarding Muslim personal law: see AWAG [Ahmedabad Women Action Group] and Ors v. Union of India AIR 1997 SC 3614.

30 Shayara Bano v. Union of India and Anr. (2017) 9 SCC 1 set aside the practice of *ṭalāq al-bid'ah* (innovative divorce, such as *triple ṭalāq*) in a 3–2 plurality decision that saw the ruling majority split between two distinct rationales: whereas Nariman and Lalit JJ. considered Muslim personal law as falling within the ambit of article 13(1) and therefore set aside the practice based on its contravening article 14 of the Constitution of India for arbitrariness, Joseph J. prohibited the practice based on its lacking a foundation in Islamic theology and thus on its nonrecognition within Islamic law itself. In connection with Khehar CJ. and Nazeer J.'s dissenting opinion, a majority of the constitutional bench (three of the five justices) can therefore be considered as having upheld the State of Bombay v. Narasu Mali AIR 1952 Bom 84 precedent.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

Hence despite being challenged, the relationship between Muslim personal law and constitutional provisions is nonetheless settled, for the moment at least. Its position vis-à-vis other secular enactments is, conversely, far more fluid. As the aforementioned sections 112 and 114 of the Evidence Act 1872 contradict Islamic norms relating to filiation and more specifically to that of legitimacy, the question of whether they supersede Muslim personal law continues to be in some respect a disputed issue in the absence of a definitive judgment by the Supreme Court.

Since the issue was first raised by Syed Mahmood J. in 1888, Indian High Courts have traditionally been split as to the overriding nature of sections 112 and 114 in regard to Muslim personal law.[31] The issues in the debate can be summed up as follows: on the one hand, whether rules relating to legitimacy are rules of evidence or that of substantive law; on the other hand, whether, following its promulgation, the Shariat Act does not itself supersede any prior legislation based on conflict-of-law rules regarding the application of law in time.

Both Roland Wilson and Syed Ameer Ali considered the rules on legitimacy to be of a substantive law nature,[32] and subsequently that section 112 should not override the provisions of Islamic law. Their approach was followed by the Court of the Judicial Commissioner at Nagpur in 1918.[33] This view was, however, notably objected to by Faiz Badruddin Tyabji,[34] who lamented the drafting of the Evidence Act but nonetheless considered Muslim legitimacy provisions to be rules of evidence. He was followed in that regard by the Allahabad High Court in 1926,[35] later confirmed in 1936.[36] With section 2 of the Evidence Act having repealed "all rules of evidence not contained in any statute, Act or Regulation" and given the uncodified nature of Islamic law in India, as well as the lack of derogation in favor of Muslim personal law within the Act, section 112 was bound to apply to all classes of Indians irrespective of their personal law. The Lahore High Court followed suit in 1930,[37] and in London, the Privy Council applied section 112 without even referring to the ongoing debate.[38]

The promulgation of both the Shariat Act in 1937 and, perhaps more importantly, the Amending and Repealing Act 1938—which repealed section 2 of the Evidence Act altogether—seemed to point in turn to the overriding effect of Muslim personal law in relation to legitimacy. While Pakistani courts might be said to have drawn the logical conclusions of such repeal, subsequently considering the rules of Islamic law as having been "revived,"[39] the Madras High Court opted for a more literal approach. Pointing to the absence of any explicit reference to filiation as a subject matter falling within the ambit of the Shariat Act, the High Court considered the provisions of the Evidence Act as still being applicable.[40] While currently this may seem to be the dominant position within the Indian judiciary, it does not, however, automatically follow that Islamic provisions are irremediably disregarded.

Indeed, the literal rule of statutory interpretation also applies to section 112, which provides a presumption of legitimacy for "any person born during the continuance of a *valid marriage*"

31 Mohd. Allahdad v. Mohd. Ismail Khan ILR 10 All. 289 (1888).
32 See Wilson, *Anglo-Muhammadan Law*, 161; Ali, *Mahommedan Law*, 2:238.
33 Zakir Ali v. Sograbi AIR (1918) 43 IC 883.
34 Tyabji, *Muslim Law*, 204.
35 Sibt Muhammad v. Muhammad AIR (1926) All. 589.
36 Sampatia v. Mir Mahbood Ali AIR (1936) All. 528.
37 Mt. Rahim Bibi v. Chiragh Din AIR (1930) Lah. 97.
38 Ismail Ahmed Peepadi v. Monin Bibi AIR (1941) PC 11.
39 See Abdul Ghani v. Taleh Bibi PLD (1962) Lahore 531; Hamida Begum v. Murad Begum PLD (1975) SC 624.
40 Submma v. Venkata Reddi AIR (1950) Mad. 394; A.G. Ramachandran v. Shamsunnissa Bivi alias Razia Begum AIR (1977) Mad. 182.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

[emphasis added]. From a very early stage, the term *valid marriage* has been construed as excluding irregular (*fāsid*) marriages from the purview of section 112,[41] while more recently the Kerala High Court came to the same conclusion concerning void (*bāṭil*) marriages.[42] Therefore, in the absence of a definitive precedent from the Supreme Court, the relationship between the Evidence Act and Muslim personal law regarding legitimacy can at best be described as intertwined.

Jurisdiction of the Courts

From the 1980s onward, the lack of clear precedent within the field of legitimacy can be partially attributed to a judicial reorganization following the Family Courts Act 1984 and the creation of the family courts. The latter have exclusive jurisdiction over marriage, divorce, and incidental questions relating to suits arising from marital relationships, and proceedings for the declaration of legitimacy.[43] They also have partial jurisdiction on matters relating to adoption alongside District Courts, City Civil Courts, and Child Welfare Committees,[44] this due to their competence over guardianship and custody matters. The Family Courts Act insists above all on protecting and preserving the "institution of marriage and the welfare of children," to this end insisting on resolving disputes through conciliation rather than through formal proceedings.[45] As such, legal counsel is not required in front of family courts, although counsel is allowed as an *amicus curiae*.[46] Subsequently, the courts rarely delve into questions of law, and appeals to High Courts are rare.

Filiation is not however under the complete jurisdiction of family courts, as disputes relating to inheritance—where legitimacy of heirs is often put forward as an incidental question—remain within the general jurisdiction of District Courts, where procedures are more formalized and are also more likely to be appealed. Moreover, in the absence of a clear reference of acknowledgment, issues relating to filiation can also arise in front of a variety of lower courts, such as the Small Causes Court and City Civil Courts. Therefore, while the creation of family courts may certainly have helped in lowering the pending case load of District Courts in most family law matters, it has nonetheless had the dual effect of dividing the jurisprudence relating to filiation into two different procedures and creating a variety of legal fora, thereby resulting in sometimes contradictory judgments.

It must, however, be stressed that despite this divide, issues relating to filiation fall strictly under the competence of the state judiciary. As in many countries with a significant Muslim community, there exist in India multiple forms of extrajudicial conflict-resolution fora, such as *dār al-qāḍā'* run under the auspices of various nongovernmental Islamic organizations.[47] Although the rulings of such entities or the opinions of prominent Muslim jurists (*fatwā*) can sometimes receive social acknowledgment within a given setting, they are not recognized by the state judiciary (though the latter sometimes can draw inspiration from them).[48]

41 Mt. Kaniza v. Hasan AIR (1926) Oudh 231.

42 Abdul Rahman Kutty v. Aisha Reevi AIR (1960) Ker. 101.

43 However, a declaration of illegitimacy cannot be issued: see *Renubala Moharana and anr. v. Mina Mohanty and ors.* (2004) 4 SCC 215 on the meaning of Section 7(1) of the Family Courts Act 1984.

44 Constituted under Section 27 of the Juvenile Justice (Care and Protection of Children) Act 2015, Child Welfare Committees have competence to declare a child adoptable, see also Section 2(23).

45 Family Courts Act 1984, Section 4(4)(a).

46 Family Courts Act 1984, Section 13.

47 The most prominent being the All India Muslim Personal Law Board.

48 See Vishwa Lochan Madan v. Union of India & Ors. (2014) 7 SCC 707.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

It is thus under a multiplicity of substantive, procedural, and jurisdictional provisions that filiation amongst Indian Muslims must be assessed and determined. Legal certainty flows in India from legal diversity rather than from uniformity.

ESTABLISHMENT OF FILIATION AMONG MUSLIMS: THE CONTINUING IMPORTANCE OF A VALID MARRIAGE

Establishment of Filiation by Law

Although the distinction between illegitimacy and legitimacy has somewhat faded among most religious communities in the last decades,[49] it remains a vivid distinction among Muslims. Indeed, whereas the filiation of a child to his or her mother cannot be disclaimed once she has given birth[50]—save in *shīʿa* law[51]—the filiation to his or her father, which subsequently determines the child's status as legitimate or illegitimate and the consequences thereof, is an artificial legal relation which is either presumed, proved, or acknowledged.

Children Born into a Valid Marriage

As mentioned above, the Indian judiciary appears to have positioned itself in favor of the superseding nature of section 112 of the Evidence Act 1872 over the Shariat Act in accord with literal rules of statutory interpretation. Section 112 reads as follows:

> [A]ny person born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Hence, contrary to Muslim law, courts have decided that as long as a child is born within the pursuance of marriage, the time of conception is immaterial to its legitimate status,[52] and thus the birth does not have to take place within a prescribed period of time after the celebration of marriage.[53] However, the concealment of a premarital pregnancy is classified as a fraud, therefore rendering the secular rules on the presumption of legitimacy inapplicable.[54]

---

49 Although the distinction remains relevant, most personal laws have been amended either to forgo its effects or at least attenuate them in the case of a voidable or void marriage: see Section 16(3) of the Hindu Marriage Act 1955; Section 26(3) of the Special Marriage Act 1954; Section 3(2) of the Parsi Marriage and Divorce Act 1936; and Section 21 of the Indian Divorce Act 1869.

50 See Baillie, *Digest of Moohummudan Law*, 1:391; Marghinani, *The Hedaya*, 136.

51 The Supreme Court of India revitalized the distinction between *shīʿa* and *ḥanafī* law in Gohar Begam v. Suggi (1960) 1 SCR 597.

52 Palani v. Sethu AIR (1924) Mad. 677. It thus follows that the potentially unlawful (*zinā*') circumstances of the conception are equally irrelevant provided a lawful marriage ensues.

53 Kahan Singh v. Natha Singh AIR (1925) Lah. 414. Hence, the premature birth of child shall not raise any presumption of illegitimacy: Dukhtar Jahan v. Mohammad Farooq AIR (1987) SC 1049.

54 Abdul Rahiman Kutty v. Aysha Beavi AIR (1966) Ker. 101. Conversely, a premarital pregnancy known to and not objected to by the husband at the time of the marriage will not be considered as a valid ground for challenging the marriage at a later date: Amina v. Hassan Koya 2003 (3) SCR 999.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

Whereas the overriding nature of section 112 is based on the absence of explicit reference to filiation in the Shariat Act, it must be read in conjunction with the Shariat Act when filiation is indirectly affected by it. In this regard, given that the presumption put forward by section 112 constitutes "conclusive proof," it appeared to be in direct conflict with the Shariat Act as the presumption would render *li'ān*—explicitly identified as a subject matter in the scope of the Muslim personal law—inoperable. Indeed, once established, the effects of legitimacy (and its possible retraction) fall back to Muslim personal law, which does not allow paternal filiation to be disclaimed,[55] save for *li'ān*.[56] With the exception of a lack of access, which is explicitly referred to in section 112, High Courts have considered that no other evidence—notably evidence of adultery and least of all evidence in the form of an oath—would be admissible, as a conclusive proof was deemed to be irrebuttable.[57] The Supreme Court, however, has recently decided that the results of DNA testing would prevail over the presumption established by section 112,[58] opening the door to a more harmonized interpretation between section 112 and Muslim personal law.

This is not the only instance where, despite its superseding nature, section 112 is to be read in conjunction with Muslim personal law. Indeed, the definition of what constitutes a "valid marriage" remains within the ambit of personal law, especially since no central statute requires compulsory registration of marital unions.[59] The issue of legitimacy governed by section 112 is thus more often than not linked to the recognition of a valid marriage, which is governed by Muslim personal law. Under the latter, in the absence of a marriage contract (*nikāḥ nāmah*) or witnesses attesting to its existence, the marriage can nonetheless be presumed from prolonged cohabitation.[60] However, it does not follow that the offspring born into such a marriage will be automatically recognized as legitimate, especially in the event of a temporary marriage (*mut'a*) accepted under *shī'a* law, where judges have required "something in the nature of acknowledgement, either expressly or by conduct, on the part of the reputed father to raise the presumption [of legitimacy]."[61]

Furthermore, while section 112 does provide for a presumption of legitimacy for up to 280 days after a marriage's dissolution, it does not expressly state that a child born beyond this period would necessarily be considered illegitimate, opening the door for Islamic law's own timeline to be applied, which can extend up to four years under the doctrine of the dormant fetus (*al-rāqid*).[62]

55 See Baillie, *Digest of Moohummudan Law*, 1:411; Sadik Husain v. Hashin Ali (1916) 43 IA 212.

56 See Baillie, *Digest of Moohummudan Law*, 2:153; Ali, *Mahommedan Law*, 2:227.

57 Shaik Fakruddin v. Shaik Mohammed Hasan AIR (2006) AP 48.

58 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik (2014) 2 SCC 576, where the court states that "in our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail," 586; also Dipanwita Roy v. Ronobrotto Roy (2014) 2 SCC 126.

59 India is party to the Convention on the Elimination of All Forms of Discrimination against Women, adopted July 30, 1980, entry into force September 3, 1981, 1249 UNTS 13 (CEDAW), subject to some reservations, notably in regard to article 16(2), requiring states to render marriage registration compulsory. Despite this reservation, the Supreme Court has ordered the government to take measures to enforce registration (Seema v. Ashwini Kumar AIR (2006) SC 1158). However, only a minority of regional states already have such provisions, and no central statute has been enacted so far (see, for example, The Kazis (Maharashtra Amendment) Act 1978; Assam Moslem Marriages and Divorces Registration Act 1935).

60 By contrast, acknowledgment (explicit or tacitly through conduct) is considered conclusive proof: Mahomed Amin v. Vakil Ahmed AIR (1952) SC 358.

61 Akbar Husain Sahib v. Shoukhah Begam Saheba (1915) 31 IC 657

62 Whereas *shī'a* law abides by physiological realities and extends the gestation period only to a maximum of ten lunar months, *ḥanafī* jurists have extended it up to two years, while *shāfi'ī* law allows for a period up to four years. See Ali, *Mahommedan Law*, 2:227–28.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

However, section 114 of the Evidence Act 1872 allows the court to presume facts only with "regard being had to the common course of natural events," and it would thus preclude an unfettered implementation of Islamic provisions in that regard.

Children Born into an Irregular or Void Marriage

Islamic law would, however, fully apply in relation to presumptions proceeding from irregular or void marriages, section 112 mentioning only "valid marriage" as falling within its scope. It thus follows that filiation arising from both irregular (*fāsid*) and void (*bāṭil*) marriages are governed by Muslim personal law.[63]

A Muslim marriage is void *ab initio* if it is prohibited for reasons of consanguinity, affinity, or fosterage,[64] as well as cases involving a woman whose husband is still living and whose marital ties subsist.[65] The offspring of such marriages are considered to be illegitimate.[66]

An irregular marriage is one for which the prohibition is not permanent and can be lifted in the future. They include, inter alia, marriages contracted without witnesses, with a fifth wife (while the other four are still alive), or with a woman undergoing her *'idda* (waiting period).[67] More common in India, however, are marriages contracted with either a non-Muslim man or a woman not belonging to a religion of the book (*kitābiyyah*, that is, Christian or Jewish),[68] such irregularity being lifted upon conversion to Islam. Children born out of irregular marriages are considered legitimate,[69] following the same presumptions as those of a valid marriage under Islamic law.

Contrary to secular law, Islamic law focuses on the time of conception rather than on the date of birth. As such, a child is presumed legitimate only if born at least six lunar months after the date of the marriage. Similar to section 112, this presumption cannot be easily rebutted: the burden of proof in claims relating to illegitimacy rest entirely on the person interested in such a claim, whereby only evidence pointing beyond mere doubt or suspicion will be entertained.[70]

As can be seen from above, Muslim personal law is more often than not very protective of a child's legitimate status, seldom allowing illegitimacy to take hold. Consistent with this inclination, and, further, to the presumptions arising for valid or irregular marriages, Islamic law also provides for filiation to be established through acknowledgment.

Establishment of Filiation by Private Autonomy: The Doctrine of Acknowledgment

Contrary to the presumption of legitimacy—whose classification in evidence law continues to be contentious—acknowledgment has from a very early stage been considered as a part of the

63 Mt. Kaniza v. Hasan AIR (1926) Oudh 231; Abdul Rahman Kutty v. Aisha Reevi AIR (1960) Ker. 101.

64 Janab Ali Mia v. Nazamaddin Pradhania (1915) 29 IC 871.

65 Ameer Ali, however, considers that if the second marriage was contracted on the *bona fide* belief that the wife was either widowed or divorced, the consequences of such union would be that of an irregular marriage, thus legitimizing the offspring, see Ali, *Mahommedan Law*, 2:240. To lift the irregularity of the second marriage, the first marriage must then be dissolved: Ata Muhammad v. Saiqul Bibi (1910) 7 IC 820.

66 Mohammad Shafi v. Rounag Ali AIR (1928) Oudh 231.

67 For a more detailed exposition on the different forms of irregular marriages, see Ali, *Mahommedan Law*, 2:239–50.

68 See Ihsan Hassan Khan v. Panna Lal AIR (1928) Pat. 19.

69 "An invalid marriage that has been consummated is joined to valid ones in some of their effects, among which is the establishment of paternity": Baillie, *Digest of Moohummudan Law*, 1:392.

70 Kotwal Gouri Nand v. Ghuku Latha (1937) 39 PLR (J&K) 51.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

Islamic substantive law of succession,[71] a position that has not been reversed despite not being explicitly mentioned within the Shariat Act. In his famous 1888 judgment, Mahmood J. states the definition and scope of acknowledgment (*iqrār bi-l-nasab*), which, in the absence of any formal codification, has been followed and further refined by subsequent case law:

> So far, it would seem at first sight that an ikrar or acknowledgment stands in the Muhammadan law much on the same footing as an ordinary admission as defined in Section 17 of the Evidence Act; and if the matter rested here, I confess I should have been inclined to regard the question as one appertaining to the province of the law of evidence. But acknowledgments of parentage under the Muhammadan law rest upon a footing higher than that of ordinary admissions as pure matters of evidence. … [The] peculiarity of such acknowledgments, that is, the permanency of their effect when duly made, upon the personal status of the persons in respect of whom such acknowledgments are made, is in itself sufficient to justify the conclusion that the acknowledgment of parentage, though it has reference to evidential presumptions and other considerations, is in effect a rule of personal status in the eye of Muhammadan law … falling within the province of the Muhammadan law of inheritance and marriage.[72]

Being an integral part of the Islamic law of succession, he goes on to reiterate that inheritance is solely based on consanguinity and thus the presumption of paternity through marriage. However,

> [a]ccording to Muhammadan law, the acknowledgment and recognition of children by a father as his sons gives them the status of sons capable of inheriting as legitimate sons.[73]

Finally, given the necessity of a blood relation to establish a right to paternal inheritance and the subsequent impossibility of adoption within Muslim law, Mahmood J. limits the scope of acknowledgment to cases where illegitimacy has not been proved:

> The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved.[74]

This position was further refined by subsequent case law throughout the twentieth century by both colonial courts (including the Privy Council)[75] and post-Independence Indian courts.[76]

The doctrine of acknowledgment is not a legitimation procedure. As a matter of evidence, the doctrine of acknowledgment is applicable only to marriages that have been neither proved nor disproved.[77] If the marriage has been disproved, is found to be void *ab initio*, or the illegitimacy of the offspring has been otherwise established, the acknowledgment can have no effect.[78] Indeed, it is classified as a presumption and thus may be rebutted by contrary evidence.[79]

71 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 289.
72 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 326–29.
73 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 333.
74 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 334–45.
75 Habibur Rahman v. Altaf Ali AIR (1922) PC 159.
76 Mohammad Amin v. Vakil Ahmad AIR (1952) SC 358.
77 See Rafiqa Begam v. Aisha AIR (1944) All. 598; Rashan Bai v. Suleman AIR (1944) Bom. 213.
78 See Habibur Rahman v. Altaf Ali AIR (1922) PC 159; Usman Miyan v. Vali Mohd. (1916) AIR Bom. 28; Mohamed Khan Sahib v. Ali Khan Sahib AIR (1981) Mad. 209.
79 S. A. Hussain v. Rajamma AIR (1977) AP 152.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

There had been some confusion whether an acknowledgment of paternity would *prima facie* be considered as an acknowledgment of legitimacy.[80] However, it now seems settled that although the acknowledgment may be either explicit or implied by one's actions, it must show the acknowledger's intent to accept the child not only as his offspring but, moreover, as his legitimate offspring.[81] In the same vein, in accord with the notion that acknowledgement of legitimacy constitutes the establishment of blood relations, it has further been decided that "it must not be made when the ages are such that it is impossible in nature for the acknowledge or to be the father of the acknowledge,"[82] which, according to Neil Baillie corresponds to a minimum age gap of twelve and a half years.[83]

For the Indian judiciary, an acknowledgement once established cannot be revoked,[84] and it confers on the acknowledged child the same rights as that of any other legitimate offspring.[85]

EFFECTS OF FILIATION OR A LACK THEREOF

Similar to its establishment, the effects of filiation among Indian Muslims are governed by Muslim personal law in conjunction with other secular provisions. The secular provisions will notably come into play in the presence of either a defective or unknown filiation.

EFFECTS OF LEGITIMATE FILIATION

The primary effect of a legitimate filiation consists in the right of the children to take up their father's name, which still has a significant social importance in India. Subsequently, the personal law of the child will also be that of his or her father.[86] More prosaically, however, one of the main aspects of the establishment of a legitimate filiation is a financial one, first in terms of maintenance during the child's minority, secondly in relation to his or her right to inheritance.

Within Muslim personal law, the duty of maintaining a child rests primarily on the father, "and no person can be his associate or partner in furnishing it."[87] The duty lasts until a son attains his majority[88] or a daughter is married,[89] provided neither have independent revenue of their own.[90] This obligation is not only a personal one, encompassing instead the entirety of the father's

80 As seems to be the case in Sadik Husain v. Hashim Ali (1916) 43 IA 212.

81 Abdool Razak v. Aga Mahomed Jaffer Bindaneem (1894) 21 IA 56; Habibur Rahman v. Altaf Ali AIR (1922) PC 159; Jiand Khan v. Province of Sind AIR (1948) Sind 130.

82 Habibur Rahman v. Altaf Ali AIR (1922) PC 159.

83 Baillie, *Digest of Moohummudan Law*, 1:411.

84 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 289.

85 See Habibur Rahman v. Altaf Ali AIR (1922) PC 159.

86 The father being the natural guardian of the child. See Section 19 in conjunction with Section 25 of the Guardians and Wards Act 1890.

87 Marghinani, *The Hedaya*, 146; see also Baillie, *Digest of Moohummudan Law*, 1:459.

88 Mohd Ramzan Magray v. Taja S.L.J. 1983 J&K 188. The Majority Act 1875 sets the majority age at eighteen years.

89 Baillie, *Digest of Moohummudan Law*, 1:462.

90 "[W]here the child is possessed of property, the maintenance is provided from that, as it is a rule that every person's maintenance must be furnished from his own substance, whether he be an infant or an adult." Marghinani, *The Hedaya*, 147.

property "in such a way that it can be enforced even against an alienee of the father."[91] Similarly, however, it is the duty of a legitimate son to maintain his parents.[92]

Furthermore, the father's duty of maintenance continues when the children are under the custody of their mother during the period of *ḥaḍāna* (nurturing period, generally until seven years old for a boy, and until puberty for a girl),[93] although High Courts have subsequently fluctuated as to whether, following a divorce, the father would still be liable to maintenance in the event his children did not want to live with him.[94] Following the enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986, some fathers have attempted to argue that their duty of maintenance could be offset by section 3(1)(b), which provides for only two years of maintenance for women caring for children, notwithstanding any other law in force. However, this interpretation was rejected by the High Courts[95] and, more recently, by the Supreme Court, which has definitely settled that under both personal law and secular provisions the father's duty to maintain his children is absolute, irrespective of the latter's residence, provided he has sufficient means.[96]

Disabilities Linked to Illegitimate Filiation

Although under Muslim personal law illegitimate children have no claim to maintenance,[97] they can, however, make recourse to secular legislation to enforce such a right. Indeed, the Code of Criminal Procedure 1973 offers a remedy to illegitimate children by allowing the courts to order a person with sufficient means to provide maintenance for both legitimate and illegitimate minor children.[98] The Supreme Court has confirmed such legal avenue for illegitimate Muslim children.[99] However, as the father is not the natural guardian of an illegitimate child, the child will take the name of his or her mother and be governed by her personal law.[100]

Nevertheless, while Indian secular legislation may have remedied certain disabilities in relation to illegitimacy for Muslim children, the latter remain barred from any claim to paternal inheritance, even though the right to maternal succession is open to them. Indeed, the Allahabad High Court, although recognizing, according to Baillie, that

91 Ibrahim Fathima v. Mohamed Saleem AIR (1980) Mad. 82.

92 Ibrahim Fathima v. Mohamed Saleem AIR (1980) Mad. 82.

93 See Mohammad Shamsud Din v. Noor Jehan Begum AIR (1955) Hyd. 144.

94 While the Madras High Court considered that the duty of maintenance was absolute, irrespective of where the children lived (Kachi Muhaldin Tharaganar v. Sainambu Ammal AIR (1941) Mad. 582), the Bombay High Court has subsequently decided that such maintenance may be declined if the children refused to live with their father without reasonable cause (Dinsab Kasimbad v. Mahomed Hussain AIR (1945) Bom. 390).

95 Siraj Sahebji Mujawar v. Roshan Siraj Mujawar AIR (1990) Bom. 344.

96 Noor Sabha Khatoon v. Mohd. Quasim (1997) 6 SCC 233. In the case of the impossibility of maintaining children due to poverty, the duty rests upon the mother and then the paternal grandfather under *ḥanafī* law. *Shī'a* law is slightly different, as it first contemplates transferring the duty to the paternal grandfather before the mother.

97 The duty of maintenance, which rests upon the father under Muslim personal law, can apply only to legitimate relationships, which in Islamic law are imprecisely entangled with the establishment of paternity itself.

98 Section 125(1)(b), formerly Section 488 of the Code of Criminal Procedure 1898. Unlike Muslim personal law, however, it does not provide for maintenance of an unmarried daughter who has attained majority.

99 Noor Sabha Khatoon v. Mohd. Quasim (1997) 6 SCC 233.

100 Ironically, this will allow the illegitimate child of a Muslim father and a Hindu mother to claim maintenance from his/her father under the Hindu Adoption and Maintenance Act 1956 (see K. M. Adam v. Gopala Krishnan AIR (1974) Mad. 232).

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

> The *wulud-ooz-zina*, or illegitimate child, has no *nusub* or parentage. Consequently, neither the *zanee*, or he who has unlawfully begotten, nor she who bore him, nor any of their relations, can be his heir, nor has he any title to their succession. His inheritance, therefore, is only for his own children[101]

Bhargava J. upon reading the above passage with another from the same Digest according to which "the residuaries of a *wulud-ooz-zina* and the son of an imprecated woman are the *moowalees* of their mothers; for they have no father, and the *kurabut*, or kindred of their mother inherit to them, and they inherit to them,"[102] came to the conclusion that "under Hanafi law of Inheritance, an illegitimate child can inherit from his mother and her relations."[103]

Suspended Effects of Filiation in the Case of Voluntary Surrender of the Child

Although not severing the filiation between a child and his parents, the Juvenile Justice (Care and Protection of Children Act) 2015 (hereafter the JJ Act 2015) provides for his or her surrender to a child welfare committee[104] due to "physical, emotional and social factors beyond their [the guardians' or parents'] control."[105]

After inquiry, the parents or guardians will execute a surrender deed before the child welfare committee, following which the child will be placed either in a specialized adoption agency if under six years old or in a children's home.[106] Following such placement, although filiation is not extinguished, the responsibility for the care (including maintenance) of the child rests upon the Indian state through the child welfare committee.

Although the surrendered child may be subsequently declared legally free for adoption,[107] the principle underlying the care of surrendered children is, nonetheless, one preferring a restoration to their parents,[108] be it with supervision or through a sponsorship program.[109]

Protection and Care for Abandoned Children with an Unknown Filiation

The protection and care for abandoned children with unknown filiation is similarly governed by the JJ Act 2015. Children who have been found in need of care can be produced in front of the child welfare committee,[110] which will place them in either a specialized adoption agency, a children's

101 Baillie, *Digest of Moohummudan Law*, 2:305.
102 Baillie, *Digest of Moohummudan Law*, 1:703.
103 Rahmat Ulah v. Maqsood Ahmad AIR (1952) All. 640 at 641.
104 Instituted in every district, a Child Welfare Committee (Chapter V of the JJ Act 2015) has the responsibility, inter alia, to take cognizance and dispose of cases for the protection, treatment, development, and rehabilitation of children in need of care (Section 29(1)), duties that include, notably, placing a child in foster care (Section 30 (v)) or in a relevant institution (Section 30(vii)), including a specialized adoption agency, and declaring an orphaned, abandoned, or surrendered child legally free for adoption (Section 30(xi)).
105 Section 35(1) of the JJ Act 2015.
106 Section 35(2 and 3).The parents are given two months from the execution of the deed to reconsider their decision.
107 Section 38(2).
108 Section 39(1) and Section 40(1).
109 Regional state governments are required to enact rules for the establishment of sponsorship programs, designed especially to help parents (in particular, widowed, divorced, or abandoned mothers and parents with life-threatening diseases) in the upbringing of their minor child through nutritional, medical, educational, or other types of support (see Section 45).
110 Section 31 (these include a range of authorities and persons, including a "public spirited citizen" (Section 31(v)) or the child him- or herself (Section 31(vi)).

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

home or foster care.[111] The child welfare committee is also bound in the case of an abandoned child to "make all efforts for the tracing of the parents or guardians of the child," and only upon an unfruitful inquiry can it declare the child "legally free for adoption."[112]

The religion, and thus the personal law, of the child—if known—is of little importance in this process. Whereas the Adoption Regulations 2017 prioritize the "socio-cultural environment" of the child in cases of adoption,[113] and the JJ Act 2015 admits inter-country adoption only when no prospective Indian adoptive parent can be found,[114] adoption by both relatives and other Indian nationals can be achieved "irrespective of their religion."[115] A Muslim child can thus be adopted by non-Muslim adoptive parents under the Act.

It must be recognized, however, that despite this relatively new legal framework, abandoned children in India are, in practice and in the vast majority of cases, living in dire conditions. Although some nongovernmental organizations have put forward the number of nearly twenty million orphans or abandoned children in India,[116] only a fraction of those declared legally free for adoption are effectively adopted.[117] In addition to the cumbersome legal procedure,[118] a recent and scathing Supreme Court order has pointed out the inefficiency of the Indian government in even producing data relative to the children under its care:

> We have been given to understand that there is no data base of all the child care institutions in the country. State Governments have not even validated the available data or undertaken the mapping of child care institutions in collaboration with the Union Government. This is an essential first step since it is difficult to imagine how children in child care institutions can be cared for if there is no record of the number of institutions, number of children in such institutions, relevant information regarding the children etc.[119]

Lokur J.'s remarks echo a long-standing position of the Supreme Court in establishing guidelines in favor of adoption, an approach that ultimately opened the possibility for Indian Muslims to adopt, irrespective of Muslim personal law.

---

111 Section 37(1). See also Section 44 in relation to foster care.

112 Section 38(1).

113 Section 3(b) of the Adoption Regulations 2017; in this respect, both the child's (Schedule II) and the adoptive parents' religion (Schedule VII) must be provided in the respective administrative forms necessary for an adoption application.

114 Section 59(1).

115 Section 56(1) and 58(1).

116 See Chetan Chauhan, "About 20m Kids in India Orphans: Study," *Hindustan Times*, July 27, 2011, https://www.hindustantimes.com/delhi-news/about-20m-kids-in-india-orphans-study/story-CM5xsW91McYBjQ3WLhh6MO.html, based on a study by the nongovernmental organization SOS Children's Village. The Indian Law Commission, for its part, cited the number of eighteen million destitute or orphaned children in 1994; see Law Commission of India, "One Hundred Fifty Third Report on Inter-Country Adoption," 1994, http://lawcommissionofindia.nic.in/101-169/Report153.pdf.

117 In 2016, only 3.2 percent of India's 50,000 declared orphans were in fact up for adoption according to official figures released by the Central Adoption Resource Authority, accessed November 21, 2019, http://cara.nic.in/; see also Aparna Kalra, "Why Only 3.2% Of India's 50,000 Orphans Will Find Parents," *IndiaSpend*, March 5, 2016, https://archive.indiaspend.com/cover-story/why-only-3-2-of-indias-50000-orphans-will-find-parents-34599.

118 For a detailed (although slightly polemical) approach before the enactment of the JJ Act 2015 and the subsequent Adoption Regulations 2017, see Arun Dohle, "Inside Story of an Adoption Scandal," *Cumberland Law Review* 39, no. 1 (2008): 131–85.

119 Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India (2017) 7 SCC 578 at 609.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

THE ISSUE OF ADOPTION AMONG INDIAN MUSLIMS

For a very long time, adoption in India has been without a proper general legal framework. Indeed, although the practice is very well entrenched among Hindus,[120] for whom the Hindu Adoption and Maintenance Act 1956 was enacted, other communities had to fall back on piecemeal legislation, custom, and other personal-law provisions. After the rejection of the Adoption of Children Bill 1980, which in any case did not intend to apply to Muslims, it fell on the Supreme Court to issue guidelines—mainly regarding intercountry adoption.[121] In accord with the Hague Convention on the Rights of the Child,[122] the Indian Law Commission took up the matter of intercountry adoption,[123] which made its way into the Juvenile and Justice (Care and Protection of Children) Act 2000, legislation that was further amended in 2006[124] and finally repealed and replaced by the Juvenile and Justice (Care and Protection of Children) Act 2015, within which the subject matter of adoption is now contained in a separate chapter.[125]

It is thus through the lens of intercountry adoption that a general secular framework has progressively been put in place in India itself. However, the question of whether this framework would supplement personal law provisions remained uncertain regarding Muslims[126] until the Supreme Court decided in favor of such a supplementary effect in 2014.[127]

The Difficult Recognition of Customary Adoptions among Muslims and the Question of Filiation

Although the prohibition of adoption within Islamic law has consistently been upheld by Indian courts,[128] adoption's existence as a matter of customary law among Indian Muslims has been nonetheless progressively recognized. Indeed, colonial legislation had specifically allowed such custom to be acknowledged in given communities or territories, while the Shariat Act did not render adoption a topic subject to Islamic law's overriding nature in the absence of a voluntary declaration to that effect.[129] As such, different High Courts have subsequently accepted that the Shariat Act did not totally abrogate custom, notably in terms of adoption,[130] with the burden of proof resting nonetheless on the claimant who requests its application, thereby entailing in particular the obligation to demonstrate long-standing and continuous practice.[131]

120 See Golapchandra Sarkar, *The Tagore Law Lectures, 1888, the Hindu Law of Adoption*, 2nd ed. (Calcutta: B. Cambray & Co, 1916).

121 Lakshmi Kant Pandey v. Union of India AIR (1984) SC 469.

122 See above note 20.

123 See Law Commission of India, "One Hundred Fifty Third Report on Inter-Country Adoption."

124 This following India's accession to the Hague Convention of May 29, 1993, on Protection of Children and Co-operation in Respect of Intercountry Adoption, signed January 9, 2003, entering into force October 1, 2003, https://assets.hcch.net/docs/77e12f23-d3dc-4851-8fob-050f71a16947.pdf. By comparison, the Juvenile and Justice Act of 1986 catered only to "neglected" or "delinquent juveniles." The amendment of 2006 for the first time defined adoption as "the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents" (Section 2(aa)).

125 JJ Act 2015, Chapter VIII (Sections 56–73).

126 The JJ Act 2015 expressly allows adoption applications to be made according to the Hindu Adoption and Maintenance Act 1956, which remains in force (see Section 56(3)).

127 Shabnam Hashmi v. Union of India (2014) 4 SCC 1.

128 Mohd. Allahdad v. Mohd. Ismail (1888) ILR 10 All. 289.

129 See Section 3 of the Shariat Act.

130 For an example, see Moulvi Mohammad v. Mohaboob Begum AIR (1984) Mad. 7.

131 Mst. Bivi v. Syed Ali (1997) 1 RLR 757.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

Despite its validity, the nature of such customary adoption remains contentious. Indeed, a customary adoption does not necessarily create a relationship that would revert to Islamic norms in terms of filiation or inheritance. For example, it was held that although customary adoptions could be recognized in the Kashmir Valley in the form of *pisar parvardah* (adopted son), the latter would "not [be] transplanted in the family of the adopter. He has no right of collateral succession so on and so forth. He can inherit only [from] his adopting father."[132] Similarly, the Supreme Court held that custom among Punjabi Jats allows for either formal or informal adoptions, the latter amounting to "a mere appointment of an heir, the appointed heir is not entitled to succeed to the collateral relatives of the adopted father."[133] On the other hand, a formal adoption would replace the existing filiation of the adoptee with that of his or her adoptive father.[134]

Therefore, customary adoption among Indian Muslims, apart from being sometimes difficult to prove, can also lead to a wide array of legal effects, whereby filiation vis-à-vis the adoptive parents is far from being automatically established. In the absence of a general secular law of adoption, it was, however, the only possible legal avenue for Indian Muslims wishing to adopt a child, barred as they were by the prohibition of Muslim personal law.

Adoption through Secular Legislation

The enactment of the Juvenile Justice (Care and Protection of Children) Act 2000 (hereafter JJ Act 2000) offered for the first time a secular framework upon which Indian citizens could adopt a child without relying on the provisions already in place through personal law.[135] The question that soon arose, however, was whether this secular statute could be accessed by Indian Muslims otherwise governed by Muslim personal law, which allows only a certain type of guardianship (*kafālah*) as means to secure the care of an orphaned, abandoned, or illegitimate child, but which does not create any form of filiation with his or her guardian.

The issue came before the Supreme Court through a public interest litigation, which provoked intense scrutiny and a staunch defense—notably by the All India Muslim Personal Law Board—of the prohibition of adoption within Islamic law.[136] Without rejecting such prohibition, the three-judge bench with Sathasivam CJ pointed to the enabling nature of the JJ Act 2000, similar to that of the Special Marriage Act 1954, which does not alter or abrogate Muslim personal law but rather allows for a choice of law in certain subject matters. Writing for the Court, Gogol J. thus states,

> The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the Personal law applicable to

132 Mohammad Akbar Bhat v. Mohammad Akhoon AIR (1972) J&K 105, at 111. It is uncertain after the enactment of the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act 2007 if the custom of *pisar parvardah* will continue to be recognized, despite adoption not being listed as a subject matter under the Act. For a detailed presentation of the procedure of adoption in Jammu and Kashmir, see Imtiyaz Hussain, *Muslim Law and Custom* (Srinagar: Srinagar Law Journal Publication, 1989), 277–87.

133 Kehar Singh v. Dewan Singh AIR (1966) SC 1555.

134 Kehar Singh v. Dewan Singh AIR (1966) SC 1555.

135 Such as the Hindu Adoption and Maintenance Act 1956.

136 See, for example, M. A. Samad, "Concept of Negation of Adoption in Islamic Law It's Causes and Justifications," *Supreme Court Journal* 4 (2008): 6–13.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

> him. . . . At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by the principles of personal law.[137]

In opening the possibility of adoption to prospective Muslim parents, the Supreme Court nevertheless stayed silent on the consequences for the adoptive child's personal law, the "adoptive parents [becoming] the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy."[138] Will the newly created filiation between parent and child be governed by the parent's personal law? It is obviously too early to offer definitive conclusions, but the analogy that the judgment draws between the JJ Act 2000 and the Special Marriage Act 1954 would suggest that, as inheritance is concerned, the Indian Succession Act 1925 should be applicable in lieu of Muslim personal law.[139]

In any event, the Supreme Court stops short of including adoption within the fundamental right to life,[140] thus perpetuating the constructive ambiguity surrounding the status of Muslim personal law within the Indian legal order.[141] As such, the recognition of filiation through adoption (other than customary adoption) among Indian Muslims can be done only through what is now the JJ Act 2015, and lower courts have shut the door to any other type of adoption otherwise available, such as one based on humanitarian grounds.[142]

CONCLUSION

Despite the goal of creating a secular uniform civil code, filiation among Muslims in India is still by and large governed by Muslim personal law, a largely uncodified corpus of key Islamic legal treatises and textbooks dating mainly from the Mughal era that have subsequently been interpreted and applied through the common law framework of British colonial justice and the post-Independence Indian judicial system under the lens of the Muslim Personal Law (Shariat) Application Act 1937. Insisting on blood relations, Muslim personal law thus recognizes legitimate filiation as resulting only from a valid or irregular marriage between the parents of a child, thereby both barring illegitimate children from maintenance and intestate succession and prohibiting adoption.

However, given both the subcontinent's colonial past and the newly founded Indian republic's secular nature, a number of legislative enactments have modified key aspects of the law of filiation among Muslims. The Evidence Act 1872 has shifted the presumption of legitimacy arising from a birth within a valid marriage to the time of the wedding—rather than the time of conception—and has invalidated the doctrine of the dormant fetus. Nonetheless, provisions of Muslim personal law still apply to presumptions associated with an irregular or void marriage and regarding acknowledgment, which creates a degree of ambiguity in terms of legal certainty. Further, whereas the Code of Criminal Procedure 1973 has lifted the disability incurred by illegitimate children in relation to maintenance, the bar against paternal intestate succession remains in place.

137 Shabnam Hashmi v. Union of India (2014) 4 SCC 1, at 8.
138 Section 63 of the JJ Act 2015.
139 Section 21 of the Special Marriage Act 1954, which regulates succession between spouses.
140 Article 21 of the Constitution of India.
141 See above, note 30.
142 For a recent example, see Shaykh Jamir Saifoddin v. The Chief Officer, The Municipal Court, Jalna, Taluka & District Jalna (2015) 147 FLR 1005.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press

India thus seems largely on par with other Muslim-majority jurisdictions, which have continued to put an emphasis on the existence of a valid marriage to establish paternal filiation and which, albeit while lifting some of the material discrimination facing children without a proper *nasab*, have remained hesitant to reform Islamic law in ways that would enforce equal treatment for legitimate and illegitimate children. Moreover, despite the increasing influence of the state in reshaping filiation among Muslims, the result has not translated into more uniform or centralized rules; rather, it has led to an increase in normative pluralism and, following the creation of family courts, a growing jurisdictional pluralism that, to a certain extent, can lead to forum shopping. Unlike most other jurisdictions, however, India has moved in recent years to establish a secular legal path to adoption that is available to Muslim parents, thus opening a new avenue for Muslims to opt out of their personal law without the cumbersome and haphazard procedures linked to customary law. Further research would be required to assess developments in practice.

The minority status of Indian Muslims and their prolonged cohabitation with a Hindu majority have rendered the custom of adoption, otherwise prohibited under Islamic law, somewhat common on the subcontinent. Yet while such adoptions based on customary law may indeed have been recognized by the courts, their effects are for the most part different from those within Hindu personal law. Indeed, even where they lift the bar against paternal inheritance, they seldom create any filiation with the adoptive family. Following the enactment of the Juvenile Justice (Care and Protection of Children) Act 2000 and its subsequent amendments, an optional secular legal framework for adoption is now available to Muslim prospective parents. However, its effects on the filiation of the child are still for the most part untested. The procedure set forth by the Act is unwieldly and faces the very practical difficulties of the state having to manage and protect a vast number of destitute and abandoned children in India.

https://doi.org/10.1017/jlr.2019.39 Published online by Cambridge University Press