

SHIFTING PARADIGMS: PROMOTING AN AMERICAN ADOPTION CAMPAIGN FOR AFGHAN CHILDREN

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INTRODUCTION

The United States has a long tradition of facilitating child adoption campaigns after disengaging from major war efforts.¹ As the plight of orphaned children overseas made itself more visible to Americans following World War II, a campaign emerged encouraging them to partake in intercountry child adoptions from post-conflict countries, such as Germany, Austria, Japan and Italy.² This inspired the globalization of the modern child adoption market.³ Christian organizations, such as the League for Orphan Victims in Europe ("LOVE") and the American Joint Committee for Assisting Japanese American Orphans, played a vital role in promoting the post-World War II adoption campaigns.⁴ Intercountry adoptions were handled under refugee and displaced persons acts and decrees, including a pivotal 1945 'Directive on Displaced Persons' by President Harry Truman allowing World War II orphans into the U.S. under the premise that they were under grave humanitarian emergency.⁵

Intercountry adoptions were once again encouraged after the Korean War (1950-53) and the Vietnam War (1954-75).⁶ The adoption campaign beginning after the Korean War paved the way for the world's largest intercountry adoption program.⁷ Further, as its military efforts in Vietnam dwindled, the U.S. government launched an intercountry adoption campaign that lifted 2,700 children out of

1. *International Adoptions*, ADOPTION HIST. PROJECT, available at <http://pages.uoregon.edu/adoption/topics/internationaladoption.htm> (last visited Jan. 14, 2015).

2. *International Adoptions*, *supra* note 2; Stephanie Zeppa, Note, "Let Me in, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act, 22 HASTINGS INT'L & COMP. L. REV. 161, 164-65 (1998).

3. See *International Adoptions*, *supra* note 2.

4. *Id.*

5. See generally *History of International Adoption*, INT'L ADOPTION FACTS & INFO., available at <http://www.international-adoption-facts-and-information.com/history-of-international-adoption.html> (last visited Jan. 14, 2015).

6. See *Capsule History of International Adoption*, BRANDEIS U. SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM (last updated Feb. 23, 2011), available at <http://www.brandeis.edu/investigate/adoption/history.html#2> (last visited Jan. 14, 2015); see also Jodi Kim, *An "Orphan" with Two Mothers: Transnational and Transracial Adoption, the Cold War, and Contemporary Asian American Cultural Politics*, 61 AM. Q. 855, 870 (2009), available at [https://ethnicstudies.ucr.edu/publications_media/kim/Transnational Adoption.pdf](https://ethnicstudies.ucr.edu/publications_media/kim/Transnational%20Adoption.pdf) (last visited Nov. 28, 2014) (explaining that on April 2, 1975, President Ford announced that \$2 million would be used to fly Vietnamese orphans to the U.S. for adoption by American families).

7. See Kim, *supra* note 7, at 865 (explaining how "[a] huge international relief effort began," after the Korean war ended and in 1955, "[t]ens of thousands of orphans" were sent to Europe and the U.S. for adoption).

Vietnam.⁸ It appears that the post-Afghanistan war context is the exception to American tradition and modern practice.⁹

Thirteen years have passed since the start of the war in Afghanistan and even though the US is no longer waging an active military campaign,¹⁰ there has been no campaign to adopt children from this theater.¹¹ It is not because there are no children that need to be adopted in Afghanistan, as there are close to two million orphans in Afghanistan.¹² The gridlock exists partially because intercountry child adoption concepts, as defined in American federal laws, come into direct conflict with Afghanistan's Child Guardianship Law, newly enacted in April 2014.¹³ Furthermore, the National Assembly's (Afghanistan's Parliament)¹⁴ stance is that its Muslim orphans¹⁵ should

8. See *id.* at 870; Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIM. LAW. 1, 29 (1993).

9. The adoption of Iraqi orphans in the post-Iraq war context is also the exception to American tradition. However, only Afghanistan will be examined as a case study for the purposes of this paper. See generally, Alice Richards, *Bombs and Babies: The Intercountry Adoption of Afghanistan's and Iraq's War Orphans*, 25 J. AM. ACAD. MATRIM. LAW. 399, 400, 404 (2013). There are currently 4.5 million orphans in Iraq. See *Iraq: The Human Cost*, MIT CTR. FOR INT'L STUDIES, available at web.mit.edu/humancostiraq (last visited Jan. 14, 2015).

10. *Afghanistan Profile*, BBC (Oct. 26, 2014), available at <http://www.bbc.com/news/world-south-asia-12024253> (last visited Jan. 14, 2015).

11. See Kevin Sieff, *Interview: Karzai Says 12-Year Afghanistan War has Left Him Angry at U.S. Government*, WASH. POST (Mar. 2, 2014), available at http://www.washingtonpost.com/world/interview-karzai-says-12-year-afghanistan-war-has-left-him-angry-at-us-government/2014/03/02/b831671c-a21a-11e3-b865-38b254d92063_story.html (last visited Jan. 14, 2015).

12. Richards, *supra* note 10, at 404. Note: U.S. responsibility in Korea and Vietnam in part came from heavy interaction between US soldiers and local women, where soldiers fathered many babies, however, in Afghanistan, there is no evidence that US soldiers interacted with Afghan women similarly. See generally Marilyn T. Trautfield, *America's Responsibility to Amerasian Children: Too little, Too Late*, 10 BROOK. J. INT'L L. 55 (1984); Arissa Oh, *A New Kind of Missionary Work: Christians, Christian Americanists, and the Adoption of Korean GI Babies, 1955-1961*, 33 WOMEN'S STUD. Q. 161 (2005); TRIN YARBOROUGH, *SURVIVING TWICE: AMERASIAN CHILDREN OF THE VIETNAM WAR* (Potomac Books, Inc., 2005); Nick Turse, *Rape was Rampant During the Vietnam War. Why Doesn't US History Remember This?*, MOTHER JONES (Mar. 19, 2013, 2:03 PM), available at <http://www.motherjones.com/politics/2013/03/rape-wartime-vietnam> (last visited Jan. 14, 2015).

13. See *infra* Part I and Part II.

14. Isaac Kfir, *Feminist Legal Theory as a Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for a State Strength Approach*, 21 WM. & MARY J. WOMEN & L. 87, 135 n.343 (2014) ("The Afghan Parliament is bicameral" with "a lower house—Wolesi Jirga (Council of People)—and an upper house—Meshrano Jirga (Council of Elders).").

15. Many Afghan orphans are Hazara, an ethnic minority, which has been heavily persecuted by the Taliban and with the Taliban resurgence; they are one of the main targets. See generally Massoud Hossaini, *Kabul's Forgotten Kids* VICE (July 1, 2007), available at

only be placed with “good” Afghan Muslim families, creating additional hurdles for intercountry adoptions.¹⁶ Non-Muslim¹⁷ children may be adopted by qualifying Non-Muslims.¹⁸

The gridlock also exists because the American public is unwilling to work with Islamic legal systems,¹⁹ such as the legal system that is perceived²⁰ to govern Afghanistan. This may be based on the belief that acceptance of Islamic jurisprudence will lead to the renouncement of U.S. domestic laws, causing public policy concerns.²¹ For example, the word “sharia” sparks emotive responses in U.S. public discourse

<http://www.vice.com/read/kabul-v14n7> (last visited Jan. 14, 2015); *Resurgent Taliban Targets Afghan Hazara as Australia Sends them Back*, GUARDIAN (Dec. 16, 2014), available at <http://www.theguardian.com/australia-news/2014/dec/17/resurgent-taliban-targets-afghan-hazara-as-australia-sends-them-back> (last visited Jan. 17, 2015) (“The Taliban are back. So Hazara are leaving. Dozens of Hazara in Kabul tell Guardian Australia they are preparing to leave Afghanistan, by legal means or otherwise.”).

16. Skype Interview with Judge Homa Alizoy (Mohammad Yusuf trans., Feb. 24, 2014); Kimberly Mills, *P-I Focus: No future in sight for Afghan children*, SEATTLE PI (Dec. 22, 2001, 10:00 PM), available at <http://www.seattlepi.com/local/opinion/article/P-I-Focus-No-future-in-sight-for-Afghan-children-1075181.php#page-2> (last visited Jan. 14, 2015) (“The even more daunting obstacle to the adoption of Afghan children is Islamic law, which doesn’t sanction children born in the faith being reared by non-believers.”); see Child Guardianship Law, No. 1130, THE OFFICIAL GAZETTE OF AFGHANISTAN, Apr. 12, 2014 (on file with author).

17. The Afghan population is divided as such: “Sunni Muslim 80%, Shia Muslim 19%, [and] other 1%.” *The World Factbook*, CENT. INTELLIGENCE AGENCY (last updated June 24, 2014), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Jan. 14, 2015).

18. See Child Guardianship Law, *supra* note 17.

19. *Bans on Sharia and International Law*, ACLU, available at <https://www.aclu.org/religion-belief/bans-sharia-and-international-law> (last visited Jan. 14, 2015) (“[A]nti-Muslim bigotry has recently crept into state legislatures around the country. Several states have passed or attempted to pass laws designed to prevent courts from applying Islamic or ‘Sharia’ law, as well as ‘foreign’ or ‘international law.’”); *ACLU, Muneer Awad v. Paul Ziriak, Oklahoma State Board of Elections, et al.*, ACLU (Aug. 15, 2013), available at <https://www.aclu.org/religion-belief/muneer-awad-v-paul-ziriak-oklahoma-state-board-elections-et-al> (last visited Jan. 14, 2015) (“State legislators in Oklahoma placed an unprecedented, discriminatory proposal to amend the Oklahoma Constitution to target the religious practices of Muslims . . . the amendment tramples the free exercise rights of a disfavored minority faith, restricting the ability of . . . Muslims in Oklahoma to execute valid wills, assert religious liberty claims under the Oklahoma Religious Freedom Act, and enjoy equal access to the judicial system.”).

20. The legal system in Afghanistan is actually a perversion of Islamic Law, especially given the presence of “contrived cultural and religious norms that surface out of misreading, misunderstandings or manipulation of the Qur’an.” Kfir, *supra* note 15, at 93. However, laws regarding transfer of child guardianship strictly follow the Hanafi School of Jurisprudence in Islamic Law. See *infra* Part I.

21. See generally *Nothing to Fear*, ACLU (May 2011), available at https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf (last visited Jan. 14, 2015).

because the American media often associates it with graphic news stories covering corporal and capital punishments, such as stoning for adultery and hand cutting for theft.²² However, Islamic jurisprudence is a firmly established source of law for many legal systems in the Middle East, Central Asia and South Asia, which promotes public policies similar to those found in Western civil and common law systems.²³ For example, Islamic jurisprudence also advocates for the family law maxim considering the “child’s best interests” in custody determinations through the concept *islah*, which means to “repair, heal, and make good.”²⁴ The United Nations Convention on the Rights of Child (“CRC”), which Afghanistan has signed and ratified, also provides that the child’s best interests are the primary considerations when carrying out intercountry adoption procedures.²⁵

There are strong humanitarian concerns driving the need to create federal statutory wiggle room to facilitate an American intercountry adoption plan for Afghan orphans because there is a need to provide orphans of this war-torn country with safe homes and permanent guardians to nurture them with love, welfare and support.²⁶ First, an estimated 8,000 orphans are forced into military service by fighting factions in Afghanistan.²⁷ Second, a rising number of Afghan children

22. *Whose Law Counts Most*, ECONOMIST (Oct. 14, 2010), available at <http://www.economist.com/node/17249634> (last visited Jan. 14, 2015).

23. See generally Angela Tang, *Comparative Analysis of Certain Criminal Procedure Topics in Islamic, Asian, and Common Law Systems*, available at <http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/AnalysisofCertainCriminal.pdf> (last visited Jan. 14, 2015); see generally CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* (2007).

24. See *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, MUSLIM WOMEN’S SHURA COUNCIL 4, 11 (Aug. 2011), available at [http://www.wisemuslimwomen.org/images/activism/Adoption_\(August_2011\)_Final.pdf](http://www.wisemuslimwomen.org/images/activism/Adoption_(August_2011)_Final.pdf) (last visited Jan. 14, 2015); *MEDIEVAL ISLAMIC CIVILIZATION: AN ENCYCLOPEDIA* 667 (Joseph W. Meri ed., 2006) (defining *islah*). The author points out that the Sunni Hanafi school of Islamic jurisprudence (which Afghanistan adopts) grounds its decisions regarding a child’s welfare in “public policy considerations of the public interest” and the child’s best interest much like states do in America. Faisal Kutty, Comment, *Islamic Law and Adoptions*, in ROBERT L. BALLARD ET AL., *THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014) (forthcoming 2014)(manuscript at 28)(on file with author), available at <http://ssrn.com/abstract=2457066> (last visited Jan. 18, 2015).

25. See generally Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The United States has signed but has not ratified the Convention on the Rights of the Child.

26. See Richards, *supra* note 10, at 404. This paper focuses on Afghanistan instead of Iraq because due to the heavier influence of Islamic law, Afghanistan’s system of governance is a more restrictive one.

27. Richards, *supra* note 10, at 404 (“More than 9,000 street children live in

are sexually abused due to a practice called *bacha bazi*, or 'a boy for pleasure,' a form of pederasty,²⁸ where wealthy Afghan men sexually exploit underage boys, ages nine to fifteen.²⁹ Homeless children and orphans are susceptible to this practice, because they lack protection.³⁰ The affected boys³¹ are often festooned in women's garments to dance at male-only parties, are regarded as property, and can be sold or rented for "tens of thousands of dollars."³² When the boys eventually begin to grow beards, a sign of adulthood, they are tossed aside and either partake in the harrowing cycle of becoming pimps themselves or turn to

poverty . . . Often, these children work at opium farms under the supervision of drug lords. Western aid to these orphans has met very little success."); see also Maria Bucci, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 299-300 (2004) ("Unaccompanied children are particularly vulnerable to military recruitment . . . children can be recruited in some countries when they are under the age of ten."); Malalai Farooqi, *The Collateral Imprisonment of Afghan Children: An Obstacle to Building the Afghan State*, 32 U. LA VERNE L. REV. 329-30 (2011) (Badam Bagh, a women's prison in Kabul, Afghanistan, houses roughly 90 inmates, some of whom are mothers who "due to lack of any alternatives, are forced to bring their children with them to prison.").

28. *Pederasty*, FREE DICTIONARY, available at <http://www.thefreedictionary.com/pederasty> (last visited Jan. 14, 2015) (defining pederasty as homosexual relations between men and minor boys).

29. Joel Brinkley, *Afghanistan's Dirty Little Secret*, SF GATE (Aug. 29, 2010, 4:00 AM), available at <http://www.sfgate.com/opinion/brinkley/article/Afghanistan-s-dirty-little-secret-3176762.php> (last visited Jan. 14, 2015); see also Ernesto Londoño, *Afghanistan Sees Rise in 'Dancing Boys' Exploitation*, WASH. POST (Apr. 4, 2012), available at http://www.washingtonpost.com/world/asia_pacific/afghanistans-dancing-boys-are-invisible-victims/2012/04/04/gIQAyreSws_story.html (last visited Jan. 14, 2015) (*Bacha bazi* has flourished "in Pashatun areas in the south, in several northern provinces and even in the capital."); Chris Mondloch, *Bacha Bazi: An Afghan Tragedy*, FOREIGN POL'Y (Oct. 28, 2013), available at <http://foreignpolicy.com/2013/10/28/bacha-bazi-an-afghan-tragedy/> (last visited Jan. 14, 2015) (In the early 1990s the Taliban tried to eradicate the *bacha bazi* practice and men who engaged in it did so in secret. In 2001, former *mujahideen* commanders came into power after the Taliban's "ouster" and brought back the practice. "[T]hese empowered warlords serve in important positions, as governors, line ministers, police chiefs, and military commander." Afghan families with too many children often "provide a son to a warlord or government official – with full knowledge of the sexual ramifications – in order to gain familial prestige and monetary compensation.").

30. Barat Ali Batoor, *The Exploitation of Afghanistan's 'Dancing Boys'*, WASH. POST (Apr. 4, 2012), available at http://www.washingtonpost.com/world/the-exploitation-of-afghanistans-dancing-boys/2012/04/04/gIQAyV8oRwS_gallery.html#photo=8 (last visited Jan. 14, 2015).

31. They are also known as *bacha bereesh*, boys without beards. Pul-E Khumri, *Afghan Boy Dancers Sexually Abused by Former Warlords*, REUTERS (Nov. 18, 2007, 11:08 PM), available at <http://www.reuters.com/article/2007/11/19/us-afghan-dancingboys-idUSISL1848920071119> (last visited Jan. 14, 2015).

32. Londoño, *supra* note 30 ("Mohammed Fahim, a videographer who films the lavish weddings in the capital, estimated that one in every five weddings he attends in Kabul features dancing boys.").

drugs or alcohol.³³

American Muslims who may want to adopt children do not want to violate tenants of their faith while doing so.³⁴ The challenges in adopting Afghan children deal with the lack of harmony between American laws and Islamic laws regarding child adoption.³⁵ First, traditional closed adoption³⁶ violates Islamic law, which emphasizes the importance of lineage and maintaining one's birth name.³⁷ However,

33. *Id.* (Pederasty is a crime in Afghanistan, however considering how widespread this crime is, it is not being prosecuted enough.); see *Decisions of Courts* (2009), AFGHANISTAN SUPREME Ct., available at <http://supremecourt.gov.af/Content/Media/Documents/jozjanE181201113192085.pdf> (last visited Jan. 14, 2015); see also *Decisions of Courts* (2009), AFGHANISTAN SUPREME Ct., available at <http://supremecourt.gov.af/en/documents/category/decision-of-courts?page=2> (the Supreme Court of Afghanistan prosecuted only 13 cases in 2009) (last visited Jan. 14, 2015).

34. Mills, *supra* note 17; see Asra Q. Nomani, *Anti-Adoption Traditions in the Muslim World Benefit Al Qaeda Recruiters*, DAILY BEAST (Mar. 31, 2012), available at <http://www.thedailybeast.com/articles/2012/03/31/anti-adoption-traditions-in-the-muslim-world-benefit-al-qaeda-recruiters.html> (last visited Jan. 14, 2015); Rachel Zoll, *Muslim Orphans Caught Between Islam and the West*, WASH. POST (Jan. 2, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/31/AR2010123103723.html> (last visited Jan. 14, 2015) ("The problem was a gap between Western and Islamic law. . . . Refugee children from Afghanistan, Iraq and elsewhere are being resettled here. Muslim couples who can't conceive want to adopt but don't want to violate their faith's teachings."); Ali Muhammad Latifi, *The Challenges of Adopting Afghan Children*, GENERATION PROGRESS (Aug. 11, 2010, 7:48 PM), available at <http://genprogress.org/voices/2010/08/11/15580/the-challenges-of-adopting-afghan-children/> (last visited Jan. 14, 2015); Eugene Volokh, *Adoption of Muslim Children*, VOLOKH CONSPIRACY (Nov. 30, 2010, 5:13 PM), available at <http://www.volokh.com/2010/11/30/adoption-of-muslim-children/> (last visited Jan. 14, 2015); see Kutty, *supra* note 25 (manuscript at 6)(quoting Alexander D. Gonzalez, *The Hague Intercountry Adoption Act and its Interaction with Islamic Law: Can an Imperfect Enforcement Mechanism Create Cause for Concern?*, 10 GONZ. J. INT'L L. 437, 460 (2007) ("Shari'ah is very much present in the hearts and minds of Muslims throughout the world. Even where it is not the formal legal system, Shari'ah has a powerful influence on Muslim attitudes and policies in most Muslim countries.")); see *infra* Part I.

35. Kutty, *supra* note 25 (manuscript at 4)(citing ASHLEY DAWN HARVEL, *THE MYTH OF THE UNKNOWN CHILD: CREATING A NEW FACE FOR ADOPTION IN AMERICA* 11 (2006) ("The legal creation of a parent-child relationship, with all the responsibilities and privileges thereof, between the child and adults who are not his or her biological parents with the . . . permanent severing all of connections and relationships with the biological parents.")); see *infra* Part I and Part II.

36. See *Open Adoption*; *Cooperative Adoption*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("*closed adoption*. An adoption in which the biological parent relinquishes his or her parental rights and surrenders the child to an unknown person or persons; an adoption in which there is no disclosure of the identity of the birth parents, adopting parent or parents, or child. Adoptions by stepparents, blood relatives, and foster parents are exceptions to the no-disclosure requirement. . . . Also termed *confidential adoption*.").

37. See Shabnam Ishaque, *Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of Child's Right to an Identity*, INT'L J. L. POL'Y & FAM. 22, 393-420 (2008); Kutty, *supra* note 25 (manuscript at 17)(citing

the Immigration and Nationality Act ("INA") provides that a child's bloodline is relinquished upon adoption.³⁸ Second, many U.S. state intestacy laws dictate that a child's right to inherit from the birth family must be severed upon adoption.³⁹ These laws directly contradict Islamic law, where a child must maintain that right.⁴⁰

Third, the legal structure governing Afghanistan's child guardianship procedures⁴¹ provides an alternative model for children needing care, called a *kafala* system, or guardianship system, that most resembles permanent foster care.⁴² An analogous system does not exist in the U.S. yet, although there is an increasing trend toward permitting "open" adoption and there is a firmly established intrastate foster care system in most states in the U.S.⁴³ Moreover, "guardianship," according to the U.S. Citizenship and Immigration Services ("USCIS"), is "deemed insufficient" for accomplishing a child's entry by immigration into the U.S.⁴⁴ Fourth, the international adoption process, difficult to navigate in any foreign country, was even murkier in Afghanistan.⁴⁵ Previously, the Afghanistan Children's Court handled child guardianship transfers on a case-by-case basis, utilizing a number of criteria, providing no codified law on the subject matter. Since the Child Guardianship Law (2014) has passed and promotes more transparent procedures, a higher placement rate of Afghan orphans should take place.⁴⁶

Even against this backdrop it is not a quixotic and starry-eyed

Qur'an 33:4-5 ("a child's pedigree must be traced-back to the biological father") and providing according to *fiqh*, "the creation of fictive kinships is strictly forbidden as it disturbs filial continuity.").

38. Mills, *supra* note 17.

39. See generally William E. Taibl, *Inheritance "By, Through and From" an Adopted Person Under the New Wisconsin Statute*, 56 MARQ. L. REV. 119 (1972); see *infra* Part I and Part II.

40. Zoll, *supra* note 35.

41. Although many interpretations of Islamic Law and Jurisprudence are perverted in Afghanistan, particularly those pertaining to women's rights, laws regarding orphans' rights by and large follow the Hanafi School. See *infra* Part I.

42. *Id.*; Kutty, *supra* note 25 (manuscript at 29-30)(Kafala is essentially "legal fostering" It tries to achieve a balance between raising the child as your own all the while ensuring the adopted child's identity is not absorbed into the identity of the adoptive family. Negation of the biological identity would be considered *haram* or forbidden.").

43. See *infra* Part I; see also Alison Fleisher, *The Decline of Domestic Adoption: Intercountry Adoption As A Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 181-84 (2003).

44. Latifi, *supra* note 35; see Richards, *supra* note 10, at 399, 409-11.

45. See Latifi, *supra* note 35.

46. See Skype Interview with Qazi Rahima Rezae (Mohammad Yusuf trans., Feb. 21, 2014) (regarding Child Guardianship Procedure in Afghanistan).

notion that a successful Afghan adoption campaign is possible if Islamic law and U.S. public policy is recognized and followed. It is possible with the execution of the following changes. First, amendments must be made to current federal legislation on intercountry adoptions, namely, the INA and the Intercountry Adoption Act (“IAA”), to allow for a *kafala* scheme. Second, the U.S. and Afghanistan should enter into an intercountry adoption treaty, outlining the procedure for American Muslims seeking to adopt a child from Afghanistan. Although Afghanistan’s Constitution declares that Islam is the state’s religion, requiring that Islamic law be followed to effectuate the first stage of guardianship procedure, this does not violate the U.S. Constitution’s Establishment Clause.⁴⁷ Amendments to the INA and IAA and the creation of an intercountry permanent guardianship treaty would simply craft a special relationship with Afghanistan based on its domestic laws on child guardianship.

The U.S. has entered into intercountry adoption plans with several countries with legal systems different than its own.⁴⁸ The U.S. Department of State’s website provides that Vietnam’s Central Adoption Authority will accept a limited number of applications from U.S. Hague-accredited adoption service providers only for children with special needs, as defined by Vietnamese law.⁴⁹ The United States, with the execution of this paper’s proposed permanent guardianship plan, is not endorsing Islam any more than it endorses Vietnam’s system of governance. Finally, American Muslim guardians and birth families should enter into legally binding agreements enforcing Islamic legal rights, afforded to children by their birth families, despite transfer of guardianship.⁵⁰ This paper will demonstrate that accepting children from Afghanistan will not violate public policy; rather, the program would be in line with American history and tradition in promoting post-war adoption schemes.⁵¹

47. CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, arts. 2-3 (2004).

48. See generally *Intercountry Adoption*, U.S. DEP’T ST., available at <http://travel.state.gov/content/adoptionsabroad/en.country-information.html> (last visited Jan. 14, 2015).

49. See *Vietnam*, U.S. DEP’T ST., available at <http://travel.state.gov/content/adoptionsabroad/en.country-information/learn-about-a-country/vietnam.html> (last visited Jan. 14, 2015).

50. See Mills, *supra* note 17.

51. Moreover, the U.S. and Afghanistan have the same stance when it comes to children’s cases, namely, that the child’s best interests are paramount. See generally Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP’T HEALTH & HUMAN SERVS. (Nov. 2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last

Part I is devoted to a discussion of Islamic Law concerning child guardianship in Afghanistan, focusing on the public policy rationales behind it. It also examines children's rights under the Hanafi School of Sunni Islamic jurisprudence, which the Afghanistan Children's Court applies in its opinions, and Afghanistan's Child Guardianship Law (2014). Part II examines U.S. federal legislation that directly governs intercountry child adoptions, pointing to relevant language in the INA and the IAA to highlight the obstacles in adopting orphans from Afghanistan. Part III focuses on U.S. policies promoting intercountry child adoption in post-conflict countries, post-World War II. It sheds light on negative implications that arose from these policies and explains why federal legislation in adoption law was reformed. Part IV provides an overview of state laws that govern issues arising under child custody. Part V provides a background of how other countries model their intercountry child adoption policies and laws, making room for Islamic *kafala* models to flourish. It also offers an overview of relevant international conventions concerning intercountry child adoptions. Part VI suggests amendments to current U.S. federal legislation to facilitate the creation of the proposed adoption campaign. It provides recommendations for the construction of certain provisions in a legal agreement between birth parents and potential permanent guardians to ensure that permanent guardians promote Islamic children's rights.

I. AFGHANISTAN'S SOURCE FOR CHILD GUARDIANSHIP LAW

Afghanistan⁵² follows the Hanafi⁵³ *madhhab*, or school of law,⁵⁴ in

visited Jan. 14, 2015) (detailing a list of countries the U.S. has intercountry adoption plans with); Skype Interview with Judge Homa Alizoy (Mohammad Yusuf trans., Mar. 3, 2014).

52. Kfir, *supra* note 15, at 111 n.167 (citing Lawrence Ziring, *From Islamic Republic to Islamic State in Pakistan*, 24 ASIAN SURVEY 931 (1984) ("An Islamic State is understood as a state that places Islam at its epicenter." An Islamic Republic (Muslim State) and an Islamic State differ where the former "separates religion from politics and government as it stresses the need for a secular, constitutional government and society, while an Islamic State governs along Islamic precepts, rejecting the values that the Islamic Republic espouses.")).

53. Kfir, *supra* note 15, at 136 n.350 (stating the Hanafi School "started in Iraq" and "[i]ts influence expanded eastward" making it "the dominant school in Central Asia and the Subcontinent."); *id.* at 135-36 (citing Ashraf Ghani, *Islam and State-building in a Tribal Society of Afghanistan: 1880-1901*, 12 MODERN ASIAN STUD. 269 (1978)) ("Islam and culture are intertwined in contemporary Afghanistan, making it difficult to identify where culture begins and religion ends. Years of conflict, external interventions and a faith in religious solutions have linked Afghan cultural norms with militant interpretations of Islam.").

54. After the death of the Prophet Muhammad (PBUH), many schools of Islamic

Islamic Law.⁵⁵ Therefore, a Hanafi analysis of legal principles on child adoption is necessary.⁵⁶ Adoption under Islamic law is different from the American concept in that it does not sever the blood relationship between a child and biological parents.⁵⁷ Under Islamic law, the relationship with adopting parents is seen as a guardianship rather than parenthood.⁵⁸ This is based on the belief that a child's lineage and heritage cannot be erased or replaced with adoption.⁵⁹ Afghanistan's Civil Code (1977) includes statutory provisions for family laws and has its foundation in the Hanafi School of Sunni Islamic jurisprudence.⁶⁰ Followers of the Hanafi School comprise almost eighty percent of the population.⁶¹ Policy imperatives under the Hanafi School provide that a child should retain his or her birth name and should maintain inheritance rights from the birth family, even if guardianship is transferred.⁶²

jurisprudence developed. Islamic philosopher and legal scholar Muhammad Iqbal provides: "From about the middle of the first century up to the beginning of the fourth, not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization." MUHAMMAD IQBAL, *THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM* 165 (Lahore: Sh. Muhammad Ashraf ed., 1977) (1930).

55. "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 3 (2004).

56. See Orzala Ashraf Nemat, *Comparative Analysis of Family Law in the Context of Islam*, AFGHAN INDEP. HUM. RTS. COMMISSION 44-45 (Aug. 15-17, 2006), available at http://af.boell.org/downloads/English_Family_Law.pdf (last visited Jan. 14, 2015); Kutty, *supra* note 25 (manuscript at 15) (citing David Powers, *The Abolition of Adoption in Islam, Reconsidered*, 4 DROIT ET RELIGIONS ANNUAIRE 97, 98 (2009-10) ("Notwithstanding the diversity and legal pluralism in Islamic law, it appears that when it came to adoption, classical *Sunni* jurists consensually posited that adoption as commonly understood today in the West (and practiced in pre-Islamic Arabia and known as *al-tabanni*) is prohibited or *haram*.")).

57. Richards, *supra* note 10, at 399, 409-10.

58. *Id.*

59. *Id.*

60. *Id.* at 399, 408 (quoting *Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, MAX PLANCK INST. FOR FOREIGN PRIVATE L. & PRIVATE INT'L L., at 10, available at http://www.mpipriv.de/files/pdf3/mpi-report_on_family_structures_and_family_law_in_afghanistan.pdf (last visited Jan. 14, 2015)); see also *Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, *supra* ("According to the deputy of the head of the high court of the province of Badakhshan, in practice uncodified classical hanafi law is considered the main source of law, superior to any statutory law.").

61. *Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, *supra* note 61, at 8.

62. See Christie S. Warren, *The Hanafi School*, OXFORD BIBLIOGRAPHIES, available at <http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml> (last visited Jan. 14, 2015) ("The Hanafi School is one of the four

More than just a religion, Islam "is an all-encompassing way of life."⁶³ The Qur'an is the first and most important source of Islamic law, which is "comprised of the verbatim words of Allah (God)" and is regarded as "the most authoritative guide to how Muslims should conduct themselves."⁶⁴ While the Qur'an contains 6235 *ayat*, or verses, "only approximately 600 *ayat* are legal rules."⁶⁵ Thus, the *Sunnah*, which contains the Prophet Muhammad's (PBUH)⁶⁶ conversations, monologues and practices, codified in *hadith*, or reports, is the secondary source to look for guidance on Islamic law.⁶⁷ Next, one must look to:

ijma (consensus of opinion), which is based on rational proof and reasoning that come from divine revelation; the qiyas, which use analogical reasoning to extend the application of sharia to new situations and ideas; and urf (custom), the collective practice of a group of people, which complements rules that the Qur'an does not fully explain. . . . Islam's strong emphasis on communitarian values adds further complexity.⁶⁸

Islamic jurisprudence promotes child fosterage, however certain legal guidelines need to be met to facilitate legal transfer of guardianship.⁶⁹ These guidelines stem from policy criteria of

major schools of Sunni Islamic legal reasoning and repositories of positive law. It was built upon the teachings of Abu Hanifa (d. 767) . . . Abu Hanifa himself relied extensively on *ra'y* (personal opinion) . . . Hanafi doctrines have always been considered among the most flexible and liberal in Islamic law, including in the areas of . . . marriage and guardianship The Constitution of Afghanistan privileges Hanafi jurisprudence as a residual source of law in the absence of explicit legislation or other constitutional provisions.").

63. Kfir, *supra* note 15, at 113 (citing JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 3, 16-17, 158-59 (2nd ed. 1990)).

64. *Id.* at 114 (citing Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L. J. 311, 312 (1995)).

65. *Id.* at 114 (citing Sayeh & Morse, Jr., *supra* note 65, at 312).

66. PBUH denotes "Peace and Blessings Be Upon Him." This is something Muslims are required to say after mentioning Prophet Muhammad's (PBUH) name.

67. Kfir, *supra* note 15, at 114.

68. *Id.* at 114-15 (citing Adrienne Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149, 152-53 (1994) and WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 26-28 (2009); Helena Malikyar, *Development of Family Law in Afghanistan: The Roles of the Hanafi Madhhab, Customary Practices and Power Politics*, 16 CENT. ASIAN SURV. 389, 390 (1997); Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15 CARDOZO J.L. & GENDER 33, 38 (2008); and M. M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 165 (1993)).

69. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 4; *see id.* at 12 ("Taking care of orphans is an act of piety in Islamic

compassion, transparency and justice.⁷⁰ Taking care of orphans is encouraged in Islam, however the Islamic concept of adoption most resembles permanent foster parenting.⁷¹ Unlike “closed” adoption practices commonly exercised in the U.S., where the biological parents’ identity is hidden by adoptive parents, under Islamic law, a child’s bloodline cannot be changed and neither should his or her birth name.⁷² Where the lineage and familial ties of an orphan are known, a few Islamic legal elements need to be satisfied during adoption procedures.⁷³

A. Lineage and Naming Rights Under Islamic Law

Lineage and naming rights are two sides of the same coin. Islamic law provides that a child’s genealogical line shall never be severed, nor can an artificial line be created with another family.⁷⁴ Naming rights, under Islamic law, deal with a child’s right to maintain his or her birth name, or identity, which represents his or her father’s genealogy.⁷⁵ A father’s family name attaches to his child upon birth, to attach parental responsibility to him, so he is accountable to provide for the child financially and to provide inheritance shares.⁷⁶ In “closed” adoptions, children are not informed of their adoption and have no way of tracing biological kin, which violates a basic tenant of Islamic law.⁷⁷ Under Islamic law, a person is entitled to his or her lineage, birth name, and family background because identity is a sacred notion needing protection.⁷⁸ The complete ‘erasure of natal identity’ is contrary to the teachings of the Qur’an and *Sunnah*.⁷⁹

thought. The Quran, the primary source of guidance for Muslims worldwide, repeatedly emphasizes the importance of taking care of orphans . . . with equity (4:127) and a sin to wrong them (93:9).”

70. See *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 4.

71. See Mills, *supra* note 17. The Prophet Muhammad (PBUH) was an orphan himself.

72. See *id.*; see *infra* Part I.

73. See *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 16.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.* at 5, 16.

78. See *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 16.

79. Kutty, *supra* note 25 (manuscript at 21)(citing JAMILA BARGACH, ORPHANS OF ISLAM: FAMILY, ABANDONMENT, AND SECRET ADOPTION IN MOROCCO 27 (Rowman & Littlefield, 2002)); Ishaque, *supra* note 38, at 393.

B. Guardianship Scheme Under Islamic Law

Islamic jurisprudence does not mirror adoption in the Western sense but it permits a system of *kafala*, or guardianship, which most resembles permanent foster-parenting.⁸⁰ *Kafala* is the vow to voluntarily take care of a minor's welfare and education, in the same way a parent should for a natural child.⁸¹ It constitutes 'a gift of care' for a child, and is not a way to relinquish a child's lineal descent.⁸² Unlike foster-parenting in the U.S., *kafala* serves as a permanent arrangement for a minor.⁸³ Like foster parenting and adoption, *kafala* is regulated by the state.⁸⁴ This particular practice arose to act on "the particular care and concern for the maintenance and upbringing of orphans and foundlings inherent in Islamic teachings."⁸⁵

Maslaha, or public policy, is a driving factor in Islamic law, which heavily influences *fiqh*⁸⁶ rules governing an orphan and *Al-laqit*, or the foundling, an abandoned child.⁸⁷ Early Hanafi scholars recognized that a complete parental relationship is in the child's best interest and society at large, in the case of foundlings and orphans.⁸⁸ The Hanafi *fiqh* manual *al-Hidaya* states, "[r]emoving a foundling from the street is strongly recommended because saving its [i.e. the child's] life is involved" and when the child's life is in danger, the removal becomes obligatory.⁸⁹ Anyone who finds an abandoned child and takes him into their care is considered the child's parent, "but only to the extent that

80. Ishaque, *supra* note 38, at 394.

81. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 6.

82. *Id.*

83. *Id.*

84. *Id.*

85. Kutty, *supra* note 25 (manuscript at 30)(citing Imad-ad-Dean Ahmad, 'The Islamic View of Adoption and Caring for Homeless Children' in ADOPTION FACT BOOK III (Washington: National Council for Adoption 1999); *Qur'an* 5:32 ("Whoever saves a human life, it is as though he has saved humanity in its entirety."); *Qur'an* 4:127 ("[A]nd concerning the children who are weak and oppressed: that you stand firm for justice to orphans. . ."); *Qur'an* 4:127 ("Serve God . . . do good- to parents, kinfolk, orphans, those in need, neighbors who are near, neighbors who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess.")).

86. *Fiqh*, or "understanding" is Islamic jurisprudence and juristic law. It is interpretation of Islamic law. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 6.

87. *Id.* at 9-10 (A foundling is a child whose lineage is unknown due to parents' death, disappearance, or abandonment).

88. *Id.*

89. *Id.* (quoting BURHAN AL-DIN AL-FARGHANI AL-MARGHINANI; AL-HIDAYA, vol. 2, at 466-67 (Lebanon Dar al-Arqam, n.d.)).

such a claim benefits the foundling.”⁹⁰

Children raised under the *kafala* system also maintain⁹¹ inheritance rights from their biological parents.⁹² Qur’anic verses explain orphans’ financial rights, providing, “And give the orphans their property. . . . And consume not their property with your own property. Truly this has been criminal, a hateful sin.”⁹³ However, Islamic law does not prohibit *kafala* guardians from giving their assets to orphans.⁹⁴ According to Sunni *fiqh*, a person can bequeath a maximum one-third of his or her property to anyone who is not a blood relative.⁹⁵

C. Historical Policy Concerns Behind Islamic Law on Children

Historical policy concerns led to the formulation of Islamic children’s rights, deriving from the Qur’an and *Sunnah*.⁹⁶ Like U.S. legislation, Islamic law also bases its laws on public policy.⁹⁷ The policy reason behind treating adoptions as permanent guardianships, instead of parenthood in the Western sense, is also based on historical events.⁹⁸ However, while American history is fairly recent, Islamic history dates back to 610 A.D.⁹⁹ Drawing similarities between Western

90. *Id.* at 10 (quoting M.S. Sujimon, *The Treatment of the Foundling (al-Laquit) According to the Hanafis*, 9 ISLAMIC L. & SOC’Y 358 (2002)); see also Kutty, *supra* note 25 (manuscript at 26)(citing Ella Landau-Tasseron, *Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies*, 66 BULL. SCH. ORIENTAL & AFR. STUD. 169 (2003)) (“a. that the acknowledged person have no known father [*majul al-nasab*]; b. that there be no obvious reason to disbelieve the statement [*an yulad mithluhu li-mithlihi*] so, for example, a person cannot acknowledge as his son another person who is older than himself.”)).

91. There is a caveat here. Although Islamic inheritance rights are extended to both boys and girls, in practice, girls’ rights are lost in translation. See generally Amrita Pande, *The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon*, 47 INT’L MIGRATION REV. 414 (2013); Shipra Saxena, *Young Migrant Women from South Asia in the UAE: Negotiating Identities Under the Kafala System* (Nov. 2012)(unpublished M.A. thesis, Inst. Social Studies).

92. See *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 17.

93. *Qur’an* 4:2; *Qur’an* 4:2-10.

94. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 17.

95. *Id.*

96. See ASAF A. A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 1 (4th ed. 1974) (“Islamic law is not a systematic code, but a living and growing organism . . . this system cannot be studied without a proper regard to its historical development.”).

97. See generally Kutty, *supra* note 25.

98. *Id.*

99. *Timeline of Islam*, PBS, available at <http://www.pbs.org/wgbh/pages/frontline/teach/muslims/timeline.html> (last visited Jan. 14, 2015).

policy objectives and Islamic ones is important. Since the driving forces behind American policy and Islamic policy are essentially the same, namely, that the child's best interest is paramount, both countries can make the proposed campaign work.

In pre-Islamic Arabia, adopted children were usually male because they were a great source of wealth and prestige.¹⁰⁰ They were given most, if not all inheritance rights by their biological parents.¹⁰¹ People mainly adopted to secure an heir, add additional warriors to their tribe and/or usurp an orphan's inheritance share.¹⁰² If the adopted child did not have a large inheritance share, there was still incentive to adopt him because he could grow to accumulate wealth for his adoptive family.¹⁰³ Many times adoptions were also linked to enslavement, where individuals would gain custody of children, under the pretense of giving them care, while actually stripping them of their birth identities.¹⁰⁴ This was done to appropriate children into their families only to service them.¹⁰⁵ Islamic legal norms specifically condemned this practice and restricted the practice of dissimulation through naming.¹⁰⁶ The Qur'an speaks specifically about orphans: "Call to them by the names of their fathers. That is more equitable to God."¹⁰⁷ This verse was revealed after the Prophet Muhammad (PBUH) adopted a freed slave named Zayd Ibn

100. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7; Amira al-Azhary Sonbol, *Adoption in Islamic Society: A Historical Survey*, in *CHILDREN IN THE MUSLIM MIDDLE EAST* 45, 46 (Elizabeth Warnock Fernea ed., 1995); see also Shaheen Sardar Ali, *Rights of the Child Under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC ST. PRAC. INT'L L. 1, 8 (2006).

101. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7.

102. *Id.*; Zoll, *supra* note 35 (stating adoption looked more like slavery in pre-Islamic Arabia. "Men would take in a boy, then erase any ties between the child and his biological family. The goal was to gather fighters as protection for the tribe. Orphans' property was often stolen in the process. As a result, Muslims were barred from treating adopted and biological children as identical in naming or inheritance, unless the adoptee was breast-fed as a baby by the adoptive mother, creating a familial bond recognized under Islamic law.").

103. See Sonbol, *supra* note 101, at 46.

104. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7.

105. *Id.*

106. *Id.* at 7-8 (Prophet Muhammad (PBUH) adopted a boy named Zayd Ibn Haritha, safeguarding his best interests as in a conventional case of adoption today); see also Richards, *supra* note 10, at 399, 409-11; Shaheen Sardar Ali, *Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC STATES PRAC. INT'L LAW 2 (2006) (Pre-Islamic Adoption practices were outlawed to "contain and in certain cases root out social evils.").

107. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 8 (quoting *Qur'an* 33:4-5).

Haritha and renamed him Zayd Ibn Muhammad.¹⁰⁸ When these verses were revealed, Zayd's name was changed back to his given name.¹⁰⁹ The Pre-Islamic practice also perpetuated a system of gender discrimination where only males were adopted.¹¹⁰ Given that the advent of Islam brought forth a movement to eradicate Pre-Islamic gender discrimination and violent practices, such as female infanticide, one may—and very well should—deduce, that banning Pre-Islamic adoption practices was aimed to lessen gender inequality over time.¹¹¹

D. Afghanistan's Child Guardianship Law

The U.S. Department of State incorrectly provides, "U.S. citizens considering adoption of an Afghan child must obtain guardianship for the purpose of emigration and adoption in the U.S. from the Afghan Family Court that has jurisdiction over the prospective adoptive child's place of residence."¹¹² The head judge of Afghanistan's only Family Court, Qazi Rahima Rezae, stated, "We (Afghanistan) deal a lot with children's guardianship cases but the Family Court doesn't have the authority to deal with guardianship. The Supreme Court has written that it is the [Afghanistan] Children's Court that has guardianship authority."¹¹³ No other traditional courts or religious courts have the jurisdiction to handle child guardianship cases.¹¹⁴

The Afghanistan Children's Court's Head Judge, Homa Alizoy, shed some light on a "Child Guardianship Law Draft" proposed to the National Assembly, which passed as good law in April 2014 with most articles intact.¹¹⁵ The Child Guardianship Law was passed by the National Assembly, signed by the President, and published in Afghanistan's Official Gazette.¹¹⁶ This law allows Afghan Muslims

108. MUHAMMAD B. AHMAD AL-QURTUBI, AL-JAMI LI-AHMKAM AL-QUR'AN 118-19 (1967).

109. See Kutty, *supra* note 25 (manuscript at 17).

110. *Id.* at 20.

111. *Id.* at 20-21 (citing Shaheen Sardar Ali, *Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC ST. PRACTICE IN INT'L LAW 2 (2006); *Qur'an* 17:31 ("When the female (infant) buried alive, is questioned— For what crime she was killed" *Qur'an* 81:8-9; "Do not kill your children for fear of poverty; it is We Who provide for them as well as for you. Killing them is surely a grave sin.").

112. *Afghanistan*, U.S. DEP'T ST. (Jul. 1, 2013), available at <http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/afghanistan.html> (last visited Jan. 14, 2015).

113. Skype Interview with Qazi Rahima Rezae, *supra* note 47.

114. *Id.*

115. See Skype Interview with Judge Homa Alizoy, *supra* note 52.

116. Child Guardianship Law, *supra* note 17.

living abroad to adopt abandoned, orphaned or abused Afghan children.¹¹⁷ The National Assembly believes that Afghan children must only be placed with Afghan guardians.¹¹⁸ Judge Alizoy conversely provided that she would like to see more Muslims taking children under their care, regardless of their ethnicity, but Afghanistan's Parliament is not open to the idea.¹¹⁹

The National Assembly's hesitation may be due to reported cases of children "taken out of Afghanistan and sold into human trafficking in [the United Arab Emirates] and Kuwait."¹²⁰ If the National Assembly is assured that only American Muslims with good intentions will have child guardianship, the law may be amended to allow American Muslims in general to apply. Nevertheless, this law should make it easier to effectuate the proposed adoption campaign. The law lays out who may apply and which children are eligible.¹²¹ It provides the procedure for gaining permanent guardianship, thus promoting transparency.¹²² This ensures that legal determinations will be based on statutory law and not solely by a judge's discretion.¹²³ This will encourage more individuals to engage in the permanent guardianship process in Afghanistan.

For example, the Child Guardianship Law provides that a permanent guardian must: be at least 30 years old; have no convictions of trafficking crimes, drugs, begging, terrorism and crimes against children; not suffer from incurable diseases; be able to perform administrative tasks and; not use drugs or alcohol.¹²⁴ Further, a child is eligible for transfer of guardianship if he or she is under age eighteen and is an orphan where none of the parents are alive, available or where the parents are absent or abandoned the child by submitting him or her to a charity or another institution where at least one year has lapsed since the parents have visited or the child has parents who cannot financially provide for him or her.¹²⁵

Guardianship priority is first given to blood relatives, then to couples with no children and last to guardians who have experience

117. *Id.*

118. See Skype Interview with Judge Homa Alizoy, *supra* note 17.

119. *Id.*

120. Latifi, *supra* note 35.

121. See Skype Interview with Judge Homa Alizoy, *supra* note 17; see also Skype Interview with Judge Homa Alizoy, *supra* note 52; Child Guardianship Law, *supra* note 17.

122. *Id.*

123. *Id.*

124. Child Guardianship Law, *supra* note 17, art. 4.

125. *Id.* art. 5.

providing *kafala* care to children.¹²⁶ The law also provides that “[i]n any case, benefit and best interests of the child take precedence over other matters to be considered.”¹²⁷ Article 17 provides, the Children’s Court can authorize the child’s withdrawal from Afghanistan if it is in the child’s best interests.¹²⁸ The court may terminate guardianship if the guardian subjects the child to physical and mental abuse, bars the child from education or job training, exposes the child to drugs or alcohol, forces the child to beg or subjects the child to sexual exploitation or child pornography.¹²⁹

The law cites to *Sunnah* that encourages taking care of orphans,¹³⁰ providing there are great public policy reasons necessitating this law, including a need to “eradicate corruption, reduc[e] the rate of juvenile delinquency, and improv[e] access to education for children” and urgent care for children who lost their parents during the war.¹³¹ It provides that the family is “the most natural and most suitable environment for the growth and development of children. Therefore, as far as possible, children should not be deprived of this right.”¹³²

Many times children are abandoned in hospitals and doctors informally transfer guardianship to desiring guardians.¹³³ The Child Guardianship Law outlaws this practice.¹³⁴ Transfer of guardianship must go through a formal process even if birth families agree to transfer guardianship outside of court.¹³⁵ This is problematic for women who want to anonymously relinquish their parental rights. For example, rape victims who have children out of wedlock are under the threat of adultery laws, which imprison women for extramarital affairs, unless proven that the aggressor committed *zinna bil jabr*, or sex by force. The burden is on the victim to produce three male witnesses to corroborate the defense.¹³⁶

126. *Id.* art. 6.

127. *Id.* art. 9.

128. *Id.* art. 10.

129. Child Guardianship Law, *supra* note 17, art. 17.

130. *Id.* at conclusion (citing Muhammad al-Bukhari, *Sahih Bukhari Volume 007, Book 063, Hadith Number 224*, HADITH COLLECTION, available at <http://hadithcollection.com/sahihbukhari/96-Sahih%20Bukhari%20Book%2063.%20Divorce/5868-sahih-bukhari-volume-007-book-063-hadith-number-224.html> (last visited Jan. 14, 2015)).

131. Child Guardianship Law, *supra* note 17, at conclusion.

132. *Id.*

133. Skype Interview with Judge Homa Alizoy, *supra* note 17.

134. *Id.*

135. *Id.*

136. Jeremy Kelly, *Afghan Woman to be Freed from Jail After Agreeing to Marry*

The law took several years to pass because the draft contained a contentious article, providing that if a male guardian raises a girl, he may not marry her.¹³⁷ The Civil Society of Afghanistan supports this article; however, the National Assembly argues that if the daughter grows up and gives her consent to marry the male guardian, there should be no obstacle.¹³⁸ The judges and lawyers who drafted the proposed legislation refused to remove this article.¹³⁹ However, the law passed without this provision instead providing in Article 8 that guardians cannot take any formal decision on who the female child will marry until the child reaches the age of majority, age eighteen, and gives full consent about her engagement and marriage.¹⁴⁰ The term *maqasid al shariah*, or objectives of Islamic law, should be used to criticize this provision's omission.¹⁴¹ The law must be amended to promote Qur'anic verses prioritizing child welfare rather than excluding rules to maintain *status quo* of men at the expense of child safety and mental well-being.¹⁴²

Subsequent to adopting Zayd, the Prophet Muhammad (PBUH) arranged to marry Zayd's ex-wife and Qur'anic verses confirmed this was permissible. However, there is no example in *Sunnah* permitting marriage to an adopted daughter and this particular issue was never discussed in *hadith*. Since the *Sunnah* is silent on the matter one must look to principles contained in the Qur'an. There are pitfalls to removing this article because, although a "formal decision" shall not be made before the female child turns eighteen, the male guardian may coerce the child into making informal decisions. This heightens the risk of exploitation. Qur'anic verses on child welfare should be cited as

Rapist, GUARDIAN (Dec. 1, 2011), available at <http://www.theguardian.com/world/2011/dec/01/afghan-woman-freed-marry-rapist> (last visited Jan. 14, 2015).

137. Skype Interview with Judge Homa Alizoy, *supra* note 17.

138. *Id.*; Kfir, *supra* note 15, at 87, 94, 140-41 (providing "in Afghanistan misogynistic and discriminatory practices stems from contrived cultural and religious norms," "a misogynistic orthopraxy linked to Islamism, a perversion of Islamic law" and the Ministry of Women's Affairs' ("MoWA") "ineffectiveness can also be attributed to the difficult conditions under which it operates. MoWA has to contend with a fickle president and political system that does not value MoWA's efforts to empower women, treating it instead as a tool to appease the international community. Although President Karzai publicly supports the empowerment of women, he works with conservatives who oppose women's empowerment to ensure his political survival.").

139. Skype Interview with Judge Homa Alizoy, *supra* note 17.

140. Child Guardianship Law, *supra* note 17, art. 8.

141. See Kutty, *supra* note 25 (manuscript at 39).

142. *Id.* at 36-39.

basis to include the omitted provision.¹⁴³ Any practices that promote exploitation of women and children are unacceptable under Islamic law.¹⁴⁴ This begs the question, if Afghanistan stresses the importance of applying Islamic law, why was the contentious article omitted? Note:

When the state is incapable or unwilling to represent the interests of members of society, the importance of family and kinship relations is inflated. Consequently, any challenges to patriarchal authority in the domestic sphere—including but not limited to challenges to the use of violence—can be construed as threatening to the family as an institution. This, in turn, lends itself to the idea that increasing the rights of women would corrode and menace the family, and, by extension, the social order. . . . Islam is not the reason why women in Afghanistan endure discriminatory practices. Rather, discrimination stems from contrived cultural and religious norms that surface out of misreading, misunderstandings or manipulation of the Qur'an. Accordingly, in claiming the existence of contrived cultural and religious practices, it is argued that these norms are synthetic and their purpose is to uphold traditional authority and/or support an anachronistic power system. By devising norms and exhibiting them as cultural or religious, the proponents do so in reference to idyllic community, allowing them to further defend these indefensible social restrictions.¹⁴⁵

“[T]he Afghan constitution and shari’a, both of which have the means to end discriminatory practices,” should be examined to make amendments to the law to include provisions ensuring that girls are not exploited.¹⁴⁶ Article 22 of the Constitution “emphasizes that every Afghan citizen—man and woman—has equal rights before the law” and since Afghanistan social structure is already permeated with inequality and oppression against women, the omitted provision is necessary to include in the Child Guardianship Law.¹⁴⁷ This is to ensure female children are treated equally as well as their male counterparts.

Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the CRC

143. See generally Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 175-76 (2007).

144. See generally *id.*

145. Kfir, *supra* note 15, at 92-94 (quoting Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 31 (2004)).

146. Kfir, *supra* note 15, at 96.

147. Kfir, *supra* note 15, at 98 n.72 (citing CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 22 (2004)).

(ratified Apr. 27, 1994) and its optional protocols on the Sale of Children, Child Prostitution, and Child Pornography, among sixteen international human rights conventions.¹⁴⁸ In August 2009, Afghanistan adopted the Law on Elimination of Violence against Women (EVAW), codifying protections for women and girls to help ensure Afghanistan meets its obligations under CEDAW.¹⁴⁹ The law, in particular, criminalizes child marriages and forced marriages, however, application of the law is sparse¹⁵⁰ highlighting “the continued pervasiveness of misogyny and contrived cultural values.”¹⁵¹ To ensure proper application of the law, EVAW needs supporting legislation like the Child Guardianship Law to ensure equal protection for girls.

In Afghanistan, there are two ways guardianship rights are transferred.¹⁵² First, the Child Guardianship Law lays out the procedure, which provides that if children are abused by their parents, guardianship may be transferred to a family that will better care for them.¹⁵³ One must prove either that the child was abandoned or abused by the parents.¹⁵⁴ The other legal procedure involves the voluntary transfer of guardianship.¹⁵⁵ When child guardianship is willingly transferred, the birth family must first appear before the Children’s Court and confess their wish to transfer guardianship.¹⁵⁶ Second, the court makes a *wasiqah*, or a legal document that notes transfer of custody and provides stipulations protecting Muslim children’s rights,

148. Kfir, *supra* note 15, at 143; *Ch. IV: Human Rights*, UNITED NATIONS: TREATY COLLECTION, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Jan. 14, 2015).

149. Kfir, *supra* note 15, at 143; CONST. OF THE ISLAMIC REP. OF AFGHANISTAN art. 22 & 27 (2004) (providing Afghanistan must ensure its international obligations are met).

150. *UN Officials Urge Ratification of Law to Eliminate Violence Against Women*, UN NEWS CTR. (May 20, 2013), available at <http://www.un.org/apps/news/story.asp?NewsID=44950#.VH5hwWRdWi0> (last visited Jan. 14, 2015); see also Marisa Taylor, *Afghan Law Barring Violence Against Women Stalls*, UN SAYS, ALJAZEERA: AM. (Dec. 8, 2013, 10:58 PM), available at <http://america.aljazeera.com/articles/2013/12/8/afghan-law-barringviolenceagainstwomenstallsunsays.html> (last visited Jan. 14, 2015) (“The report showed that 650 incidents of violence against women and girls were reported to authorities across 18 different Afghan provinces between October 2012 and September 2013.” However, EVAW was only applied to “109 of those reported incidents . . . representing a meager 2 percent increase from the 15 percent of reported cases to which EVAW was applied the year before.”).

151. Kfir, *supra* note 15, at 144.

152. Child Guardianship Law, *supra* note 17.

153. *Id.*

154. *Id.*

155. *Id.*

156. Skype Interview with Judge Homa Alizoy, *supra* note 52.

including naming rights and inheritance rights from the birth parents.¹⁵⁷

Potential guardians must follow preliminary procedures to gain guardianship rights. They must appear before the Afghanistan Children's Court to apply for permanent guardianship.¹⁵⁸ Approximately one to five children are adopted and emigrated to the U.S. every year.¹⁵⁹ If the legislation was amended, allowing American Muslims to apply generally, the number of children adopted and emigrated could increase. The Children's Court heard two cases on child guardianship recently, dealing with foreign potential guardians.¹⁶⁰

Judge Alizoy shared a case regarding an Afghan-American woman who petitioned the court for guardianship of two abandoned children found by hospital staff and placed in a temporary guardian's care.¹⁶¹ Judge Alizoy first had to ensure that the children were in fact foundlings.¹⁶² She ordered the General Attorney's Office to conduct further investigation on the children's background.¹⁶³ The Office then followed up with the Ministry of Social and Public Works to ensure that the petitioner exercised proper legal procedures to obtain the children and their social worker consented to the transfer.¹⁶⁴ Further, Judge Alizoy ordered the social worker to provide her with a letter confirming that the children were foundlings and that she transferred guardianship to the petitioner.¹⁶⁵ Subsequently, Judge Alizoy began processing the legal work for the case.¹⁶⁶

The Court requires potential guardians to show competency to raise a child and that they are: of Afghan descent; "good" Muslims; able to financially support the child and; able to provide for the child's welfare.¹⁶⁷ Judge Alizoy further explained that the guardian must be of good character, "a respectable person," and has to care deeply about the child."¹⁶⁸ The guardian must show the Court that he or she was raised according to Islamic ideals to demonstrate the ability to take care of the

157. *See id.*

158. *See id.*

159. *See Afghanistan Country Profile*, U.S. DEP'T ST., available at <http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/afghanistan.html> (last visited Jan. 14, 2015).

160. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Skype Interview with Judge Homa Alizoy, *supra* note 52.

166. *See id.*

167. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17.

168. *See id.*

child with Islamic values in mind.¹⁶⁹

When a permanent guardian wishes to move the child abroad there are additional procedural steps.¹⁷⁰ First, the Children's Court must send its decision to the Supreme Court for review.¹⁷¹ Next, the Supreme Court reviews the case, files and confirms the authenticity of the court documents.¹⁷² Third, the Supreme Court translates the documents into English to send to the Foreign Ministry.¹⁷³ The Foreign Ministry registers the documents, stamps them and provides the permanent guardian(s) with written permission to take the child abroad.¹⁷⁴

The 1977 Civil Code codifies inheritance laws according to the Hanafi School of Islamic jurisprudence.¹⁷⁵ Article 1993 of the Civil Code provides that a deceased person's personal property and real property shall be transferred to his heirs in accordance with Islamic rules on inheritance.¹⁷⁶ Although there are laws on inheritance, Afghanistan lacks a sufficient legal system due to several decades of conflict causing lack of resources to address inheritance issues.¹⁷⁷ Since Afghanistan's court system is projected to improve in the future, the adopted child may claim inheritance shares upon reaching age eighteen, by providing the Children's Court records which evidence the child's lineage.¹⁷⁸ This is important to consider in ensuring the adopted child's inheritance shares are maintained despite transfer of guardianship.¹⁷⁹

169. *Id.*

170. See Skype Interview with Judge Homa Alizoy, *supra* note 52.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Bruce Etling, *Legal Authorities in the Afghan Legal System*, HARVARD L. SCHOOL, available at <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf> (last visited Jan. 14, 2015); *Land Rights in Crisis*, ELDIS (2014), available at <http://www.eldis.org/assets/Docs/13485.html> (last visited Jan. 14, 2015); *Afghanistan: Food Security and Land Governance Fact Sheet*, LAND GOVERNANCE FOR EQUITABLE & SUSTAINABLE DEV. 1, 2 (Apr. 2011), available at <http://www.landgovernance.org/system/files/Afghanistan%20Factsheet%20landac%20april%202011.pdf> (last visited Jan. 14, 2015).

176. Colin Deschamps & Alan Roe, *Land Conflict in Afghanistan*, AREU 18 (Apr. 2009), available at <http://www.areu.org.af/Uploads/EditionPdfs/918E-Land%20Conflict-IP-web.pdf> (last visited Jan. 14, 2015).

177. *Id.*

178. See *Inheritance Form*, AFG. EMBASSY, WASH., D.C. (2007), available at <http://www.embassyofafghanistan.org/sites/default/files/forms/02.07.2007Inheritance.pdf> (last visited Jan. 14, 2015).

179. See *infra* Part III and Part V.

II. UNITED STATES FEDERAL LAW ON INTERCOUNTRY CHILD ADOPTIONS

In 1961, the INA incorporated provisions regulating the intercountry adoption process to improve its screening.¹⁸⁰ The 1978 amendment to the INA declares, when a child is released for immigration and intercountry adoption to the U.S., the prior parent shall not be accorded any right, privilege or status, with respect to the child.¹⁸¹ In 2000, the U.S. enacted the Intercountry Adoption Act ("IAA").¹⁸² The INA and the IAA define key terms such as "parent," "child," and "orphan."¹⁸³ The USCIS, the Department of Homeland Security and the Board of Immigration Appeals declared that obtaining guardianship status alone is insufficient to facilitate the immigration of an adopted child into the U.S. under the INA, requiring parenthood status instead.¹⁸⁴ Under the INA, a birth parent is not considered a parent if he or she has irrevocably released the child for emigration and adoption.¹⁸⁵

The IAA allows American parents to adopt children from non-Convention¹⁸⁶ countries, as long as the child qualifies as an adopted child or an orphan under the INA.¹⁸⁷ According to the INA, a child is an unmarried individual under the age of twenty-one.¹⁸⁸ Under the INA, the adopting parent(s) must personally observe the child during adoption proceedings in the sending country.¹⁸⁹ The U.S. cannot recognize adoptions unless the adoptive relationship is authorized by

180. Stephanie Zeppa, "Let Me in, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act, 22 HASTINGS INT'L & COMP. L. REV. 161, 164-65 (1998) (amendments were made to the INA to "create a permanent provision for the immigration of adoptable children" which laid out a regulatory framework for intercountry adoption. Prior to that, Congress enacted the Displaced Persons Act (DPA) in 1948 [after World War II] that included in it a provision "to admit, regardless of their country's immigration quota, 3,000 displaced orphans" from Germany, Austria and Italy. Congress only intended for the DPA to serve as a "temporary solution to the immediate welfare problems in Europe after the war.").

181. Immigration and Nationality Act, Pub. L. 95-417, 8 U.S.C. § 1153 (1978).

182. Richards, *supra* note 10, at 413.

183. 8 U.S.C. § 1101 (1952); 42 U.S.C.A. § 14901 (2000).

184. Richards, *supra* note 10, at 411.

185. 8 U.S.C. § 1101 (1952); see *Definition of Child and Parent in INA*, AM. IMMIGR. L. CENTER, available at <http://www.ailec.com/services/INADEFS.pdf> (last visited Jan. 14, 2015).

186. Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

187. 42 U.S.C. § 14901 (2000).

188. 8 U.S.C. § 1101 (1952); see *Definition of Child and Parent in INA*, *supra* note 186.

189. 8 U.S.C. § 1101 (1952).

local custom or religious practice, which is recognized by a court of law there.¹⁹⁰ Additionally, the relationship must hold all the usual attributes of child adoption, according irrevocable rights to adoptive parents with respect to the child.¹⁹¹

The INA lays out the groundwork for criteria that needs to be met to facilitate intercountry adoption. If adopting parents cannot fulfill the requirements under INA 101(b)(1)(E), which provides that an adopted child must qualify as an "orphan" under INA 101(b)(1)(F) in order to emigrate to the U.S., they must have legal child custody and reside with the child for at least two years before U.S. immigration can occur.¹⁹² An "orphan," under the INA, is a child that lacks parent(s) because of their death or disappearance, abandonment, or separation from him or her.¹⁹³ A child is also an orphan if the sole or surviving parent cannot provide him or her with proper care.¹⁹⁴ The IAA also requires proof that a child's natural parent(s) are deceased to qualify as an "orphan," by obtaining proper paperwork from the sending country.¹⁹⁵ The sole or surviving parent must also, in writing, irrevocably release the child for purposes of U.S. emigration and adoption.¹⁹⁶ To reiterate, the INA does not consider someone a parent if he or she has, in writing, irrevocably released the child for emigration and adoption.¹⁹⁷ The USCIS assesses and approves prospective adoptive parents and determines whether the child qualifies as an "orphan" under the INA.¹⁹⁸

In order to facilitate adoptions between the two countries, the U.S. will need to make amendments to the INA and the IAA. While this may seem like plenty to change, only a few phrases need to be updated in order to allow a *kafala*, or "permanent guardianship," scheme to work in the U.S. The changes would not upset the policy rationale underlying

190. U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes, U.S. DEP'T ST. 9 (2013), available at <http://www.state.gov/documents/organization/87531.pdf> (last visited Jan. 14, 2015). Adoption is "[t]he creation of a parent-child relationship by judicial order between two parties who usu[ally] are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child." *Adoption*, BLACK'S LAW DICTIONARY 55 (9th ed. 2009).

191. U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes, *supra* note 191, at 9-10.

192. *Id.* at 10.

193. 8 U.S.C. § 1101 (1952).

194. *Id.*

195. Richards, *supra* note 10, at 399, 414-16.

196. U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes, *supra* note 191, at 15.

197. 8 U.S.C. § 1101 (1952).

198. William Giacofci, *Curbing Intercountry Adoption Abuses Through the Alien Tort Statute*, 18 ROGER WILLIAMS U. L. REV. 110, 115 n.34 (2013).

intercountry adoption laws, because permanent guardians would have full and permanent custody of the children, barring the birth families from reclaiming their custody rights in the future.¹⁹⁹

III. POLICY REASONS FOR SWEEPING INTERCOUNTRY ADOPTION LAW REFORM

Today, child adoptions within the U.S. are more standardized than the pre-1950s.²⁰⁰ State systems have social workers that conduct a home study of the adopting parents during a probationary period before adoptions are finalized, even if the child was adopted abroad.²⁰¹ This process involves background checks, reference checks, and follow-up visits.²⁰² However, intercountry child adoption laws were not always so stringent.²⁰³ Beginning in the late 1950s, there was a massive federal policy shift toward increasing regulations governing intercountry adoption procedures in the U.S. for several reasons.²⁰⁴ The main reasons behind the shift were negative effects resulting from intercountry adoption procedures during the end of the Korean War and the Vietnam War as discussed below.²⁰⁵

A. America's Intercountry Adoption Scheme Post-World War II

First, individuals successfully adopted children from Japan, Germany and Korea post World War II through a process called "proxy adoptions," allowing U.S. citizens to hire a proxy agent to adopt a child on their behalf and transport him or her to the U.S.²⁰⁶ Domestic adoptions were subject to state regulations, which assessed the prospective parents' competency to provide for the adopted child's welfare, by way of investigation and supervision.²⁰⁷ However, the

199. See discussion *Infra* Part VI.

200. See *History of International Adoption*, *supra* note 6.

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.*; *Proxy Adoption of Foreign Children has Many Abuses*, MILWAUKEE J. at 13 (Aug. 27, 1958), available at <http://news.google.com/newspapers?id=UQIqAAAAIBAJ&sjid=miYEAAAAIBAJ&pg=4367%2C3295730> (last visited Jan. 14, 2015).

205. Pam Connell, "Proxy Adoptions" from Other Countries, FAMILIES, available at <http://www.families.com/blog/proxy-adoptions-from-other-countries> (last visited Jan. 17, 2015).

206. *History of International Adoption*, *supra* note 6; *Proxy Adoption of Foreign Children Has Many Abuses*, *supra* note 204.

207. Connell, *supra* note 206.

domestic regulatory scheme exempted international adoptions due to the "proxy adoption" loophole.²⁰⁸ This loosely regulated process had negative implications because it thwarted state and federal regulations, allowing adoptive parents to neglect, sexually abuse, and physically abuse adopted children, because they were not screened for competency to parent.²⁰⁹

A public outcry ensued after child agencies made public the Child Welfare League of American and International Social Service's study of "proxy adoptions."²¹⁰ Public policy sentiments of the time regarding "proxy adoptions" is best exemplified by a Milwaukee Journal article written in 1958 which stated:

Corrective action clearly needs to be taken. Unfortunately, it cannot be done by state or local governments; they only bear the burden when proxy adoptions "go bad." The federal government must act either through tightening immigration procedures or perhaps by special treaty arrangements with countries in which proxy adoptions are most easily arranged.²¹¹

"Proxy adoptions" revealed the inadequacy of federal policy in dealing with intercountry child adoptions. The public's outrage encouraged the onset of regulations to reform intercountry adoption procedures to avoid human rights abuses.²¹² The 1961 amendment to the INA finally incorporated international adoption.²¹³

B. America's Intercountry Adoption Practices Post-Vietnam War

A second series of events, prompting tighter intercountry adoption regulations, occurred at the end of the Vietnam War. While the Vietnam War was winding down, the U.S. government launched a campaign called "Operation Babylift" to "save the children" in Vietnam, airlifting more than 2,000 "orphans" out of Vietnam.²¹⁴ Unbeknownst to adoptive parents, many children were not orphans, allowing their Vietnamese parents to reclaim approximately 200 of them.²¹⁵ The initiative carried children out of Vietnam, under the false

208. *Id.*

209. *See Proxy Adoption of Foreign Children Has Many Abuses, supra* note 204.

210. *See id.*

211. *Id.*

212. *History of International Adoption, supra* note 6.

213. *Proxy Adoptions*, ADOPTION HIST. PROJECT, available at <http://pages.uoregon.edu/adoption/topics/proxy.htm> (last visited Jan. 14, 2015).

214. Kim, *supra* note 8, at 870.

215. *Id.*

pretense that they were orphans needing the care of adoptive parents.²¹⁶ The Babylift campaign was particularly controversial because many children's documents were often forged or inaccurate.²¹⁷ Many critics defamed this program using the pejorative "Operation Babysteal."²¹⁸

Cross-national problems resulted from the corrupt processes carried out in "Operation Babylift" because many Vietnamese parents and guardians never fully and knowingly relinquished their rights to their children.²¹⁹ For example, the U.S. Court of Appeals for the Ninth Circuit, in *Nguyen Da Yen v. Kissinger*, heard an action brought on behalf of three Vietnamese children in the U.S., who were never legally released for adoption, with living parents desiring their return in Vietnam.²²⁰ The Court ordered an investigation of the children's records to identify and locate their natural family to facilitate repatriation with their parents.²²¹

Given the historical context, it makes sense that the U.S. would tighten the grip on immigration and intercountry adoption laws and procedures. Reforms were necessary to prevent children from ending up in the hands of unfit parents. Federal legislation was changed to provide that a potential parent must personally observe the child in the sending country so that its government can assess whether the child is in good hands.²²² There is also a pertinent legal objective to avoid emigrating children illegally to the U.S., constituting child trafficking. Another policy concern raised in Vietnam's case is the lack of finite relinquishment of the birth family's custody rights. Though some children in Vietnam were orphans under the U.S.' standard, namely, they were missing one or both parents, many of the extended families in Vietnam wanted to care for these children, as their cultural norms dictated, and did not "recognize the Western concept of being an

216. *Id.*; Buser, *supra* note 9, at 29-31.

217. *Operation Babylift*, PBS, available at <http://www.pbs.org/itvs/preciouscargo/babylift.html> (last visited Nov. 9, 2014); Allison Martin, *The Legacy of Operation Babylift*, ADOPT VIETNAM, available at <http://www.adoptvietnam.org/adoption/babylift.htm> (last visited Jan. 14, 2015).

218. Kim, *supra* note 8, at 870; see generally Christine Lai, *The Orphans of Vietnam*, DARTMOUTH (Nov. 19, 2013, 4:21 PM), available at <http://www.dartmouth.edu/~hist32/History/S30%20-%20The%20Orphans%20of%20Vietnam.htm> (last visited Jan. 14, 2015).

219. *Operation Babylift*, *supra* note 218.

220. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1197 (9th Cir. 1975); Buser, *supra* note 9, at 29-31.

221. Buser, *supra* note 9, at 29-31; *Nguyen Da Yen, et al. v. Kissinger*, CTR. FOR CONST. RTS, available at <https://ccrjustice.org/ourcases/past-cases/nguyen-da-yen,-et-al.-v.-kissinger> (last visited Jan. 14, 2015).

222. See 8 U.S.C. § 1101(b)(1)(F) (1952).

orphan.”²²³

Current federal legislation is more comprehensive and stringent because the U.S. cannot allow any new adoption campaign to resemble the failed campaigns in Korea and Vietnam. However, amending current legislation will not undermine public policy. This campaign will be successful if the U.S. engages in policies sensitive to Afghanistan's traditions and public policy concerns. The U.S. can avoid a host of litany, similar to the ones stemming from “Operation Babylift,” even if it amends the INA and IAA to afford a religious exception. If the U.S. allows for a *kafala* scheme, severing the birth family's custody ties permanently to facilitate the intercountry adoption of Afghan children, this will ensure that the birth family cannot regain custody of the child. Additionally, the amendments would only provide legroom for a *kafala* scheme, and would not affect American intercountry adoption procedures with other countries. This means that the amendments will only apply to countries adhering to Islamic law.

IV. STATE LAWS ON CHILD CUSTODY AND CHILD ADOPTION

To carry out a successful intercountry adoption campaign with Afghanistan, American Muslims must be willing to enter into a guardianship contract including provisions requiring them to maintain the child's given name. Contractual stipulations in written child adoption agreements are generally upheld by approximately twenty-six states, even where they require specific performance.²²⁴ These are upheld as long as the court finds they are in “the child's best interests and are designed to protect the safety of the child and the rights of all the parties to the agreement.”²²⁵ For example, in open adoption cases, the birth family may require the adopting family to: deliver birthday cards from them to the child and mail pictures of the child until the child turns eighteen.²²⁶ The written contract between the families “can

223. Nguyen Da Yen, et al. v. Kissinger, *supra* note 222.

224. See *Open Adoption and Post-Adoption Contact Agreements*, FCA ADOPTIONS, available at <http://www.fcadoptions.org/adoption-options/open-adoption-and-post-adoption-contact-agreements.php> (last visited Nov. 10, 2014); see generally *Sample Open Adoption Agreement*, FCA ADOPTIONS, available at http://www.fcadoptions.org/files/Sample_Open_Adoption_Agreement.pdf (last visited Jan. 14, 2015); *Postadoption Contact Agreements Between Birth and Adoptive Families*, CHILD WELFARE (May 2011), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf (last visited Jan. 14, 2015).

225. *Postadoption Contact Agreements Between Birth and Adoptive Families*, *supra* note 225, at 3.

226. See *id.*

clarify the type and frequency of the contact or communication and can provide a way for the agreement to be legally enforced.”²²⁷ However, the agreements are only enforceable if they are “approved by the court that has jurisdiction over the adoption.”²²⁸

Parties can make an adoption agreement that enforces Islamic legal principles about naming and delegate disputes arising under that agreement through religious arbitration in the U.S.²²⁹ This contract can be upheld under general contract law.²³⁰ A majority of state courts uphold specific performance arising under open adoption contracts.²³¹ Thus, states can also uphold an intercountry adoption agreement between American Muslim guardians and Afghan birth families or guardians, stipulating that the child must retain his or her birth name in accordance with Islamic law. Further, since the birth name shall be agreed upon at the start of the child’s life with the permanent guardian’s consent, it will not repeatedly interfere with the permanent guardian’s ability to raise the child.

American state laws govern a child’s inheritance rights.²³² For example, Maryland’s Estates and Trusts Code eliminates the adopted child’s right to inherit from natural parents or their genealogical line.²³³ Maryland’s law is reflective of some states laws regarding this issue.²³⁴ Maryland case law provides, child adoption does not provide a child with more rights, namely, inheritance from two separate genealogical lines, or “double inheritance.”²³⁵ However, some other states allow an adopted child to inherit from adoptive parents, natural parents and their families.²³⁶ For example, Pennsylvania embraces a flexible approach

227. *Id.* at 2.

228. *Id.* at 4.

229. See discussion *infra* Part VI.

230. *Id.*

231. See generally *Postadoption Contact Agreements Between Birth and Adoptive Families*, *supra* note 225.

232. Matthew Izzi, *The Law of Inheritance*, LEGAL MATCH, available at <http://www.legalmatch.com/law-library/article/the-law-of-inheritance.html> (last visited Jan. 14, 2015).

233. See MD. CODE ANN., EST. & TRUSTS §1-207(a) (LexisNexis 2014); *Hall v. Vallandingham*, 540 A.2d 1162, 1163 (Md. 1988).

234. See generally *Unsel v. Meier*, 972 S.W.2d 466, 472 (Mo. 1998) (“To grant dual inheritance, the child adopted would be given the inheritance of a natural child and allowed an additional one. The law intended to give the child adopted the same rights and advantages of a natural child as far as possible. It was never intended to give the child of adoption more.”); see generally *JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES* (8th ed. 2009).

235. *Hall*, 540 A.2d at 1164.

236. See *DUKEMINIER, SITKOFF & LINDGREN*, *supra* note 235, at 94-95.

where an adopted child may inherit from the birth family if a relationship is maintained with the birth family.²³⁷ State laws on “double inheritance” deal with property transfers only within the U.S. Questions about the child’s Islamic inheritance rights can be deferred to Afghanistan’s government, since the inheritance shares afforded to the child are in Afghanistan.²³⁸ Inheritance can be transferred to the child at the age of majority, should the child decide to claim it in Afghanistan.²³⁹

V. MODELS FOR REFORM

International law promotes the idea of Western legal systems respecting the Islamic *kafala* model. The Hague Convention on parental responsibility and protection of children provides if a child is placed in *kafala* care by his or her State of origin and the guardian wishes to take the child abroad, the State will first consult the latter State’s central authority and provide it with a report on the child and reasons for the *kafala* placement. The latter State must consent to the placement, in light of the child’s best interests before the child may be brought abroad.²⁴⁰ The U.S. signed this convention but has not ratified it and Afghanistan has not signed it.²⁴¹ To ensure the success of the proposed campaign, the U.S. and Afghanistan must ratify the convention to create a working *kafala* scheme. If there is international recognition that both countries are accountable in promoting the *kafala* scheme the campaign will be more successful.

Moreover, Article 20 of the CRC recommends states to take into consideration the adopted child’s religion when looking for compatible adoptive families.²⁴² The U.S. signed but has not ratified this convention, while Afghanistan has signed and ratified it.²⁴³ The U.S. must ratify this convention to ensure Afghanistan’s policies are respected. This will encourage Afghanistan’s government to enter into an intercountry adoption treaty with the U.S., facilitating a successful

237. 20 PA. CONS. STAT. ANN. § 2108 (West 2014).

238. See discussion *infra* Part IV; Deschamps & Roe, *supra* note 177.

239. See discussion *infra* Section IV.

240. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, art. 33(1), Oct. 19, 1996, 2204 U.N.T.S. 503.

241. *Id.*

242. U.N. DEP’T ECON. & SOC. AFFAIRS, CHILD ADOPTION: TRENDS AND POLICIES, at 45, U.N. Doc. ST/ESA/SER.A/292, U.N. Sales No. E.10.XIII.4 (2009), available at http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf (last visited Jan. 14, 2015).

243. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

campaign for American Muslim guardians and Afghan children. First, the treaty will outline the procedures guardians must follow in Afghanistan to effectuate guardianship transfer. Second, it will outline American procedures guardians must follow to effectuate the child's U.S. emigration. Third, it will provide that the guardians must comply with local U.S. state procedures on adoption to ensure the adopted child is placed in a safe and stable home.²⁴⁴

Western countries that encourage Muslim families to adopt children in accordance with Islamic law are the best models to examine to reform American intercountry adoption laws and facilitate the proposed adoption campaign. For example, the New South Wales province of Australia promotes a campaign encouraging Muslim individuals to adopt Muslim children.²⁴⁵ Australia's common law legal system, similar to the American legal system, allows children to retain their birth family's last name and inheritance rights from their birth family by way of a will.²⁴⁶ This is legally enforceable under a mutually agreed upon 'Adoption plan.'²⁴⁷

Many Muslim-majority countries, such as Jordan and Morocco, permit foreign adoption that allows the transfer of *kafala* to Muslim guardians in other Western countries on a case-by-case basis.²⁴⁸ Turkey is an interesting model to examine because it allows for full legal adoptions, where biological parents can transfer guardianship permanently, while providing safeguards in its legal code, preventing the violation of Islamic law.²⁴⁹ In Turkey, "[a]doption gives full inheritance rights to the child from the adoptive family. In addition, the adopted child can also inherit from the biological family. However the adoptive parents cannot inherit from the adopted child."²⁵⁰ This ensures the applicability of Islamic Law, in the sphere of children's rights, preventing adoptive parents from usurping the child's inheritance

244. See *Afghanistan Country Profile*, *supra* note 160.

245. See *Adoption in NSW: Information for the Muslim Community*, NSW DEP'T COMMUNITY SERVICES (2007), available at http://www.community.nsw.gov.au/docs/swt/_assets/main/documents/adoption_muslim_broch.pdf (last visited Jan. 14, 2015).

246. *Id.* at 4.

247. *Id.*

248. See *Adoption and the Care of Orphan Children*, *supra* note 25, at 10-11 (citing FAQ: *Adoption of Children from Countries in which Islamic Shari'a Law is Observed*, US DEP'T ST., available at http://adoption.state.gov/adoption_process/faqs/adoption_of_children_countries_islamic_sharia_observed.php (last visited Jan. 14, 2015)).

249. See *Adoption and the Care of Orphan Children*, *supra* note 25, at 11 (citing *Adoption*, ADALET HUKUK, available at http://www.adalet-hukuk.com/yeni_sayfa_7.htm (last visited Jan. 14, 2015)).

250. *Id.*

shares.

The European Court of Human Rights (“ECHR”), in *Harroudj v. France*, heard a child adoption dispute illustrating how an equitable remedy can be achieved where two legal systems, France under a Western civil system and Algeria under an Islamic legal system are in conflict.²⁵¹ There, Zina Hind was born in Algeria and abandoned immediately by her biological mother; her biological father was unknown.²⁵² Zina became a ward of the Algerian State and the Court of Boumerdès granted a 42-year-old unmarried applicant the right to have permanent *kafala* of the child. He also authorized Zina Hind to leave Algeria and settle in France.²⁵³ After arriving with the child in France, the applicant applied for full adoption, arguing it was in the ‘best interests of the child,’ invoking Article 3 § 1 of the CRC and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.²⁵⁴

However, the Lyons Tribunal De Grande Instance dismissed her application, noting that *kafala* gave her sufficient parental authority to make decisions in the child’s best interest.²⁵⁵ The court held, *kafala* gave the child all the protections she was entitled to under international conventions.²⁵⁶ The court reasoned that, under Article 370-3 of the French Civil Code, a child could not be adopted if the sending country’s law prohibited adoption, which Algeria did.²⁵⁷ The ECHR upheld France’s decision, holding the child “was already under her care and control, pursuant to the Islamic *kafalah* guardianship system,” fully enabling the applicant to make decisions in the child’s best interest.²⁵⁸ The court provided, under the CRC “the *kafalah* model is accepted and defined as ‘alternative care,’ which it deemed on par with adoption.”²⁵⁹ The court noted, *kafala* is recognized under international law and was

251. See *Harroudj v. France*, App. No. 43631/09, para. 1 (Eur. Ct. H.R. 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113819> (last visited Jan. 14, 2015).

252. See *id.* para. 5.

253. *Id.* para. 7.

254. *Id.* para. 10.

255. *Id.* para. 11.

256. See *Harroudj v. France*, App. No. 43631/09, para. 11 (Eur. Ct. H.R. 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113819> (last visited Jan. 14, 2015).

257. See *id.*

258. *Id.*

259. Faisal Kutty, *Islamic Law, Adoptions and Kafalah*, JURIST (Nov. 6, 2012, 4:40 PM), available at <http://jurist.org/forum/2012/11/faisal-kutty-adoption-kafalah.php> (last visited Jan. 14, 2015).

fully accepted in French law and States must accommodate *kafala* in its domestic law where applicable.²⁶⁰ This ECHR decision promotes positive groundwork for accommodating Islamic adoptions in Western countries.²⁶¹

European States are starting to embrace *kafala* and the U.S. can too. Spanish family law has provisions that accept *kafala*, allowing guardians to have custody of a child without “creating a relationship of filiation as would be the case with adoption, which the Koran forbids.”²⁶² English law also provides a similar legal scheme. The Adoption and Children Act 2002 makes room for a special guardianship court order, which accommodates minority groups who wish to transfer guardianship to a permanent family but “have religious or cultural difficulties with adoption as it is set out in law.”²⁶³ The U.S., like its Western counterparts, can build in its legislation, room for a *kafala* scheme to flourish.

VI. RECOMMENDATIONS FOR A SUCCESSFUL AFGHAN ADOPTION CAMPAIGN

The INA and IAA must be amended to state that a birth parent’s parental rights are not fully relinquished upon adoption if they are from countries adhering to Islamic law. The INA and IAA should provide a religious exception clause, creating wiggle room for a *kafala* scheme for “permanent guardians” adopting from Islamic countries. Currently, the USCIS, the Department of Homeland Security and the Board of Immigration Appeals have declared that guardianship status alone is “insufficient” for the purposes of immigration under the INA.²⁶⁴ This is partially because there is a need to ensure that parental rights are relinquished, leaving no room for birth families to regain custody of their natural child.

However, parental rights need to be relinquished only to the extent that the child cannot be returned to the biological parent. “Permanent guardianship” status should be sufficient to facilitate immigration of adopted children from Islamic countries, because the INA and IAA

260. *Id.*

261. *Id.*

262. Andrea Büchler, *Islamic Family Law in Europe? From Dichotomies to Discourse - or: Beyond Cultural and Religious Identity in Family Law*, 8 INT. J.L. CONTEXT 196, 202 (2012).

263. *Id.*

264. Richards, *supra* note 10, at 411.

amendment would define “permanent guardians” as individuals with full and permanent custody rights to the child. This will ensure that the child’s sole and primary caretakers are the “permanent guardians,” to avoid repeating the failures of “Operation Babylift.”²⁶⁵ To successfully adopt a child and for permanent guardianship to follow suit in the Afghanistan Children’s Court, the child must be accorded certain rights under Islamic Law, namely the child’s ability to retain his or her lineage and naming rights.²⁶⁶ This can be ensured if the adopting parents and the biological parents, enter into a contract honoring Islamic lineal and naming rights, by providing a clause that states that the child shall retain his or her birth name.²⁶⁷

The adoption agreement should also provide that if permanent guardians break a clause in the adoption contract by changing the child’s birth name, the remedy to explore is private Islamic arbitration in the U.S.²⁶⁸ A religious arbitration agreement between the Muslim families may “refer to a religious venue or use religious language to explain the terms of the arbitration proceedings.”²⁶⁹ Further, “parties must mutually agree on the arbitrator in order for the arbitration to be successful.”²⁷⁰ Religious arbitration is a way for parties to submit a dispute to a religious tribunal and seek enforcement of the tribunal’s decision in state or federal court.²⁷¹ The Federal Arbitration Act (“FAA”) only minimally regulates arbitration proceedings, stating that a court may vacate an award where there is a finding of fraud during the proceedings and/or misbehavior by one of the parties leading to the other party being prejudiced.²⁷²

To ensure that the settlement of a dispute arising from changing the child’s birth name is settled through Islamic arbitration, the adopting family and the birth parent(s) must include a provision in the written agreement providing for this protection. The provision must provide

265. Kim, *supra* note 8, at 870.

266. Skype Interview with Judge Homa Alizoy, *supra* note 17.

267. See generally Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481 (1996).

268. It is worth noting that after conducting extensive research on the Westlaw database, there was no Australian case law on disputes arising between Muslim birth families and guardians over a birth name change.

269. Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, VERMONT L. REV. 157, 165 (2012).

270. Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 645 (2006).

271. See Baker, *supra* note 270, at 157-59.

272. See *id.* at 160, 163, 171 (an example: “The Parties agree to arbitrate all existing issues among them . . . according to the Islamic rules of law by Texas Islamic Court.”).

that disputes arising from the agreement shall be settled through Islamic arbitration, ensuring that civil courts lack jurisdiction to hear issues arising from the adoption contract.²⁷³ If the adopting family changes the child's surname, the birth family may petition the court to enforce the agreement through arbitration. The court must find that there was a "valid arbitration agreement to order the parties to arbitrate the dispute based on the terms of the agreement."²⁷⁴

However, to ensure the arbitration clause is enforced and an arbitrator's specific performance order is upheld, there needs to be an assurance to public courts that the arbitration remedy is not contrary to "public policy," which provides that the child's best interest is paramount.²⁷⁵ State courts give great deference to parents when determining the child's best interests.²⁷⁶ However, it is important to note that public policy in the U.S. is ever changing. Recently, leading behaviorists and psychologists have promulgated the view that "open adoption" is in the child's best interests.²⁷⁷ American courts may find these experts' views persuasive in determining what is in the child's best interest, coupled with the importance of upholding private contracts, especially those involving clauses based on religion, to avoid any constitutional issues.²⁷⁸ The U.S. Constitution's First Amendment provides constraints for public courts, "referred to as the 'church autonomy doctrine,' [that] has gained traction in debates over religious arbitration and dramatically limits the extent to which courts will review the decisions of religious tribunals."²⁷⁹ Civil courts circumvent dealing with religious arbitration to avoid entanglement in religious affairs, since "agreement to arbitrate before a religious tribunal will often use religious language or terms that do not have clear secular analogies."²⁸⁰

273. *See generally id.*

274. *See id.* at 160.

275. Baker, *supra* note 270, at 163; *see generally* Hall, 540 A.2d at 1162-65.

276. *See generally* Troxel v. Granville, 530 U.S. 57, 67 (2000).

277. *Research about the Impact of Openness on Adoptees*, INDEP. ADOPTION CENTER, available at <http://www.adoptionhelp.org/open-adoption/research> (last visited Jan. 14, 2015); Kutty, *supra* note 25 (manuscript at 4) (providing an acceptable definition of adoption from an Islamic perspective where "[t]he legal creation of a family relationship analogous to that of parents and child between a child and adults who are not the biological parents while not severing or negating the child's biological connection.").

278. Baker, *supra* note 270, at 197; *see generally* ARTHUR D. SOROSKY, ANNETTE BARAN & REUBEN PANNOR, *THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD AN ADOPTED, BIRTH PARENTS, AND ADOPTIVE PARENTS* (1978); *see generally* Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Property*, 32 *CARDOZO L. REV.* 225 (2010).

279. Baker, *supra* note 270, at 172.

280. *Id.* at 176.

In order to avoid a constitutional problem, namely entanglement with religion, the court could defer

the determination of Islamic law to a mutually agreed arbitrator Furthermore, the court would not unconstitutionally endorse one school's interpretation of Islamic law over another school's interpretation. The court, in fact, would not endorse any particular view because the parties choose the arbitrator, and in effect, the school of thought.²⁸¹

Since Afghanistan's government endorses Hanafi jurisprudence, parties can delegate a learned individual in that school of thought to be the arbitrator of a decision based on that law.²⁸² Thus, private Islamic arbitration can pass constitutional muster. A religious clause in a contract can only be securely upheld if the language is clear and if Islamic law specifically backs the rule, leaving no room for ambiguity.²⁸³ If a Qur'anic verse states a rule clearly, there is little room to dispute the meaning of the rule presented in the adoption agreement.²⁸⁴ The Qur'an clearly states that a child must retain his or her biological father's name; if the adoption agreement provides that this Islamic law should be enforced through Islamic arbitration, the adoption contract should be upheld.²⁸⁵ If permanent guardians and birth families provide an Islamic arbitration tribunal with jurisdiction to uphold the contract, it can be upheld without violating American public policies or legal principles. If disputes between the contract parties were settled through private arbitration, applying principles of Hanafi Islamic Law, Afghanistan's legal mechanisms may ensure more openness to facilitating intercountry adoptions.

CONCLUSION

There are numerous hurdles involved in facilitating a successful campaign to provide Afghan children with safe and loving homes. First, Afghanistan's Parliament does not wish to extend guardianship criteria to Muslims in general. Further, the omitted article forbidding permanent guardians from marrying their adoptive daughters needs to be reinstated to ensure that Afghan children are placed in safe and stable homes. This legislation gives hope that more individuals will adopt

281. Trumbull, *supra* note 271, at 642-43.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

because the guidelines are codified, making the procedure clearer and the process less strenuous in the future. The second hurdle involves convincing the American public and legislators to amend federal legislation on intercountry adoption laws in order to incorporate room for a *kafala* scheme from Islamic sending countries.

An even bigger obstacle is to convince the Afghan government, its people, and American Muslims that a U.S. campaign facilitating the adoption of Afghan children will not thwart Islamic legal principles and laws. If Afghan children are raised by American Muslims in accordance with Islamic values and their Islamic children's rights are upheld, the Afghan government may be persuaded to embrace this campaign. An intercountry adoption treaty between the U.S. and Afghanistan will serve well in ensuring this because it will provide that American Muslims must follow Afghanistan's laws before considering bringing the child abroad.

Just as Christian organizations promoted intercountry adoption campaigns after World War II, it is important that Muslim organizations lead the one proposed in this paper. Currently Islamic Relief USA, a 501(c)(3) tax-exempt charitable organization, is involved in providing American Muslims with the opportunity to make donations towards Afghan orphans' healthcare and education. It would be beneficial to receive this organization's endorsement for the proposed campaign, because of its well-established dedication to the care of Afghan children.²⁸⁶

Afghanistan's government has a great interest in the well-being of its people, especially its children. The importance of taking care of orphans is well established in Islamic law and the notion that the "child's best interest is paramount" is discussed extensively in Western legal matters and Islamic ones. The intercountry adoption of Afghan children is possible²⁸⁷ with the utilization of these parallel public policy concerns as inspiration to make a positive change.

286. See *Afghanistan: About the Situation*, ISLAMIC RELIEF USA, available at <http://www.irusa.org/countries/afghanistan/> (last visited Jan. 14, 2015); see also *Orphans FAQS*, ISLAMIC RELIEF USA, available at <http://www.irusa.org/islamic-relief-usa/answers/orphans-faqs/> (last visited Jan. 14, 2015).

287. If the right to receive permanent guardianship of Afghan children extends to American Muslims generally, they must ensure that the children learn about their Afghan heritage, history and language. See generally *Transracial Parenting in Foster Care and Adoption*, IOWA FOSTER & ADOPTIVE PARENTS ASS'N, available at http://www.ifapa.org/pdf_docs/TransracialParenting.pdf (last visited Jan. 14, 2015).