A Study on Positive Law Regard to the Guardian Marriage with Adopted Child

Mahboubeh Halvayipour* and Sima Rahgosha
Department of Law, Bandar Abbas Branch, Islamic Azad University, Bandar Abbas, Iran

ABSTRACT
Adoption discussion is one of sensitive issues in societies, because the issue of orphaned children as well as children with bad guardians is a comprehensive problem, which exists in every society. Adoption was present throughout history with various purposes. A group adopted a child as their own child without any consanguinity and relative-in-law relationships. This credit and assumption brought families without children, and children without parents together. Orphans Protection Law was passed in 1974 and according to the conditions and provisions mentioned in this Act, orphaned children were given a couple without children. The dominant general atmosphere on the law, due to the fear of being charged with a violation of legal provisions, included a brevity and ambiguity. So that in 17 Articles in 1974 and 28 Articles of Support Bill in 2013, without addressing the shortcomings of issues, such as Mahramiat and lack of establishment of inheritance, Orphans Protection Law ended its job. Therefore, in the following discussions, we analyze Mahramiat and marriage with adopted child.

Keywords: Iran's Laws, Adopted Child, Guardian, Marriage.

INTRODUCTION
Orphans Protection Law has generally been silent regard to the issue of marriage reverence in the relationship between the adopted child and the members of the adoptive family (guardian) and has not objected it. This silence has caused the proposal of different opinions regard to the issue of marriage reverence.

Some have commented this silence instead of expression as negative opinion, since extending the effects, resulted from lineage, to "guardian" is contrary to the principle and is known as an exceptional in its nature1.

To confirm this viewpoint, we can refer to Article 11 of the constitution, which states: "the duties and responsibilities of the guardian and the adopted child in terms of taking care, training, support and respect are the same as the rights and

* Corresponding Author

duties of children and parents". That is to say, what have been likened to the relationship between the children and parents by the law is just taking care, training, support and respect and nothing else. Therefore, the legislature believes that this is not the case in relation to other effects.

In contrast, others have focused on the spirit and purpose of the law. They consider the purpose of establishing an atmosphere like a normal family inconsistent with the permission of onset of sexual desire. Thus, although it is not mentioned in the law, at least in the relationship between the child and the guardian, the existence of reverence is maintained.

The opinion differences are rooted in the dual approach of the legislator: On the one hand the legislator has called the law "adoption" and with emphasis on the material interests of the child, as one of the objectives, it brings guardianship to the minds. Surely the guardianship cannot be expected to create Mahramiat. On the other hand, the legislator did not adhere to the goal and in the effects determination position, he exceeds the limits of the guardianship institution and orders to insert the guardian last name on the birth certificate of the child (Article 14). Therefore, the child is fostered as the guardians' true child, at their home (Article 11). The most important of all is that the legislator considers them as legal and virtual parents.

As a result of this dual approach, there is doubt in the position of issue announcement. This has resulted in legislative silence. Nonetheless, it seems that reverence extending must be preferred. In the position of conflict between the name and spirit of the law, the latter must be chosen. In particular, the choice of this name, and also including some of Articles, rather than being affected by pre-determined goals and expressing the true intention of the legislator, are to maintain the appearance and the prevention of legal problems.

Even if there was exceptional, lineage effects extending is considered as the principle. It must be admitted that the marriage reverence is necessary for the implementation of the proposed effects. How can we imagine the marriage of those that the identity of one of whom (guardian) is inserted in the birth certificate of the other one (adopted person) in the parent column? How can the marriage between persons, the identity of whom have been registered as a couple's children (Article 14), be issued? Isn't the child's birth certificate issuance by the last name of the spouse an irony of this fact that the law knows her/him as the child of the family? At least it is impossible to register their marriage.

It should also be noted that the provisions of Article 11, in analogy of the guardian and the child's rights and duties with the rights and duties of parents and child, simply in terms of taking care, training, support and respect, are not conceptually incompatible with creating marriage reverence. Because Mahramiat is not in the category of the rights and duties. As a result, the mentioned Article is
apart from it. In other words, the Article is not in the position of expression. Therefore the silence is not the silence in the position of expression. These facts have caused even believers in lack of reverence propose the prohibition of marriage in another format, without mentioning the name of "Mahramiat". An approach whose effects can be observed everywhere in the Law. Thus, the expedient necessitates that the legislature adopt a solution based upon banning the marriage, or the precedent solve problem with extended commentary on the law.

Orphaned Children and Teenagers Protection Law has innovated a new bill. Article 27 of the Act provides that:

"The marriage with her/his adopted child or adolescent, or someone who has already been under her/his guardianship, and its record is subject to the permission of the family court, or obtaining the experts opinion of the organization".

Therefore, the status of the marriage between the guardian and the person under guardianship is made similar to the status of the marriage of Iranian women and foreign national men.

In this context, Article 1060 of the Civil Code states:

"The marriage of Iranian women and foreign national men, in cases where there is no legal impediment, requires special permission from the government".

However, this innovation, contrary to what seems to be, is sometimes backward and in negative direction of the Mahramiat relationship between adopted person and the guardians. Regardless of interpreting the legal sanction of the court permission as the lack of marriage influence, or simply the refusal of its registration. The possibility of the above mentioned persons' marriage, even under certain circumstances and subject to expedience indicated by the court, shows the lack of Mahramiat identification among them. This is incompatible with the goal of adoption (guardianship), i.e. creating an environment similar to the natural family and the source of sexual perspective dominance on the atmosphere of individuals relationship.

So, the bill has denied the assumption of the reverence that can be inferred from the legislature's silence (in Orphans Protection Law), with its explicit.

First Speech: Adoption in the New Law on Family Support

The first systematic and documented law for Adoption and Protection of Orphans was approved by the National Assembly in 1974. The Law had investigated the guardianship and custody of children under age 12 without parents by families with no children. The 39-year Law is the only law in Iran, which determines the criteria related to adopted child. Iran's Welfare Organization, due to the high number of orphans decided to eliminate the flaws in the existing law, including development of adoption inclusion of orphans. The law has passed many ups and downs. In fact, it
Paragraph I: Review on Strengths and Weaknesses
As it was said, new legislation has been developed in order to overcome the shortcomings of the previous law. Despite the criticisms, we should know that it also has many strengths. Some of the strengths include: in the former Act, with respect to the population of orphaned and bad guardian children, only 15% of children were included in the Adoption Act. Because according to this law, only those children can be adopted that lack parents and grandfather. The huge number of children that were under the care in Welfare was not only the children with this condition, but also those who had guardians unable to hold and train them appropriately. Therefore, the need for new legislation that makes more children under the Adoption was felt. In fact, the new law has paid attention to this subject on the basis of Article 10 and Clause 2 of Article 9 of the bill. Consequently, every child deprived of parental care can be covered by this Law (Adoption). In this law, the conditions of adopting a child have become easier and simpler. Also virgins, if eligible, in accordance with Article 5, Section 3 of this Act, can have a child under their own legal guardianship. Therefore, in this law, firstly the children who are under the law, are much wider than before. In fact, a heavy financial burden of the government has been relieved. It seems that it has strengthen the foundation of families who cannot have children. In fact, with this strategy that couples who cannot have children, can adopt children, the conflicts due to lack of child are prevented.

Paragraph II: Objections to the Act
Two important objections are taken from this Act. Articles 22 and 27: The first objection is that the Act allows the adopted person's marriage with parent, although it is bound to the court opinion (Article 27). The existence of such an Act and the possibility of such a marriage will lead to many negative consequences to adoption agency. The legislator did not pay enough attention to this matter. In addition, according to Article 22 the adoption issue is inserted in the child's birth certificate.
Article 22 states: "In description section of the couples ID card the stepchild’s first and last name as well as her/his adoption will be inserted". This means that the adoption of the child is publicized and everyone will be aware of it. However, in both mentioned laws, some reasons are stated for its existence. For example, in Article 22, the child’s interests protection and preventing marriage with Maharem are mentioned as the reasons for Reformation. Nevertheless, there were other ways to achieve this goal and this may undermine the child's identity and damage to her/him, of course, will be damage to adoption agency⁹.

Second Speech: Reasonable Solution to Create Mahramiat between Parent and child
Mahramiat and permanent privacy between the child and parent is possible typically through Redhai Mahramiat (breastfeeding). Also another point is that Mahramiat contraction is possible through obtaining specific conditions. For example, if the adopted child is a girl, for her Mahramiat to her adoptive father, she can be married temporarily with her adoptive father's father shortly, in order to make her as the stepmother of the father. Thus she will be Mahram to him, his brothers, his nephews and niece, forever⁶.
Is there any solution if the adoptive father's father is dead?
Some jurisprudences, in case of death of the adoptive father's father, have recommended the temporary marriage of the adoptive father and adopted daughter, with the condition of no relation. The adopted son has also the same condition³.

CONCLUSION
The possibility of adopted child marriage with parent was silent in Act of 1974. Adoption process has become well matured in Iran society and adopted children lived with their parents without any lineage relationship. They were accepted as part and descendants of the family. After the development of the new law, that is Orphans Protection Law in 2013, in accordance with Article 27 of the Law, the adopted child marriage with parent was raised on public opinion. The main reason for the possibility of such marriage is derived from Jurisprudence. In this way that the birth is a legal way to prove lineage, nothing else. So there is no Mahramiat between the child and parent. Finally, when there is no Mahramiat, there is a possibility of marriage.
Because adoption is a quite legal and contractual issue. The Law was generally silent regard to marriage, and Orphans Protection Law regard to marriage reverence between a person under guardianship and family members (guardians) and they were not objected to it. This silence has caused the proposal of many different opinions and has created a campaign of pros and cons. The cons point to Article 11 of this Law that states: "the duties and responsibilities of the guardian and the
adopted child are the same as the rights and duties of children and parents". Although the law has not mentioned the Mahramiat between the child and parent, when an atmosphere like the person’s natural family is formed, the libido permission (adopted child marriage with parent) should not be given to the family. Consequently, a firm family that takes the responsibility of mission in a great society, prevents the entrance of damaged people to the society. The law proposes a two-way relationship. On the one hand it gives a child to a family that needs childish tumult and concerns providing the benefit of the child as a primary goal, keeping in mind the guardianship. According to Article 11, the new law issues the insertion of the guardian last name on the child’s birth certificate as the child’s parents. Therefore, she/he is grown up in the family like a real child. Thus the law sees the guardians as the legal and virtual parents. On the other hand, it does not adhere to its target and destination. In accordance with Article 27, the same law issues the marriage of the adopted person who reached puberty with the guardians. The result of this dual approach is the uncertainty among families and pros and cons community. Opponents of this theory are in the higher position. They states that this issue must be taken into consideration as being contrary to the norm and creating psychological and cultural tension among the adoptive families. This marriage should not be seen only from a religious dimension, but the serious injuries that can be resulted from this marriage to the person, the family and adoption agency must be noticed. There are many legal issues that have been left unsaid and abeyance by the law, including retaliation, temporary marriage and so on. Therefore, this issue could be unsaid and this good action that indicates support for orphans would not be damaged. It is better, in changing stage of the existing laws, the ultimate goals be considered and the appearance paves the way for the content. However, the main step to be taken is in drafting the laws and changing existing regulations. Legitimacy must be measured based on religious principles. Therefore, being present at the current society, we should believe the changes in time and location, and enact the law based on the requirements of the day. The society waits for this paragraph or a better replacement for it. The Vice President of the Women’s Affairs who is responsible in this regard, has remained silent in removing this Article. Now that I am writing this thesis, one year of this Act is celebrating. The Law that instead of building a secure home for orphaned children, has given legal permission to sexual violence against them. The Legislation that could be a factor for disturbing psychological safety of these children and families who accepted their guardianship. Therefore, Article 27 must be deleted from the Law.

REFERENCES


