

## Chapter Nine

### Parentage, Legitimacy and Acknowledgement (IQRAR)

#### 1. Islamic Concept:

Legitimacy of child depends basically on marriage, *shahih* or *Fasid*. Islam recognizes the legitimacy of a child born in wedlock only, and the child is illegitimate if born outside of wedlock. Islamic law treats extramarital sexual connection as fornication which is subject to *hadd* or specific punishment. Legitimacy or illegitimacy of a child is, therefore, connected with the legal status of the matrimonial relationship, if any, between the person who has begotten it and the woman who has given birth.

#### 2. Parentage:

Parentage is the relation of parents to the child. Parentage is the combination of paternity and maternity. Paternity is the legal relation between the father and the child. Maternity is the legal relation between the mother and the child.<sup>36</sup> Parentage is established either by birth during regular or irregular marriage or by acknowledgement in certain cases. The determination of paternity and maternity is essential for the purpose of guardianship, maintenance and inheritance.

#### 3. Determination of Maternity:

Maternity is the natural relationship between the mother and the child. The woman who gives birth to the child is its mother. Under the Sunni law, the birth of a child to a woman establishes its maternity with her irrespective of the fact whether the child is born in or out of wedlock, i.e. whether she was lawfully married or unmarried, and even if the child is the result of fornication or *Zina*. So the rules of inheritance, maintenance and guardianship are applicable for the child and its mother only.<sup>37</sup> But *shiya* law differs from this view and according to it, mere birth is not enough to establish maternity. A child born of adultery, incest is an illegitimate child and is devoid of maternity in the woman who has given birth to it. So under *shiya* law, "a child of fornication owns no descent to

<sup>36</sup> R.K Wilson, Anglo Muhammadan Law; P.165

<sup>37</sup> D.F Mulla, Principles of Mahomedan Law, P. 277.

either of its parents. Thus neither the man who has unlawfully begotten, nor the woman who has unlawfully borne the child, nor any of their relations can inherit from such child; nor has the child any title to inheritance from them."<sup>1</sup>

Both *sunni* and *shiya* law give no recognition to paternity if the marriage is void or *batil*. An issue of a *batil* marriage acquires neither paternity nor maternity because *batil* marriage is no marriage. *Sunni* law accords maternity to an illegitimate child but not paternity.

#### 4. Legitimacy of Paternity:

Legitimacy is a status which results from certain facts. But legitimations is a proceeding which creates a status which did not exist before. In the proper sense, there is no legitimation under Islamic law.<sup>2</sup> The paternity of a child, as stated above, is only established by marriage whether *shahih* or *Fasid* between the parents of the child. In Islamic law, there is no recognized mode to legitimize an illegitimate child. Legitimacy is established by acknowledgement. When paternity is established, legitimacy is also established. The paternity of a child cannot be established by a Muslim by adopting him who is not his actual child. Adoption is unknown to Islamic law, because adoption has been clearly disapproved by the holy *Quran* as a mode of establishing paternity and it has also been disapproved in *Mir Zaman V. Mir Alam* case.<sup>3</sup> The *Quranic* provisions regarding the disapproval of the adopted child are follows:

"Allah not made for any man

two hearts his inside ;nor

has He made your wives whom you back

away from your real mothers;

nor has he made your adopted sons

your real sons. That is what you speak

with your mouth, but Allah speaks the

truth, and He guides to the path.

Call them by their fathers' name;

that is more just in the sight

of Allah; but if you know not their

fathers, then they are your brothers

in religion and your clients"<sup>4</sup>

<sup>1</sup> Ayed Ameer Ali, Muhammadan Law, Vo.2, P.212.

<sup>2</sup> Habibur Rahman V. Altaf Ali (1921) 481A.. 114.

<sup>3</sup> AIR, (1936) Pesh. 108.

<sup>4</sup> Al-Quran, 33: 4-5.

**5. Presumption of Legitimacy:**

Islamic law prescribes different rules regarding presumption of legitimacy or illegitimacy of a child which are as follows:<sup>5</sup>

- i) A child born within six months of the marriage is illegitimate unless the father asserts that the child is his own and is not the result of fornication; the shortest period of gestation, according to all the schools, is six months;
- 2) A child born after six months of the marriage is legitimate unless the father disclaims it; the holy *Quran* fixed this period of gestation (46:15);
- 3) A child born within ten lunar months of the termination of marriage is legitimate (*Shiya* law); within two lunar years is legitimate (*Hanafi* law) and within four lunar years is legitimate (*Shafi* and *Maliki* Law), provided the mother having not remarried.

According to *Sunni* school, therefore, where a child born to a woman within the period as stated above, i.e. Six months or more from the date of marriage, and within ten months after dissolution of the marriage either by divorce or death of the husband, such child is legitimate without an express acknowledgement by the father. A simple denial of paternity by the husband cannot deprive the child from the right of status of legitimacy.<sup>6</sup>

**6. Islamic Law on paternity and corresponding statutory law:**

Section 112 of the Evidence Act, as enforced in Bangladesh, states that a child born during the continuance of a valid marriage, or within 280 days after its dissolution, the mother remaining unmarried, is conclusively presumed to be legitimate, unless there was no access when he could have been begotten. In the case of *Muhammad Alladad Khan V Muhammad Ismail Khan*,<sup>7</sup> Justice Mahmood of Allahabad High Court, left the question open whether section 112 of the Act supersedes the Islamic law, but since that time the trend of modern decisions regards it

<sup>5</sup> A.A. Fyzee, *Outlines of Muhammadan Law*, P. 190.

<sup>6</sup> Ameer Ali, *Muhammadan Law* VOL. 2, P. 192.

<sup>7</sup> (1888) ILR 10 All. 289.

as purely a question of the evidence governed by section 112, Evidence Act, even in respect of Islamic Law. But in case of *fasid* or irregular marriage, there is every possibility of confusion. It is found from study that there are some contrasts between section 112 of the Evidence Act and Islamic Law on legitimacy, which are as follows:<sup>8</sup>

- (i) Under section 112 a child born even a day after marriage is legitimate, unless the parents had no access to each other at any time at which it could have been begotten. But Islamic Law, in this case, does not treat this child legitimate.
- (ii) A child born after six months from the date of marriage, but within 280 days of dissolution of the marriage is legitimate under both systems subject to *lian* or imprecation in case of Islamic Law but under Evidence Act, Proof of non-access is a precondition.
- (iii) According to Hanafi law, a child born between 280 days and 2 years about the legitimation of the marriage is legitimate subject to *lian*. But Evidence Act, (Section 114) provides that " the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events."

Statutory provisions are more elastic and liberal than Islamic law in the field of legitimacy. Evidence Act empowers the Court to exercise its discretion under different circumstances.

**7. Acknowledgement of Paternity:**

Acknowledgement (*iqrar*) of paternity means the statement of claim or assertion of a person that another person whether male or female is his own natural and legitimate child.<sup>9</sup> The establishment of paternity of a child can be made by lawful acknowledgement of the father.

Islamic law recognizes the only form of filiation or paternity is the one which is created by *iqrar* or acknowledgement.<sup>10</sup> Under the Sunni Law, the father alone has the right to establish the relation of

<sup>8</sup> D.F Mulla, *Principles of Mahomedan Law*, P. 278.

<sup>9</sup> Aziz Ahmad, *Islamic Law in theory and Practice*, P. 252.

<sup>10</sup> Nawab Muhammad Azmat Ali Khan V. Lalli Begum (1881) 8 All. 234.

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sonship to the total exclusion of the mother or any other relative. The Calcutta High Court in a case *Fazilatinnissa v. Kamrunisa*<sup>11</sup> laid down the principle that acknowledgement is an integral position of the Muslim family law and the conditions to be determined for its effectiveness with reference to Islamic jurisprudence and not by Evidence Act.

Acknowledgement may be either express or implied. A formal declaration as necessary for an express acknowledgement. But implied acknowledgement is presumed from the fact that a person has openly and habitually treated another as his own legitimate child.<sup>12</sup> Acknowledgement of paternity takes place in Islamic Law in the following manners:

- (i) Where the paternity of a child is not known or established beyond result.
- (ii) It is not proved that the claimant is the offspring of fornication. and
- (iii) The circumstances are such that they do not refute the presumption of paternity and as such an acknowledgement of paternity by the father is possible and effective.<sup>13</sup>

### 8. Conditions of valid acknowledgement:

In order to render the acknowledgement valid and legally effective, the following conditions must be fulfilled:<sup>14</sup>

#### (i) Unknown Paternity:

The question of acknowledgement of paternity arises when the paternity of the child is uncertain. It is also necessary that marriage between the parents of the acknowledged child must neither be proved nor disproved, but it should be in a state of not proud. An example of a leading case on this subject is *Muhammad Alladad Khan V. Muhammad Ismail Khan Case*.<sup>15</sup> This principle is, therefore, applicable only to cases of uncertainly as to legitimacy, but not applicable if it is already established or if already not proved.

<sup>11</sup> (1904) 9 Cal. W.N. 352.

<sup>12</sup> Nawab Muhammad Azmat Ali Khan v. Lalli Begum (1881) 8 All. 234.

<sup>13</sup> Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 192.

<sup>14</sup> Syed Khalid Rashid, Muslim Law, P. 145.

<sup>15</sup> (1888), 10 All. 289.

## (ii) An Acknowledged person must not be the offspring of fornication or Zina.<sup>16</sup>

A child is the offspring of fornication if he borns either without marriage or of a mother who was married wife of another, or of a void marriage.

## (iii) Difference of age between the acknowledger and the acknowledged:

The age of the acknowledger should exceed the age of the acknowledged at least by twelve and half years; because a boy can attain the age of puberty at the age of twelve and maximum period of gestation is six months. So the acknowledger must be serious to the child (acknowledged) in respect of age by twelve and half years.

## (iv) Acknowledged person must not be the child of another person.

A child of another man cannot be acknowledged as one's own child.<sup>17</sup> A child must not have two legal fathers, for this will lead to legal and social complication.

## (v) Legal marriage must be possible between the father and the mother of the acknowledged.

The father and the mother of the acknowledged child must not be within the prohibited degree, consanguinity or affinity or fosterage. This type of marriage is void *ab initio*. A full brother, for example, cannot acknowledge the child of his full sister as his own son or daughter. The Quran has imposed this prohibition and as such no one should violate it.

## (vi) Bonafied intention to confer status of legitimacy.

The Privy Council in *Habibur Rahman V. Altaf Ali*<sup>18</sup> case observed, "The acknowledgement must be merely of sonship, but must be made in such a way that it shows that the acknowledged meant to accept the other not only as his son, but as his legitimate son". So a mere casual acknowledgement of the fact of paternity, without intention, cannot confer the status of legitimacy and it will be of no effect.<sup>19</sup> So

<sup>16</sup> Habibur Rahman v. Altaf Ali, (1921) 48 I.A. 114.

<sup>17</sup> Muhammad Alladal Khan V. Muhammad Ismail Khan, (1888), ILR, 10 All. 289.

<sup>18</sup> (1921) 48 IA 114.

<sup>19</sup> Abdur Razzak v Agha Muhammad (1893) 21 IA 56: 21 Cal. 660.

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there must be an express or *bonafide* intention to do so. The general rule is that acknowledging a child as son indicates accepting him as legitimate son.

(vii) A person whose mother had been divorced by the acknowledger and the legal bar to the marriage had not been removed by intervening marriage.

(viii) Rebuttal of acknowledgement:

The presumption of paternity by acknowledgement may be rebutted under the following situations—<sup>20</sup>

- (a) Disclaimer on the part of the person acknowledged, he or she being of an age to understand the transaction; or
- (b) Such proximity of age or seniority of the acknowledged, as would render the alleged relationship physically impossible, i.e. the acknowledger must be senior to the acknowledged by at least twelve and a half years; or
- (c) Proof that the acknowledged is in fact the child of some other person; or
- (d) By proof that the mother of the acknowledged could possibly have been the lawful wife of the acknowledger at any time when the acknowledged could have been begotten.

The Court, however, shall take into consideration the above conditions at the time of delivery of judgment regarding acknowledgement of paternity of a child. But the enactment of the Muslim Marriages and Divorces (Registration) Act, 1974 and the registration of date of birth have made the problem easy in Bangladesh. If the provisions of the Act are strictly followed, the questions of determination of paternity and its acknowledgement will hardly arise.

(ix) Legal capacity of an acknowledger:

Under Islamic Law an acknowledgement of paternity takes place only when the person acknowledging possesses the legal capacity to enter into a valid contract. A Muslim, therefore, who has attained puberty, and who is of sound mind and also free from bondage is entitled to acknowledge a child as his own issue. An acknowledgement made by

<sup>20</sup> R.K. Wilson, Anglo Muhammadan Law, P. 165.

a minor, or by a person who is in duress, or who is *non compas mentis*, is absolutely invalid.<sup>21</sup> However, an insane person may be acknowledged without regard to his or her opinion and similar is the case with a minor.

9. Legal consequences of acknowledgement:

Once a child has been acknowledged, it will have legal effects upon the acknowledged (child), parents, wife, status of marriage, rights of inheritance etc.

The jurists have identified the following legal effects of acknowledgement:—<sup>22</sup>

- (i) Acknowledgement of child means the acknowledgement of the wife (Mother of the child).
- (ii) It shall be presumed that there was a valid marriage between the father (acknowledger) and the mother of the child (acknowledged)
- (iii) Acknowledgement creates the mutual right of inheritance among the children, parents and wife.
- (iv) The acknowledger cannot revoke acknowledgement once made.
- (v) The acknowledged, under certain circumstance, can disown the acknowledgement as stated above.

(10) Some Leading cases on acknowledgement of paternity:

There is a voluminous case law on acknowledgement in Indian subcontinent, of which only two leading cases are cited here in order to examine whether the law as interpreted and applied by the Court is in accordance with the *shariya* or there has been any change.<sup>23</sup>

(a) *Muhammad Allah Dad Khan V Muhammad Ismail Khan*<sup>24</sup>

This is a leading case on legitimacy and acknowledgement. The parties were Sunni Muslims. This suit was brought by Muhammad Allah Dad Khan and Musammat Hakim-un-Nissa (to whom Muhammad Allah

<sup>21</sup> Ameer Ali, Muhammadan Law, Vol. 2, PP. 220-221.

<sup>22</sup> Syed Khalid Rashid, Muslims Law, P. 147.

<sup>23</sup> Cited from Asaf A Fyzee, Cases in the Muhammadan Law of India and Pakistan P.199-200, 220-221, 248-253.

<sup>24</sup> (1888) 10 All. 289 (Full Bench)

Dad Khan had sold his rights and interests in a portion of the property in dispute) against Muhammad Ismail Khan and his three sisters, and three other persons, for a declaration of right to and possession of two shares in certain villages left by Ghulam Ghaus Khan, father of the first four defendants, upon the ground by the first-mentioned plaintiff was the eldest son of Ghulam Ghaus Khan and brother of the defendants, was therefore entitled to shares by the right of succession. The defense of the first four defendants was to the effect that Allah Dad Khan was only the step-son of Ghulam Ghaus Khan, having been born prior to the marriage of his mother, Moti Begam with Ghulam Ghaus Khan. The case of the plaintiffs was that even if they failed to prove that Allah Dad Khan was the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had, on various occasions, acknowledged him to be his son, and therefore, under the Muslim Law Allah Dad Khan was entitled to inherit as the legitimate son of Ghulam Ghaus Khan. They filed certain letters and other documents in which the deceased expressly referred to Allah Dad Khan as his son; and contended that these references amounted to acknowledgements of him as a son by the deceased, which, under the Muslim Law, give him the status of a legitimate son.

The defendants 5, 6, 7 held a lease parts of the property in suit from the daughters of Ghulam Ghaus Khan. They filed a written statement of defense in the following terms:

'That defendants have taken the lease of the villages from the actual owners, and they have reason to believe that the plaintiff is not the legitimate son of Ghulam Ghaus Khan. Defendants have, year after year, paid in good faith the lease money to the daughters of Ghulam Ghaus Khan, the owners of the property, from whom defendants have taken the lease. Defendants have been unnecessarily joined as parties to the suit.'

The question before Full Bench was whether the plaintiff Allah Dad was son of Ghulam Ghaus deceased or not. The fact of the case as follows:

- (i) that Moti Begum did not stand in any such position of relationship with Ghulam Ghaus as would render her marriage with him unlawful;
- (ii) that she is not proved to have been ever married to any person other than Ghulam Ghaus;
- (iii) that she was married to Ghulam Ghaus;
- (iv) that the exact date of her marriage with reference to the birth of the plaintiff Allah Dad is unascertainable for want of trustworthy evidence;
- (v) that she cohabited with Ghulam Ghaus for a considerable number of years and was treated by him as his lawful wife;
- (vi) that the plaintiff Allah Dad was acknowledged and treated by Ghulam Ghaus as his son;
- (vii) that in such acknowledgement or treatment there was no express specification as to whether Allah Dad was a step-son, a legitimate son or an illegitimate son of Ghulam Ghaus;
- (viii) that similar acknowledgement or treatment was accorded to him by the defendant Ismail and the other children of Ghulam Ghaus by Moti Begum, and indeed by the rest of the family.

It was a decision of a Full Bench (Allahabad High Court), which was consisted of Sir John Edge, C.J., Straight and Mahmood, JJ. Straight, J., delivered the leading judgment and Sir John Edge, C.J., agreed with him. But Mahmood J., delivered a separate judgment. However, it was held that Allah Dad was the legitimate son and heir of Ghulam Ghaus Khan.

**(b) *Habibur Rahman V. Altaf Ali*<sup>25</sup>**

This is an important case on legitimacy. The plaintiff, Habibur Rahman, instituted a suit in the Bogra District Court against Altaf Ali and others (respondents) claiming himself to be the sole heir of Nawab Sobhan. It was stated in the plaint that the plaintiff was the son of the Nawab by his second wife, one Mozelle Cohen, a Jewess converted to

<sup>25</sup> (1921) 48 I.A. 114.

Islam. Altaf Ali was the daughter's son of the deceased Nawab. Habibur Rahman affirmed that Mozelle was married to the Nawab and the Nawab had acknowledged him as his son on many occasions.

In this case the trial judge (Greaves, J.) raised three issues -

- (i) Was Mozelle Cohen married to Shobhan?
- (ii) If so, was Habibur Rahman the legitimate son of sobhan and Mozelle Cohen?
- (iii) Was there any acknowledgement as pleaded, if so, what is its legal effect?

The judge found upon the first issue that Mozelle Cohen was not married to the deceased Nawab Abdus Sobhan, the second issue that Habibur Rahman was not their legitimate son, and on the third issue, he found that though the Nawab had not acknowledged Habibur Rahman as a son generally, he had done so on two occasions, but learned Judge considered that those acknowledgements were not made with any intention of conferring legitimacy upon the plaintiff. He therefore dismissed the suit upon those finding on May 14, 1917.

Habibur Rahman then made an appeal in the Calcutta High Court. Sanderson C. J. and Woodroffe and Chitty J.J. heard the appeal. The Chief Justice and Chitty J. in separate judgments, each found that the alleged marriage was disproved and since the plaintiff could not be rendered legitimate by any acknowledgement, the suit failed. Woodroffe J. held that no acknowledgement made with the intention of conferring legitimacy had been proved and so he agreed that the appeal could be dismissed.

The appeal, therefore, was dismissed on August 1, 1918 upholding the judgment of the lower Court i.e. Bogra District Court.

The plaintiff, Habibur Rahman, appealed (Appeal No. 54 of 1920) to the Privy Council. The defense of the plaintiff pleaded that though there was no proof of marriage between the Nawab Sobhan and Mozelle Cohen but still the plaintiff was the natural son of the Nawab who during his life time acknowledged Habibur Rahman as his son by

talk and conduct and therefore he may be regarded as his legitimate son and thus he can claim to be heir of the Nawab.

In defense of defendant, Altaf Ali, it was pleaded that though Habibur Rahman is the natural son of the Nawab, but in the absence of any valid or *Fasid* marriage between the Nawab and Mozelle Cohen, he can not be acknowledged as legitimate son of Nawab Abdus Shobhan.

Justice Lord Dunedin of Privy Council assumed that a child could only be acknowledged through lawful marriage. In support of their finding, their Lordships stated, "By the Muhammadan Law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *Zina*, that is illicit connection and can not be legitimate." Their Lordships accepted the finding of the lower Courts that Nawab did not marry Mozelle Cohen and it was held that the acknowledgement did not establish the paternity of the plaintiff with the Nawab. Their Lordship, therefore, advised His Majesty to dismiss the appeal with costs.