

## **STUDY MATERIAL**

### **LL.M SEMESTER II**

**SUBJECT CODE – LM 112**

**SUBJECT NAME – MUSLIM LAW  
RELATING TO STATUS**

**SUBJECT TEACHER – MS. NASREEN AZAUNNISA**

**TOPIC NO – 7 LEGITIMACY AND PARENTAGE**

### **1.Introduction**

Under Muslim law that where the paternity of child is established, the legitimacy is also established<sup>1</sup>.

Maternity is the legal relation between the mother and the child. Paternity is the legal relation between the child and the father. Parentage is the legal relation between the parents and the child.

Under Sunni Law, maternity is establish with the birth of the child , irrespective of the fact whether the child was born out of a lawful wedlock or is result of *zina*. Under Shia Law, to establish maternity , lawful marriage of the father and the mother is to be established<sup>2</sup>.

Paternity is established if the child is born out of a lawful marriage between the mother of the child and the father the marriage may be valid, or even irregular but must not be void<sup>3</sup>.

### **2.Legitimacy-**

Under Muslim Law it is necessary that there exists a valid marriage between the father and the mother of the child at the time when the child has been conceived. The most important thing in the determination of the legitimacy of a child is the marriage between the father and the mother

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<sup>1</sup> Aqil Ahmed, Mohammedan Law 119 (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

<sup>2</sup> Ibid, p.119.

<sup>3</sup> Ibid, p.200.

of the child. When a child is born out of a lawful marriage, the child is said to be a legitimate child of the married couple<sup>4</sup>. The Privy Council in *Habibur Rahman Chowdhary v Altaf Ali Chowdhari*<sup>5</sup>, held that in Muslim Law, a son to be legitimate must be the offspring of the man and his wife, or the man and his slave and any other offspring is the child begotten through *zina*, therefore, are not legitimate.

Presumption of legitimacy and period of gestation-

The rules regarding legitimacy are as follows<sup>6</sup>:

- (a) A child born within less than six months after the marriage is an illegitimate child. But if the father acknowledges it, the child becomes legitimate.
- (b) A child born after six months of marriage is considered to be a legitimate child. But if the father disowns him/ her, the child becomes illegitimate child.
- (c) Under Hanafi Law, if a child is born within two lunar years after the dissolution of marriage, the child is considered legitimate. Under Shia Law, if a child is born within ten lunar months after the dissolution of marriage, the child is considered legitimate. And under Shafei and Maliki Laws, if a child is born within four lunar years after the dissolution of marriage, the child is considered legitimate. Otherwise the child will be considered illegitimate.

### 3. Legitimacy and Legitimation-

Legitimacy and legitimation are two different concepts. Legitimacy is a status and it generates from certain facts. Whereas legitimation is a process which creates a status, a status which did not exist before. The concept of legitimation is unknown in Islamic Law<sup>7</sup>.

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<sup>4</sup> Aqil Ahmed, *Mohammedan Law 201* (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

<sup>5</sup> AIR 1922 PC 159.

<sup>6</sup> S.M. Hasan, "*Muslim Law of Legitimacy and Section 112 of the Indian Evidence Act*", available at: <http://14.139.60.114:8080/jspui/bitstream/123456789/736/31/Muslim%20Law%20of%20Legitimacy%20and%20Section%20112%20of%20the%20Indian%20Evidence%20Act.pdf> (last visited on April 7, 2020).

<sup>7</sup> Ibid.

Where the legitimacy of a child is ambiguous, the acknowledgement by the father is needed to confer the status of legitimacy on the child. But if it is proved that the child is illegitimate, even the acknowledgement of the father cannot legitimize the child.

In *Habibur Rahman Chowdhury v Altaf Ali Chowdhury*<sup>8</sup>, the Privy Council held that Habibur Rahman failed to prove that the deceased Nawab acknowledged him as his son or that the deceased Nawab married his mother Mozelle Cohen, so he cannot be regarded as the legitimate son of the Nawab, and as a result cannot claim inheritance in the property of the Nawab.

#### **4. Acknowledgement of paternity**

According to Mulla, “Where the paternity of a child that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, Muslim Law recognizes ‘acknowledgement’ as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for the purposes of inheritance.”

Under Muslim Law acknowledgement is declaration of legitimacy and not a legitimation. Muslim Law does not recognize the institution of legitimation as well as the institution of adoption.

Where the fact of the marriage union or the exact time of the occurrence of the marriage union is in doubt, or is not clear with reference to the legitimacy of the acknowledged child is not proved, in such cases the doctrine of acknowledgement is applied<sup>9</sup>. In *Mohammad Khan v Ali Khan*<sup>10</sup>, the Madras High Court observed that the doctrine of acknowledgement cannot be invoked in cases where the marriage between the parents of the child was not possible because of adulterous relationship. This doctrine can only be applied in cases where the exact time of marriage cannot be proved or the fact that marriage has taken place cannot be proved. The doctrine of acknowledgement can only be applied where presumption of lawful marriage can be drawn.

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<sup>8</sup> AIR 1922 PC 159.

<sup>9</sup> Aqil Ahmed, *Mohammedan Law* 205 (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

<sup>10</sup> AIR 1981 Mad. 209.

Therefore, assumption of lawful marriage is a condition precedent for the application of the doctrine of acknowledgement.

In *Muhammad Allahabad Khan v Muhammad Ismail*<sup>11</sup>, the father of Allahabad Khan died leaving behind two sons and three daughters. On the death of the father Allahabad Khan, the eldest son of the deceased, filed a suit in the court of law, stating that fact that he being the eldest of the sons, is entitled to inherit 2/7 portion of the property of his father. He contended that he was the step-son of his father, who was born before the marriage of his father and mother. He had been acknowledged by his father on several occasions. As proofs he presented to the court a number of letters sent from the father to him which proves that he had acknowledged him as his son. It was held by the Court that the plaintiff had established himself as the son of the deceased and is entitled to the property of the deceased.

### **5. Express or implied acknowledgement-**

Acknowledgement under Muslim Law can be expressed or implied. If a person habitually treats and recognizes another person as his child, it is called express acknowledgement. In cases of express acknowledgement by the father proofs need not be provided by the child, because such treatment of the child by the father gives a valid presumption of legitimacy<sup>12</sup>. This was observed in *Muhammad Azmat v Lalli Begum* (1831) Cal. When a father acknowledges another as his child in front of only one person and when a dispute arises as to the status of the child after the death of the father, the statement of the person before whom the fact was disclosed is accepted in the Court if Law to prove the father's acknowledgement of the child's legitimacy.

The father has to acknowledge the child, be it a son or a daughter. The acknowledgement must be made intentionally knowing the fact that it will have serious consequences with regard to inheritance of property. This was held by the Privy Council in *Muhammad Ali v Muhammad Ibrahim*<sup>13</sup>.

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<sup>11</sup> ILR (1987) 10 All. 289.

<sup>12</sup> Aqil Ahmed, Mohammedan Law 207 (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

<sup>13</sup> AIR 1929 PC 135

## **6. Consequences of Acknowledgement-**

The consequences of acknowledgement is two-fold (i) in respect of the acknowledged son, (ii) in respect of the mother of the acknowledged son.

When a child is acknowledged by his father, a valid and legal relationship of father and son arises. And the child is entitled to inherit the property of the father and vice versa.

When the child of a woman is acknowledged by the father, a legal and valid relationship arises between the father and the mother of the acknowledged child. The mother is also acknowledged as the lawful wife of the father of the child.

## **7. Conditions of valid acknowledgement-**

The following conditions must be fulfilled before there is a valid acknowledgement<sup>14</sup>:

- (i) The age of the parties- the age of the parties must be such that such a relationship of father-child is possible. According to Ballie, the age difference between the father and the acknowledged child must not be less than twelve and a half years.
- (ii) Child of another person- a man should not be allowed to acknowledge a child who belongs to another person.
- (iii) Confirmation by the child- If the person who is being acknowledged is an adult, it is a requirement of the law that the adult person should confirm it otherwise it will give space to other kinds of legal complication later on. If the child does not verify it, then it will require proof to prove the descent of the child.
- (iv) Intention to acknowledge- the person who is acknowledging must have a real intention to do it. He must have a real intention to legitimize the relationship between the child and him. The acknowledgement must be done by him knowing the fact that

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<sup>14</sup> Aqil Ahmed, Mohammedan Law 208 (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

- it will give rise to serious consequences especially in terms of inheritance. The acknowledgement must not be a casual one.
- (v) Child which is a result of *zina*- a child which is a result of *zina* cannot be acknowledged and subsequently legitimized.
  - (vi) Competent acknowledger- the person who is being acknowledged must have the capacity to consent. That is to say that he must be sane and adult.
  - (vii) Legal marriage possible- it is a condition precedent in acknowledgement that a legal marriage is possible between the parents of the child acknowledged. That is to say that there should not be present any bar to legal marriage between the father and the mother .

## **8. Section 112 of the Indian Evidence Act and Islamic Law-**

Section 112 of the Indian Evidence Act, 1872, says , “ the fact that any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of this man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.” So, according to the Indian Evidence Act, 1872, if a child is born within 280 days of the dissolution of a marriage the child will be deemed to be the legitimate child of that man.

There are certain differences between the Muslim Law and what Section 12 of the Indian Evidence act says. For conclusive presumption the period of gestation is 280 days after the dissolution of marriage.

The minimum and maximum limit of gestation fixed by Muslim Law has been criticized on the point that they are in contradiction of scientific knowledge of gestation and pregnancy.<sup>15</sup>

Comparison between Section 112 of the Indian evidence Act and the Islamic point of view on legitimation:

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<sup>15</sup> S. M. Hasan, “*Muslim Law of Legitimacy and Section 112 of the Indian Evidence Act*”, available at: <http://14.139.60.114:8080/jspui/bitstream/123456789/736/31/Muslim%20Law%20of%20Legitimacy%20and%20Section%20112%20of%20the%20Indian%20Evidence%20Act.pdf> (last visited on April 7,2020).

- (a) A child born after six months from the date of marriage union, but within 280 days of the termination of the marriage union is legitimate under both the system, subject to proof of non-access under the Indian Evidence Act.
- (b) Under the Indian Evidence Act, 1872, a child will be deemed to be legitimate even if it is born on the next day of the marriage. But if it is shown that the parents had no access to each other, such presumption will not be made.

There are certain contradictions between the Muslim law on legitimation and the Indian Evidence Act. Now, the question arises which will prevail, the Indian Evidence Act or the Muslim law? The jurists are divided on this point. Jurists like D.F. Mulla and Tyabji are of the views that the Indian Evidence act prevails upon the Muslim Law on this particular point<sup>16</sup>. But according to Ameer Ali, the Indian evidence Act embodies the English rule of Law and as a result it cannot be applied to Muslim Law<sup>17</sup>. The Allahabad High Court held in *Sibt Muhammad v Muhammad*<sup>18</sup>, that Section 112 of the Indian Evidence act supersedes the Muslim Law.

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<sup>16</sup> Aqil Ahmed, Mohammedan Law 203 (Central Law Agency, Allahabad, 23<sup>rd</sup> edn., 2009) (Revised by Prof. I. A. Khan).

<sup>17</sup> Ibid.