
Acknowledgement of Paternity under Muslim Law: Indian Perspective

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Abstract

Paternity should have to be insured to make free a child from the stigma of illegitimate. The child who is illegitimate in the eye of law, the society is also considering the same. Until the paternity has been established the child does not get legal father as well as legal identity. The biological father should have the right to acknowledge his own child. Acknowledgement means accepting the truth; in some cases paternity also need to be acknowledged. In the context of Mohammedan law some situations demands for acknowledgement regarding paternity. If the parents are not married then paternity needs to be legally recognized in order to identify the father and secure the father's rights. We need to change our view, we need to consider situations, and we need to understand the practical scenario than we can implement a decent law for the society.

Keywords: Illegitimate, Wedlock, Zina, Firash, Legitimare.

Introduction

The word paternity derived from a Latin word '*paternitas*' which used in the 'canon law to signify a kind of spiritual relationship,' it also means fatherhood. According to Black's Law Dictionary, paternity defines the identity of the father of a child both legally and biologically.

A child gets born with lots of blessings and happiness for the parents. Generally, if the Mother was married at the time the baby is born or ten-month period before the baby is born then the husband become the legal father of the child. However, if the parents are not married then paternity needs to be legally recognized in order to identify the father and secure the father's rights. Until the paternity has been established the child does not get legal father as well as legal identity. Moreover, till the father's identity has not been recognized the child is not become legitimate child. On the other hand, when the mother gets pregnant by one person but marries another person and she delivers the baby after marriage then the husband did not becomes father of

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the child automatically. That husband needs to acknowledge that child legally and after that he can become legal father. Additionally, who is the biological father of that child has no right to acknowledge that child under law. If the mother of the acknowledged child have not been the lawful wife of the acknowledger then that acknowledgement should be void. Then the child would be declared as *Walad Zina* (i.e. bastard), where paternity of a child is uncertain.

Acknowledgement means legally accepting someone, which creates some legal rights. When a man legally recognize any baby who did not biologically belong to that man, then it is called 'Acknowledgement of Paternity' under Mohammedan Law, this concept is also known as 'Adoption' under Hindu Law. This doctrine of 'Acknowledgement of Paternity' under Mohammedan Law applies only when there is uncertainty and paternity of the child has been proved from any other person, the child is not a result of any *Zina* (i.e. adultery, fornication, incest, or illicit relation) and the circumstance of his birth are such that he could be a legitimate child of his father.

The word legitimacy has been derived from the Latin term '*legitimare*' which means to make lawful.' Legitimacy refers to the status of a child who is born to parents who are legally married to each other. Under the Indian Evidence Act 1872, there is presumption in favour of legitimacy of a child 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. According to Mohammedan Law, to establish paternity three proofs are needed, such as marriage, acknowledgement and evidence, otherwise the child becomes illegitimate. Consequently, being an illegitimate child without any culpability; leads him to be a burden of the society. Thus, it should not happen to any child as it goes against the idea of natural justice.

This paper deals with the rights of the parents to acknowledgement of a child and various aspects relating to acknowledgement of paternity under the Muslim law. Over the time steps have been taken to improve the status of women and children but still there exist a significant difference. In this paper, there is focus on this issue especially under Muslim law with the help of cases.

Specifically, when a child have no identity of a father that child recognize as an illegitimate child. This paper will help to change the view of readers regarding this matter. The motive of this paper is to make people understand that, a child cannot be called as illegitimate child, maybe the way in which the child came into existence that can be illegitimate but the child did not illegitimate. In additionally, the biological father should have the right to acknowledge his child as his legitimate child.

This study has discussed in detail the concept of Legitimacy and Acknowledgement of paternity under Mohammedan Law. It has evaluated the

effect of paternity, necessity of paternity; ways to establish paternity and rights creates through paternity. The study signifies that, once a father acknowledges the paternity of a child, that child becomes legitimate irrespective of the fact that the child was born out of lawful wedlock. But the problem becomes more complicated where the father refuses to acknowledge the paternity of the child in his lifetime. Such a child will remain for all intent and purposes an illegitimate child. The concept of illegitimacy regarding a child should be eliminated from the law as well as from the society, to establishing a natural justice.

Provisions regarding legitimacy of a child under Mohammedan Law

According to Lord Dunedin, he points out in '*Habibur Rahman v. Altaf Ali*' case "Legitimation is a proceeding which creates a status which did not exist before. In proper sense there is no legitimation under Mohammedan Law."

Under the Mohammedan Law a child to be legitimate must be the offspring of a man and his wife. 'Legitimacy is proved by showing that the child's parents had been lawfully married to each other at the time of the birth of the child.'

Sometimes there may be no direct proof of the marriage, in such case under Mohammedan Law proof of an acknowledgement of paternity is taken as presumptive proof of the marriage. Once a marriage is presumed to be valid, children born of such marriage are also legitimate. Thus, it is the establishment of a valid marriage that gives rise to proper legitimacy or paternity of children in Islamic Law.

There is a saying in Islamic Law 'that *Firash*, i.e. matrimonial authority belongs to the husband. All the jurists agreed that commission of illicit relations by a wife or a husband does not affect the validity of marriage.' The Prophet (PBUH) and all the Jurists condemn it "If as a result of illicit relation the wife becomes pregnant and if the husband is aware and keep mute for sometimes with her after his awareness and then the paternity established through Li'an, it shall not be allowed and the child shall be affiliated to him."

The jurists further held, 'the commission of adultery by the wife does not affect the marriage contract but it is recommended that the husband should divorce her.'

Muslim Law provides that, 'an illegitimate child is a *filius nullius* owing no *nasab* to parent. According to Shias, a child born outside the lawful wedlock is related neither to the father nor to the mother. On the other hand, Hanafis do not take such rigid stand, according to them, an illegitimate child for certain purpose such as wearing and nourishment is related to the mother. Under no School of Muslim Law, an illegitimate child has any right of inheritance in the

property of his putative father. Muslim Law also does not provide for the guardianship of illegitimate child, but in modern India by judicial system, it has established that guardianship of an illegitimate child vests in its mother.'

Establishment of paternity

The acknowledgement of paternity under Muslim Law is in 'the nature of a declaration by the father that a child is his legitimate offspring but it is not a process of legitimating of an illegitimate child.' A valid marriage is essential element, for acknowledgement of paternity under Mohammedan Law some proofs are also needed. A man can acknowledge another either expressly or impliedly as his lawful child. Under Islamic Law, Paternity may be established through: -

- ❖ Marriage
- ❖ Acknowledgement, and
- ❖ Evidence.

Paternity through Marriage

As earlier discussed, marriage is the right channel through which paternity may be established. The marriage in question must be valid and all essentials of marriage contract must be complied with. These are consent of the two parties, consent of the parents especially the father or his representative, payment of dower and the ceremony to take place between at least two witnesses. It is important to stress that after a couple might have complied with all the essentials of a valid marriage under Islamic Law, there must be continuation of such marriage. After that legitimacy can be fully established. 'A child's paternity or affinity is not considered through physical resemblance but by consideration of the period within which the child is born after continuation of the marriage of his parents.'

Paternity through acknowledgement

Paternity of the child shall be established if the following conditions are fulfilled, those are: The paternity of the child is not established in any one else; The ages of the man and the child are such that family relationship is possible between them; Where the child is of discreet age, the child has agreed in the acknowledgment; The man and the mother of the child could have been lawfully joined in marriage at the time of conception; The acknowledgment is not merely that he or she is his son, but that the child is his legitimate son; The man is competent to make a contract; The acknowledgment is with the distinct intention of conferring the status of legitimacy; The acknowledgement is definite and the child is acknowledged to be the child of his body.

Presumption from acknowledgment rebuttable

The presumption of paternity arising from acknowledgment may only be disproved by— denial on the part of the person acknowledged; proof of such proximity of age, or seniority of the acknowledge, as would render the alleged relationship physically impossible; proof that the acknowledge is in fact the child of some other person; or proof that the mother of the acknowledged child could not possibly have been the lawful wife of the acknowledger at the time when the acknowledge could have been conceived.

In the case of, '*Hai Ghazali v. Asma*' 'Parties were married in Nov 1974 and were divorced on August 1975. The wife claimed maintenance for a child born on 11 August 1975 but the Husband denied that the child was his. The Kadi (Judge) who heard the case gave judgment for the wife. He held that the child was legitimate and ordered the Husband to pay maintenance for the child. Because, the child was born during the marriage and was born more than 6 months after the marriage.'

Paternity through Evidence

It may happen that a husband may be away for a short period and when he comes back his wife tells him that she gave birth to this particular child. If the husband doubts it, then the wife may bring evidence to prove her allegation. In such cases evidence of two females is sufficient.

'In Hanafi School the evidence of one woman is sufficient and Hanbali school share the same view while in Shafi'i School, the minimum number for such evidence is four females.'

Conditions for Valid Acknowledgement

'The paternity of the child should be doubtful that means it should neither be proved nor disproved that the child is illegitimate. It was held in a case that, "if the child is known to be illegitimate, it cannot be acknowledged to be legitimate." The doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgement has its effect, but that effect always depend upon the assumption of a lawful union between the parents and acknowledge child.

"The acknowledger should acknowledge the child as his legitimate child, not just as his child." Generally, when one person calls another as his child, 'he means to call him as his legitimate child.' 'The intention to confer the status of legitimacy must be clear.' So whenever any acknowledge any child he must have to declare that child as his legitimate child and have to express that clearly.

The age of the acknowledger and acknowledged person should be such that they appear to be father and child. The acknowledger should be at least twelve and a half years senior to the person acknowledged.

The person acknowledged must not be the offspring of adultery or a result of any kind of *zina*. If the child is an outcome of *zina* then the child cannot be acknowledged as a legitimate child. That child is not able to get any acknowledgement of paternity. That child has no right under law and the society will not also accept the child.

The paternity of the person acknowledged must not be established by anyone else. If the paternity is certain and established by any other person then that acknowledgement is not legal and as well as the husband of the mother of that will not be able to acknowledge paternity of that child.

The acknowledgement must not be repudiated by the acknowledged person. Under Muslim law, a person who has the ability to understand the transaction has the right to repudiate the acknowledgement. For the validity of acknowledgement of paternity, no confirmation by the person acknowledged is necessary. Once an acknowledgement of paternity is made, it cannot be revoked.'

Rights create by getting acknowledgement of paternity

When a valid acknowledgement of paternity is made, the following rights and consequence flow from it:

- ❖ It raises a presumption of valid marriage between the acknowledger and the mother of the person acknowledged.
- ❖ The acknowledger and the acknowledged person have mutual rights of inheritance.
- ❖ The mutual rights of inheritance also arise between the acknowledger and the mother of the acknowledged person.

It also has some benefits to establishing paternity for the mother, the father, and the child.

For the child

- ❖ Legal record of the identity of both parents.
- ❖ Father's name on the birth certificate.
- ❖ Information on family medical history if needed for the purpose of the child's medical treatment.

- ❖ Emotional benefits of knowing both parents.
- ❖ Financial support from both parents, including child support, Social Security benefits, veterans benefits, military allowances, and inheritance.
- ❖ Health or life insurance from either parent, if available.

For the mother

- ❖ Help in sharing parental responsibilities.
- ❖ Information about medical history if needed for the purpose of the child's medical treatment.
- ❖ Improved financial security for the child.
- ❖ Access to health insurance, if available.

For the father

- ❖ Legal establishment of parental rights.
- ❖ Father's name on the birth certificate.
- ❖ Right to seek court ordered custody or visitation.
- ❖ Right to be informed and to have a say in adoption proceedings, if any.

Critical Analysis

A child is only able to get the identity of a father and have a right to get acknowledged by a person who is the legal husband of the mother of the child. That person maybe a biological father of that child or not but the child may not be the outcome of any *zina*, this is the law. My question is, what about the biological father? If he wants to acknowledge that child he cannot do so, because the law did not permit that. There is no provision in the law regarding the paternity right of a biological father. Dr Mohamad Sujimon, a Scholar of Islam said that "If the biological mother is acknowledged, why not the biological father? There is gender discrimination operating here." But, yes our laws in some respects is gender biased and gender discriminative. From my point of view, law should permit the biological father to acknowledge paternity to the child.

The child is sinless and innocent. Law should look at the best interest of the child and try to find a solution. If a child is a result of *zina* then you cannot punish the child by recognizing him/her as a *waladzina*. *Zina* was committed by the parents not by the child, so why should the child have suffer from a mental pain as being a *waladzina* and live without any parental identity.

Always people point out that child as a symbol of stigma and burden for the society. The Supreme Court gave a judicial message in the case of '*Gaurav Jain v. Union of India*' that 'children are innocent and abandoning of the child by one of the parents, excluding a good foundation of life for them, is a crime against humanity.' This is also goes against the principles of natural justice.

The National Fatwa Council has ruled that a Muslim child born less than six months after the parents' marriage is illegitimate and cannot bear his father's name. This is not appropriate rule for an innocent child, if any kind of *zina* took place between two people and after that they decided to marry and at the same the girl is become pregnant out of that *zina* before marriage. Then the father of the child cannot acknowledged the child because the child came in to mother's womb before marriage and the child born less than six months after the parents' marriage, then the law will declare he child illegitimate. What type of inhumanity rule is this, it should not be practice any more. I am not in support of *zina*, I am in support of that innocent child. If the parents get married, that is an additional supporting factor; why the child should will addressed as an illegitimate child. The Quran clearly says that "no soul has to carry the burden of another soul" (Surah Al-Baqarah, 2:286). Therefore, undressing a child of its dignity and a healthy state of mind is, to him, against Islamic principles.

On the other hand, if the child declared as an illegitimate child then the child cannot bear his father's name. So the child loses the right of maintenance, the right of inheritance, custody and protection of the father. This is a significant blow not only materially but also emotionally, which could psychologically scar the child for life especially in a society where illegitimacy is scorned.

Now a day if a child get acknowledgement then additionally also get right to maintenance and inheritance, lots of issue and cases arising regarding this two matters. I want to cite some case decision regarding these two issues.

In '*Pavitri v. Katheesumm*' a question arose on the maintenance of an illegitimate daughter, born of a mohammedan male and a hindu woman, against his putative father and his assets. The court held that the mohammedan law imposes no burden of maintenance of an illegitimate child on the putative father. An illegitimate child is not entitled to be maintained by either parent under the shia law and only from mother under the hanafi law.

However in the case of '*Nafees Ara v. Asif Sadat Al*' Khan Petition was filed under Section 488 of the Criminal Procedure Code of 1898 claiming right of maintenance for an illegitimate child. In this case the court held that the Muslim law does not make any specific provision provide for granting or prohibiting the grant of maintenance to an illegitimate child against the father, does not mean that the civil or criminal court have no jurisdiction to grant maintenance.

Islamic Countries provisions regarding acknowledgement

‘Islamic countries have restraint in child adoption. There are countries like Afghanistan which does not recognise adoption altogether. It is interesting to see that Iraq does not deem inter-country adoption at all. Distinctive features of these countries are given under, as follows:

- ❖ Bangladesh: Does not permit adoptions under Muslim law. Under Hindu law, Hindus may adopt Hindu children.
- ❖ Afghanistan: Islamic law does not recognize adoption (Art. 228 of civil Code of 1980);
- ❖ Iraq: Iraq does not permit the adoption of its nationals by foreigners.
- ❖ Kuwait: Kuwaiti law has no provisions for adoption and legitimation under Muslim law.’

Muslim law does not recognize assumed father for any purpose. It sticks to the concept of “*filius nullius*”. There is no process recognised under the Muslim law which confers legitimacy on an illegitimate child. However Mohammedan laws have adopted measures which is “acknowledgement of paternity” which are preventive measures to save the children from being bastard. Mohammedan Adoption or any equivalent of the same is not recognized under Mohammedan law.

Recommendation

Personal Laws are discriminatory, it injected into the society and emerged bias, prejudices, and inequity, unfairness and women were cast aside. The personal laws began rendering groups of people powerless and this suppressed group then came to be referred to as the weaker section of the society. Women from different religious and ethnic backgrounds were treated differently. The inequality covered in the framework of personal laws leading people differently, this shows the need for a Uniform Civil Code. Article 44 of the Indian Constitution mandates the establishment of such a code by providing that the “State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” Although this constitutional mandate has existed for over half a century and women's rights supporters have long demanded its realization, opposition from patriarchal minority leaders has yet prevented the implementation of a uniform code.

We need to change our view, we need to consider situation, and we need to understand the practical scenario than we can implemented a decent law for the society. Whatever law we have now all are codified in the early society but now the society has been changed, so we should have a uniform law which is perfect for this society.

Conclusion

The practical scenario of the society is far different from the guideline of the law prescribed in the statutes. The child who is illegitimate in the eye of law, the society is also considering the same. However, no one does not consider his innocence although the child himself does not bring him in this world. He is the result of *zina* but he does not commit that *zina*. Moreover, the whole world goes against him. Thus, the word “illegitimate” should not be added with the child. Meanwhile, the biological father should have the right to acknowledge his own child.

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