



Evaluation of the presumption of legitimacy of a child and the Muslim law

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Abstract

The present article penned by me is on presumption of legitimacy and Muslim law. It covers a brief discussion of what is Muslim law and the various schools of the law. Then the article proceeds to discuss marriage under Muslim law where it is well settled that the nikah is a contract which has the essential of *ijab* and *Kabul*. A marriage under Muslim law can be valid (*sahih*), irregular (*fasid*) and void (*batil*). Irregular or invalid marriages are also called *fasid*. A marriage which is not valid may be either void or irregular. Void marriage is a marriage which is unlawful in itself. Then the article has been turned on the subject of legitimacy of a child. Muslim law describes that an illegitimate child is "*filius nullius*" which means a son of no one or a bastard. The status of legitimacy of a child is an outcome of the paternity established by existence of valid marriage. The Shia School of law says that a child who is born outside the lawful wedlock is not related to the father or the mother. It is settled law among Muslims that where paternity of a child is established there legitimacy is also established. That main pivot between legitimacy and paternity is the fact of marriage. And the fact of marriage may be established by direct proof and indirect proof. After describing the concept of acknowledgment the rules have been discussed. At the end a comparison has been drawn between evidence act and Muslim law over the law of presumption of legitimacy.

Keywords: presumption of legitimacy, Muslim law

Introduction

"Muslim Law is an integral part of the Indian civil law – no less legally valid and socially relevant in any way than the personal law of the majority community." – Tahir Mahmood. Islamic law is applicable on all Muslims. Now the first thing which comes to my mind is that who is a Muslim? A Muslim is a person who professes the Muslim religion and acknowledges that there is one God, that Mohamed is his Prophet ^[1]. A person can be a Muslim by birth or by conversion ^[2]. In Muslim law there are broadly two major schools of law one is the Sunni school and the other is the Shia School of law. And further there are four recognised schools of Sunni law. They are i) Hanafi school, ii) Maliki school, iii) Shafei school and iv) Hanbali school. The Shia school of law is further divided into i) Athna Asharias, ii) Ismailiyas and iii) Zaidyas. Each of the Muslim law school is governed by their own law. Therefore Sunni law applies to Sunnis and Shia law applies to Shias. Muslim law is the law applied by Indian courts to Muslims in some matters only. This power of the court is derived from the Statutes of the Imperial Parliament read with Article 225 of the Constitution of India and mostly by Indian legislation. For the rest of the remaining matters the Muslims are governed by the general laws of India.

Marriage under Muslim Law

Marriage ^[4], as per Muslim law is a contract which is undertaken with the object of procreation of children and legalizing of children. On the other hand "*zina*" means fornication or adultery. It is that type of sexual intercourse between a man and a woman which is not permitted by the Muslim law. That the offspring of such an intercourse are illegitimate and such children can never be legitimated by acknowledgement.

A marriage under Muslim law can be valid (*sahih*), irregular (*fasid*) and void (*batil*). Irregular or invalid marriages are also called *fasid*. A marriage which is not valid may be either void or irregular. Void marriage is a marriage which is unlawful in itself. For example, a marriage with a Muslim woman who has a living spouse or who has not been divorced is a void marriage because a Muslim woman cannot have more than one husband ^[5]. Similarly a Marriage with a woman prohibited by Consanguinity, Affinity and Fosterage is void. An irregular marriage is a marriage which is not ipso facto unlawful but because of relative and temporary prohibitions it becomes irregular. For example a marriage contracted without the presence of witness is irregular in nature. Similarly a marriage with a fifth wife by a man already having four wives is irregular ^[6]. Marriage with a woman who is undergoing *iddat* period is also irregular ^[7]. Such defects as stated above can be cured therefore they can be made valid by removal of the objection.

A void marriage is not considered a marriage at all and no civil rights and obligations are created between the parties and the children born out of void marriage are illegitimate. In case of an irregular marriage which has been consummated the children become legitimate children.

A marriage may be presumed in absence of direct proof from prolonged cohabitation as husband and wife ^[8]. It can also be presumed if the man acknowledges the paternity of the child born to the woman having fulfilled all the valid conditions of acknowledgement. The marriage can also be presumed by an acknowledgement by the man that the woman is his wife ^[9].

There is also a concept of Muta marriage under Muslim law. The Shia school recognises two types of marriages one is the permanent marriage and the other is the Muta marriage. A Muta marriage is a marriage where the period of cohabitation is

fixed and the dower is specified. Where the term of marriage is fixed but the dower is not specified such a marriage becomes void in nature. The children born out of Muta marriage are legitimate and can inherit property^[10].

Presumption of Legitimacy in the Muslim Law

Muslim law describes that an illegitimate child is “*filius nullius*” which means a son of no one or a bastard. The status of legitimacy of a child is an outcome of the paternity established by existence of valid marriage. The Shia School of law says that a child who is born outside the lawful wedlock is not related to the father or the mother. A bastard child or an illegitimate child has no legal parents. Therefore no liability is imposed on the father or the mother of the illegitimate child. The Sunni Hanafi School of law states that the mother of an illegitimate child or a “*filius nullius*” has an obligatory duty to maintain the child till the illegitimate child attains the age of seven years.

In the words of Tyabji, Mohammadan law appears to impose no burden upon the natural father of an illegitimate child. No school of Muslim law recognises the right of an illegitimate child of inheritance in the property of his father. There can be no situation where the father accepts and admits of the illegitimate child to be of his own but there is no law which can legally recognise the illegitimate child.

The word *acknowledgement* by father means a declaration of the paternity of the child by the father. An acknowledgement of a child by the father cannot legitimise a child who is proved to be illegitimate by the facts and circumstances under the Islamic law.

It is settled law among Muslims that where paternity of a child is established there legitimacy is also established. That main pivot between legitimacy and paternity is the fact of marriage. And the fact of marriage may be established by direct proof and indirect proof as discussed above.

Under Muslim law there are only two methods through which parentage can be established, and they are:

- by birth during a regular marriage (irregular marriage also included but not void marriage), or
- by the acknowledgement of the child. Islamic law does not recognise adoption of a child who is illegitimate in nature.

It is important here to understand that the *doctrine of legitimization* and *doctrine of acknowledgment* of paternity is different. The doctrine of *legitimization* lies where the illegitimacy of the child is certain, proved and has been admitted. Whereas the concept of *acknowledgement* flows from the fact that the father and the child are related by blood and the union of the father and the mother of the child is lawful.

In the case of *Mohammad Khan vs Ali Khan*^[11], the court said that the doctrine of *acknowledgement* can only be used in a situation where the factum of marriage itself or the exact time of marriage could not be proved and not in cases where the lawful union between the parents of the child was not possible as in case of incestuous intercourse or an adulterous connection and where the marriage necessary to render the child legitimate was disproved.

Concept of Acknowledgement

Where the paternity of the child cannot be established by the legitimate descent from his father through the proof of marriage between the father and the mother of the child at the time of conception there the Muslim law recognises the concept of

acknowledgement of the legitimacy of a child^[12]. The doctrine of acknowledgement applies only to cases where the fact of marriage itself or the time of occurrence of marriage is not proved or is a matter of uncertainty that is neither *proved* nor *disproved*^[13].

Conditions of Acknowledgement

The followings are the conditions of a valid acknowledgment of legitimacy of a child in accordance to the Muslim law:-

1. There must not be any incapacity of the parties for entering into a valid contract of marriage. The parties to a marriage should have the capacity of contract.
2. That the child in question must not be offspring of zina (illicit relationship).
3. That the presumption of legitimacy, as discussed above must have been existing and should be present. An illegitimate child cannot by any means be conferred by legitimacy.
4. The acknowledgement may be either express or implied. That means the acknowledgement can be in words spoken or written or in terms of express conduct of the father^[14].
5. The acknowledger must have distinct intention to confer the status of legitimate sonship.
6. That the child to be acknowledged should not be a child of someone else and that the age of the acknowledger should be possible of that of a father.
7. The legal marriage should be possible between the mother and the acknowledger.
8. The child who has been acknowledged should confirm the acknowledgement.
9. The acknowledgement once granted cannot be revoked^[15]. Paternity is a legal relation which exists between the child and the father. And such relations are necessary because several rights and liability between the two can only flow if there is a relation between the child and the father. To establish paternity there should be a marriage between the parents. The marriage which is required to establish paternity should be a valid marriage or irregular marriage but should not be a void marriage.

“Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith and reasonably believed by him to be such or whose marriage being merely irregular and not void ab initio has not at that time been terminated by actual separation.”^[16]

Mehbubunnissa Begum vs. Mohd Yusuf^[17]. A person must acknowledge that child is his son. It must be shown that person making the acknowledgement intended to confer the status of legitimacy on child. *Habit Rehman vs. Altaf Ali*^[18]. The legitimacy is the status, which results from certain facts, while legitimation is a proceeding, which creates the status of legitimacy, which did not exist before. There is no legitimation in Muslim Law. A child to be legitimate must be conceived during the marriage of man and his wife. Any other child is offspring of zina, i.e., illicit connection and cannot become legitimate even by subsequent marriage of his parents.

Rules for Presumption of Legitimacy under Muslim Law

The Muslim law has broadly categorised three rules for the presumption of legitimacy of a child by which all Muslims are governed. Both the schools of Islamic law; Shia and Sunni follow the same rules and the rules are as follows:

- i) Where a child is born within less than six months (6 months) after the marriage is considered as an illegitimate child unless the father acknowledges it.
- ii) Where a child is born after six months from the date of marriage is presumed to be legitimate child, unless the putative father disclaims it by *lian*.
- iii) Where a child is born after dissolution of marriage is considered to be legitimate under the following schools as follows:
 - Under Shia Law, if the child is born within 10 lunar months,
 - Under Hananfi law, if the child is born within 2 lunar years, Under Shafei and Malilki Law, if child is born within 4 lunar years.

Comparative Study of Muslim Law and Section 112 of Indian Evidence Act

The Indian Evidence Act which is a secular law has stated an irrefutable presumption of legitimacy which is embodied in the Section 112 of the Act. That the *Section 112* reads as follows.

Section 112: *"Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at the time when he could have been begotten."*^[19]

Having studied the provision of Section 112 of the Indian Evidence Act and the Muslim law on the point of legitimacy of a child, a comparative analysis can be drawn between both the laws. The express differences among both the laws are as follows:-

1. that the Muslim law says that a child shall be considered as an legitimate child where he should not only be born but also be conceived by the wife during a *valid marriage* between the man and the woman. Whereas under the Evidence Act a child born even after one day of valid marriage may be considered as legitimate. Meaning thereby that the day when the child was begotten is not important from the point of view of the Indian Evidence Act.
2. Further in Muslim law, where the child is born within two years (extendable up to 4 lunar years in certain cases) of the dissolution of marriage may be considered as a legitimate child of the husband and the wife and the presumption of legitimacy of a child is applicable, whereas under the Evidence Act a child born after 280 days of the dissolution of marriage cannot be considered as a legitimate child. The presumption of legitimacy is fixed under the Evidence Act to 280 days from dissolution of marriage (maximum). And even if a child is born on 281th day from dissolution of marriage cannot be conferred with legitimacy.
3. The Muslim law says that child born within 6 months of marriage is illegitimate by birth unless the father acknowledges him. Whereas the Evidence Act says that a child born even after a single day after solemnization of marriage is legitimate child of the parents. This means that a child born on the 2nd day after marriage is legitimate by presumption under the Act.

4. After having discussed the provisions of the personal law of Muslims and the Evidence Act it can be concluded that both the laws are in contradiction to each other. And therefore, in a situation of contradictory laws, The Evidence Act shall supersedes the rules of pure Muslim law. And the same has been established by a series of cases as well. Great thinkers like Mullah and Ameer Ali have even stated this in their books that the Evidence Act supersedes the Muslim substantive law. In the case of *A.G Ramchandran vs Shamsunnisa Bibi* ^[20], it was held that the Evidence Act is a very general act and is applicable on all religions including Mohammedans. In the case of *Sibt Mohammad vs Mohammad* ^[21], also it was held that the Evidence Act supersedes Muslim law

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