

Status of Child in Islamic Society

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Abstract

The PARADOX of human society – that it has unity and continuity of its own and yet exists solely in the minds and action of its members – can be resolved only by understanding how the NEWBORN individual is molded into a social being. Without this process of molding the society could not perpetuate itself beyond a single generation and culture could not exist. Nor could the individual become a person; for without the ever-repeated renewal of culture within him there could be no human mentality, no human personality. Both the person and the society are alike dependent on this unique process of molding.

Each society tries to mold his newborn individual according to his own needs and requirements. Beside family and school, social environment and social laws of the society plays vital role in laying the foundations of the newborn individual. In Islamic society the newborn individual is molded according to the teachings of the Holy Quran, which regards the child as a respectable being because of his humanity (Note 1) and sinlessness. (Note 2) In the light of Quranic teachings the Muslim Scholars framed a system of rules concerning the social and legal status of the child in Islamic Society as Robert Roberts writes:

One of the most commendable things which one finds in the reading of the Quran is the Solicitude which Muhammad shows for the young and especially for such as has been deprived of their natural guardians. Again and again he insists upon a kind and just treatment being accorded to children. And working upon his words, the Mohammedan doctors have framed a system of rules concerning the appointment and duties of guardians which is most complete, and extending to the most minute details.

This paper focuses on social laws of Islamic society regarding the child. It discusses the legal aspect of the newborn individual. It also explains the laws of paternity, guardianship, inheritance, wills and adaptation.

Keywords: Islamic society, Social laws, Paternity, Guardianship, Inheritance, Wills and adaptation, Different school of thoughts

LEGITIMACY AND PATERNITY

Within the tribal organization of Arabia the smallest unit is that of the *ahl*, “the tent” or household. It consists of a single family, of which the father is the head and the other members are his direct descendants. In their own interest and that of the society amongst whom they live they are reckoned as belonging to his stock, and his actual physical paternity therefore is matter of importance. In the pre-Islamic time the principle ruled that “the child follows the bed”, i.e. that the child reckoned paternity from the man, whoever he might be, who was married to its mother at the time of its birth. Islam modified the principle by declaring that a pregnant woman,

when her husband dies or divorce her, cannot be remarried until the birth of her child (Note 3) which is reckoned by Islamic law as begotten by him and as legitimate.

As a general principle a child born in wedlock is regarded in Islam as legitimate and as being the child of the wife's husband provided it's born less than six months after cohabitation of husband and wife. However, if the father wishes to acknowledge a child born less than six months after his cohabitation with his wife, it is legitimate. The extreme limit of four years after cohabitation is allowed for the birth of a child by *Shafi'ite* and *Malikite* codes, which within that limit would regard such a child as legitimate, provided, of course, that the mother had not in the meantime contracted another union. (Note 4) *Hanifi* law makes the limit two years.

The principle that the "child follows the bed" is coupled in the *hadith* with the declaration that "the adulterer gets nothing. (Note 5) that is that the child belongs to its mother's husband at the time of its birth even if he should not be the father. *Shi'ite* law goes so far as to say that the paternity of a child conceived adulterously is attributed to the husband unless he disavows it formally by pronouncement of the *li'an* against his wife. If a father repent of his disavowal later and desires to acknowledge his paternity, that is permitted. In any event, the adulterer cannot claim paternity of the child.

In Islamic law it is sufficient for the father to acknowledge cohabitation with his wife or slave girl to establish the legitimacy of the child. If circumstances (such as the question of succession) require the mother to prove a child to be hers, her statement must be supported by that of midwife or some other respectable Muslim woman present at the birth. As concubinage is lawful in Islam, therefore, it is not necessary for the mother of a child to be married to its father in order for it to be declared legitimate. Children born of a marriage which is subsequently declared irregular remain legitimate if the parents can prove they contracted the marriage in good faith and believing they were entitled to be married. Also, in case of error, or where there is a doubt that the child was begotten in wedlock or during a master's lawful ownership of a slave- girl, the child is declared legitimate.

In case of repudiation of children by parents, if a husband suspects that the born by his wife is none of his, and he does not wish to acknowledge it, he must denounce it immediately it is born, follow up his denunciation with an accusation of adultery against his wife in accordance with the procedure of *Li'an*. He cannot, however, denounce the child simply on ground that it does not resemble him in appearance. As quoted that a Bedouin came to the Prophet declaring that his wife had given birth to a negro child, and hinting that he wish to repudiate it. The Holy Prophet, however, refused him permission to do so, and remarked that the differences even of the colour do not prove adultery, and the woman's husband is not entitled to divorce her. (Note 6)

If a child is disavowed by the husband of the mother it reckons descent from her alone; and similarly if the husband's kinfolk dispute, with a show of proof, that the child is his. Normally, indeed, the legitimacy of the child is a matter of some concern to the father's family or tribe, and where there is a special reason for guarding the purity of the family, claims to belong to it is scrutinized with some care. The following example from the early of Islam is quoted from the *Kitab-al-Aghani*. The family of 'Ali b. Jahm al-Sami, court poet to the Caliph Mutawakkil, claimed that they were descended from a member of the *Quraysh* known as *Sama*. The *genealogists* of the *Quraysh*, however, refused to accept the family of the poet as kin to them, saying that when *Sama* died his widow married a man from another tribe, and that the person from whom the poet's family claimed descent was a child of this second marriage. (Note 7)

The law refuses to recognize external claims to paternity of a child which its mother's husband has disavowed, and in such case no blood relationship between the child and the person claiming to be its father is in law recognized.

GUARDIANSHIP

On the question of responsibility for the support of the children the Holy Quran makes very valuable regulations. It is conceivable that where the parents live together there remains no need to formulate any laws on the subject, particularly where children are regarded as precious possessions. The need arises when matters become complicated by the divorce of the mother. In this regard the two sections of the Holy Quran, dealing with divorce and related matters, are noteworthy. In these two sections it is laid down that a mother should suckle her child for two full years at least, during which time she should be fed and clothed by the father, though neither parent can be unduly pressed for the support of the children. (Note 8) The earlier passage, related to the maintenance of children definitely impose no compulsion on the divorced mother to suckle her child, and if she undertakes it she is entitled to a fee for her services likely any other wet-nurse who may be hired. This is the opinion of Hanafi school of thought. (Note 9) Others, basing their opinion on the later passage, hold that mothers, married or divorced, are compelled to suckle their children. Still others, for example the Malikites, are of the opinion that a married mother is compelled to suckle her child for the specified period, but a divorced mother need not. (Note

10) It is to be mentioned too, that the period of two years laid down by the Holy Quran may be lessened to a time agreed upon by both parents. (Note 11)

When parents are living together they are jointly responsible for upholding of their children, the father providing material necessities, and the mother caring for the welfare of their bodies and for their mental and religious training. (Note 12) In case of dispute the mother has the right to custody of the children during their infancy. How long that period may extend is not specified in the Holy Quran, and the various schools of law accordingly provide their own ideas on the subject. In the view of the *Shi, 'ites*, the mother, provided she is a free woman and a Muslim, has a charge of child for the first two years of its life while it is at the breast. After weaning the child is to be entrusted entirely to the custody of his father, a girl until she is seven years old to that of her mother. After that age the father takes charge of the daughters too. If the mother dies before the boy is of two years old or the daughter of seven years, then the father takes charge; as he does also if he divorce the mother of the child. If the father dies, the mother takes charge.

The *Shi, 'ite* school agrees that the mother has first right to the custody of the child until the age of seven years. It is considered that at that age the child has the power to discriminate, and it can then chose with which parent it live for the future. However, the mother must be a free Muslim woman, in full possession of her senses, innocent of misdemeanor, trustworthy; having a fixed abode and not married to a man other than the child's father.

According to the *Malikites*, guardianship of a boy continues with his mother until his puberty; of a girl, until the obligation to maintain her ceases i.e. until the consummation of her marriage. The mother even is an infidel, a divorced woman or a widow. (Note 13)

The age of puberty is not fixed in the Holy Quran, although it is indicated that a youth reached manhood when nocturnal emissions began. The majority of the legal schools agree upon the age of fifteen as being for a boy the age when he reaches manhood. A *hadith* narrates that 'Abdullah ibn Omar, once told a freedman of his that the Prophet, after the Uhad, had refused him a share of the spoils because he was too young to participate, he being then fourteen years old. But a year later, after the battle of the Trench, he was granted his share. (Note 14)

The particular age of fifteen years is set as the legal term of manhood if there is doubt about the physical signs of puberty. If these physical signs can be proved, then an earlier age may be accepted; though nine years is the lowest limit. For a girl similarly, either the legal age of fifteen years or the regular indication of puberty is taken to mean the definite attainment of womanhood. *Abu Hanifa* preferred the age of eighteen as the legal of manhood, and declared that where a youth was in the care of a guardian whom he could not satisfy about his capacity to have the disposition of his own property, the period of minority might be deferred for seven years longer, i.e. until the age of twenty five. (Note 15)

During the period of their minority, children have no power to dispose their persons or their property. Accordingly they are then nominally in the charge of an elder whose tutelage may be of three kinds. The first kind is that concerned with the care of the infants, and here the parents are jointly concerned. If the mother is divorced, it is she who is entrusted with their care until they reach a particular age – either two years old or seven, according to different schools. If the mother dies before the child has reached the age of seven, her maternal grand mother takes charge. Only if these relatives are not available is the father entrusted with the care of the child up to age of seven. If the parents are both living but are divorced, those schools of law which consider seven years to be an age at which has a power to discriminate, permit it then to choose whether it will live with its father or mother. Only if the parent chosen is a Muslim of full age and free can he or she undertake the guardianship of the child. If the mother marries a man outside the circle of child's kinsfolk she is incapacitated from acting as guardian.

Closely bound up with the first form of guardianship is the second, which is concerned with providing children with spouse when they have reached the right age. The guardian from this aspect is the *Wali*. It is the father here who has the first right to the office and then the nearest male kinsman. As *wali* the guardian must be a Muslim of full age. A Christian father who has a Muslim daughter could not dispose of her in marriage.

The third form of guardianship is that which is concerned with the care and management of the property of minors. Here too, it is the privilege of the father to exercise guardianship failing him; it falls to the grandfather's will. Males alone have the right to the office, but some legists consider that the claim of an infant's mother to be the guardian is entitled to consideration.

The guardian of an orphan has the power which are similar to, though less extensive than, those possessed by a father. A marriage contracted by the latter for his infant son is valid when the latter reaches marriageable age; but any other *wali's* contract could be set a side by a ward at coming his age. A minor, however, may not

alienate his property without permission of his guardian, which himself may have no dealings with the property of his charge except it be in the interest of the ward (Note 16), but the Holy Quran permits a guardian who is in need to use for his own purpose a portion of his ward possession. (Note 17) When he reaches the age of marriage, the orphan after being tested with respect to his fitness to manage his property, should be given his possessions if the test is found satisfactory. (Note 18)

According to Abu Hanifa, the orphan's property whatever the results of the test, must not be retained after he has reached the age of twenty five, and provided he is not mentally deficient. (Note 19)

INHERITANCE

In pre-Islamic era the system of inheritance was confined to the male agnate relatives ("asaba") of the deceased. The Quranic regulations on this subject introduced the novel and outstanding reforms of permitting woman to inherit from their kinsmen. The details of Islamic laws of inheritance may be studied under the subject of INHERITANCE in law books of Islamic jurisprudence. Our concern here is only with the rights of sons and daughters. A testator may make bequests to the extent of not more than one third of his or her property remaining after payment of all debts. (Note 20) Out of the rest, or if he dies intestate out of the balance left after payment of all debts, the persons mentioned in the Holy Quran as being entitled to "shares" receive them, and the remainder then goes to the sons, if there are any. There is no mention in the Holy Quran of any right accruing to a first-born son and all sons inherit equal portions of their father estate. Where, in addition to sons there are also daughters, the latter, by the Holy Quran, receive "shares" in the proportion of one to every two received by the sons. (Note 21)

Daughters are amongst the persons who are especially mentioned in the holy Quran as entitled to "shares." Where there are no sons, an only daughter receives one half of the estate after the necessary deductions have been made for debts, etc., and two or more daughters receive between them two thirds. Where there is no other legal heir, some codes assign the remainder of the estate also to the daughter of the daughters, though others deny their title to it. According to Islamic law of inheritance no son or daughter can be excluded from inheritance by any mistaken calculation of the amount of the "shares" allotted by the testator or by any law.

However, certain disabilities have been regulated by the legists and the interpreters of the Holy Quran, to preclude undesirable persons from inheritance. Thus no person can inherit from another whom he has slain, either by design or by accident. (Note 22) The apostasy of an heir excludes him from any legacy, and so also would the fact of his being a slave or an unbeliever. Bastardy only excludes from the father but not from the mother, between whom and whose children, however begotten, the ordinary rules of kinship hold. The child, therefore, can also inherit from its mother's kinsfolk. This is the law according to the Sunni schools. (Note 23)

ADOPTION

Adoption gives no right to inheritance in Islamic society. In pre-Islamic times, an adopted member of a clan or family stood on equality with true-born members of it, sharing in booty and inheritance as well as in the duties of raid. Even women could be legally adopted and share in inheritance, some times in face of the opposition of other heirs. (Note 24) Since adoption also gave a clan the right to inherit from an adopted member, persons who owned property were sometime invited to membership, even though they were regarded as of humble status. Occasionally such a person, suspecting the motives of the invitation, would refuse. (Note 25) In Islamic society adopted son was excluded from inheritance declaring that Allah had not made adopted sons real sons and they were to be called by the name of their father. (Note 26)

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Notes

Note 1. Al-Quran, Surah Al-Isra, 17 :70

Note 2. Al-Quran, Surah At-tin, 95: 4

Note 3. Al-Quran, Surah Al-Baqarah, 2: 228, 234.

Note 4. Ibn-e- Qudama, Al-Mughni, vol: 7, 3rd edi, Darul-Fikr, Beirut, p477

Note 5. Abu Dawood, Sunan-e- Abi Dawood, kitab-ul-*Li'an*, *Hadith No 496*

Note 6. Muslim bin Hijaj, Sahih-ul-Muslim, kitab-ul-*Li'an*, *Hadith No 2757*

Note 7. Abul-Faraj Asfahani, Kiata ul- Aghani,, vol: 9, Bulaq, 1887 p.104.

Note 8. Al-Quran, Surah Al-Baqarah, 2: 228- 234.

Note 9. Amir Ali, A'i-nul-Hidaya, part 2 Kitab-ut-Talaq, p409,410.

Note 10. Abu Muhammad Abdu-Wahab, At-Talqeen, Maktaba Nazar Al-Riadh, p348.

Note 11. Al-Quran, Surah Al-Baqarah, 2: 228- 234.

Note 12. This kind of charges is technically known as *HADANA*.

Note 13. Bukhari, Sahih-ul-Bukhari, Kitab-ul-Maghazi, *Hadith No 3871*

Note 14. The legal punishment for theft (cutting of the hand) is not inflicted on a youth below the age of fifteen. (Abu Yusuf, Kitabul Kharaj, p 106).

Note 15. Al-Quran, Al-Quran, Surah Al -An'am, 6: 152

Note 16. Al-Quran, Surah Al –Nisa, 4: 6

Note 17. Al-Quran, Surah Al-Nisa, 4: 5

Note 18. Muhammad Shafi, Mufti, Tafseer Maraif-ul-Quran, ed 2nd , Vol: 2, Idara-tul- Marirf, Karachi, p 305

Note 19. Ibid,p 318-331.

Note 20. Ibid.

Note 21. Ibid.

Note 22. Ibid.

Note 23. The Story of Suraym's slave girl (Kitab-ul-Aghani, Vol:17, p94).

Note 24. Ibid, Vol. 1, p134.

Note 25. Al-Quran, Al-Quran, Surah Al-Ahzab 33: 4.