

## THE LEGAL STATUS OF A CHILD UNDER MUSLIM LAW

by

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The words 'Legal status' imply a 'position' or a 'character' ascribed to a child by the construction of law, upon the consideration of some factors, which in turn entitles or disentitles the child for certain other matters within the framework of the legal system. Like other system of laws, the question of legal status of a child has acquired an important place in the study and research of the Muslim matrimonial law. Normally, the process of ascribing legal status to a child is concerned with the question of determining the legitimacy or illegitimacy of a child. In this paper attempts will be made to examine firstly, the shariat (Classical Muslim law) provisions of legitimacy and secondly, the amendments brought about by the statutory provisions and the judicial decisions in this sub-continent and lastly, ways of overcoming the existing problems if any, in this legal aspect.

### **Shariat Law of Legitimacy :**

- (A) A child in order to be legitimate and (Jaez) under shariat law :
- i) there must be an existence of marriage valid (Sahih) or irregular (fasid) but not void (batil).<sup>1</sup>
  - ii) between the man and his wife,
  - iii) at the time of the conception of the child,<sup>2</sup>
  - iv) and the child is born after a minimum period of pregnancy i. e. six lunar months after marriage in the normal course<sup>3</sup>  
or

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1. Dr. Tanzilur Rahman : Majmu'a Quwanin Islam, Karachi, Vol. I. pp - 147-51 (1965).
  2. Dr. Tanzilur Rahman : A code of Muslim Personal law, Vol. 1, 1st Ed, p - 689 (1978).
  3. Depending on Two Quranic verses : Al-Quran, Sura, Al Ahqaf, XLVI : 15; Al-Quran, Sura, Luqman, XXXI : 14, The Holy Quran, A. Yusuf Ali, 1983 p- 1370, Note- 4790.

- v) in case of dissolution of marriage the child should be born within a maximum period of gestation, which is different according to the views of the different schools.<sup>4</sup>
- B) Where the legitimacy of a child can not be proved by establishing a marriage between the parents at the time of its conception with direct evidence, Muslim law recognizes acknowledgement as an indirect method whereby such marriage and legitimate descent can be established.<sup>5</sup>

The above rules of Shariat are based on the question - "What was the nature of marital relationship between the begetter and the bearer of a child at the time of its conception? - not at the time it was born"<sup>6</sup>. The child is legitimate, if the marriage between the begetter and the bearer of the child, subsisting at the time of the conception of the child, had been either valid (Sahih) or irregular (fasid),<sup>7</sup> the child is illegitimate - if the marriage between the begetter and the bearer of the child, subsisting at the time of the conception of the child, had been void or no marriage had at all existed. The Principle is that only a legitimate union (valid or irregular) can produce a legitimate child, and an illegitimate union in no way can produce a legitimate child. So, in Muslim shariat law, the determining point is the "time of conception" and not the "time at which the child was born". That is why the western concept of "child born outside wedlock" is not accepted to shariat law rather such a child is regarded as "Walad-uz-zina" i. e. child of fornication.<sup>8</sup> Two illustrations will make the principle more clear.

### Illustrations :

- (a) A, a male and B, a female entered into a valid marriage on 1.1.90. Any time after that, i.e. on 2. 1. 90, B conceives a child which is

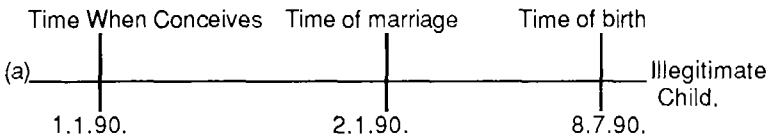
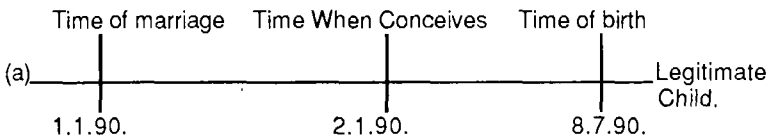
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4. Ibn Qudama Al Magdisi : Al-Mughni, Cairo, Vol. VII, p-477 (1367 A. H.)  
 5. P. L. D. 1975. S.C. 624.  
 6. Dr. Tahir Mahmood : The Muslim law of India, P-152 (1980).  
 7. B. R. Verma's Mohammedan Law (In India and Pakistan) 5th Ed. P-196 (1980).  
 8. Dr. Tahir Mahmood : The Muslim law of India, P- 152 (1980).

born any time after six months, on 8.7.90, the child is legitimate.

- (b) A, a male and B, a female were on friendly terms and had no valid marital relationship between them, But on 1.1.90, B conceived a child by the contact of A. Any time after that i. e. on 2.1.90, they entered into a valid marriage. The child is born any time after six months i.e. on 8.7.90. The child is illegitimate.

Subsequent marriage cannot legitimize a child who was conceived at a time when the parties were under no valid marriage relationship, although the son is born during the continuation of a valid marriage. This can be demonstrated by horizontal lines.



The question of duration of gestation (hamal) is also of great legal importance in shariat. The shariat law has fixed up a minimum and a maximum period of pregnancy in order to determine the legitimacy of a child. Relying on the two Quranic verses, the jurists of all the schools of Muslim law are of the unanimous verdict that the minimum period of pregnancy after marriage is six lunar months i. e. 174 to 180 days.<sup>9</sup> In the case of a valid marriage the six months period is reckoned from the date of marriage; but in the case of an irregular marriage, the time is reckoned according to Imam Muhammed whose view is generally accepted, from the date of consummation.

9. Al-Quran, Sura, Al-Ahqaf, XLVI : 15; Sura, Luqman, XXXI 14. Baillie : Neil, B. E : Digest of Mohammedan law, Part I, 2nd Edn. P-392, 396 (1875).

There are different opinions given by different Imams regarding the maximum period of gestation; Abu Hanifa, on the authority of a tradition reported by Ayesha Radiallahuanha, assigned two years as the maximum period of gestation.<sup>10</sup> According to imam Malik, shafei and Ahmd Ibn hanbal, the longest period of pregnancy is of four years.<sup>11</sup>

Under shia law, according to a better opinion, the maximum period is ten months.<sup>12</sup> That is to say, For this long the child may well remain in womb during a valid state of pregnancy.

It is submitted that the verdict of the Muslim jurists regarding the shortest duration of gestation, i.e. six lunar months, is quite in conformity with the modern obstetrical opinion.<sup>13</sup>

According to some modern critics the longest period of gestation prescribed by the Hanafi and shafei schools, is due to "the imperfect knowledge of gestation and pregnancy prevalent in early times."<sup>14</sup> In reply to that some writers have submitted that "in view of the legal disabilities and social sufferings of illegitimate children and the criminal liability of their parents at Muslim law, and in accordance with Islam's expectation of a very high standard of sexual morality from its followers, the policy of Muslim law is to regard every child as legitimate as far as possible. It is out of this anxiety to keep children away from the stigma of illegitimacy that Muslim law prescribes unduly long periods as maximum period of gestation."<sup>15</sup>

My humble submission is that Muslim law by prescribing a longest possible time of valid gestation has tried to cover up even an exceptional valid birth case, while giving the man adequate scope of

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10. C. Hamilton : Translation of Hedaya (S.G. Grady's Edn.) P-137 (1870).
  11. Howard, E.C. : Minhaj - et - talibin, 259 (1914). Ibn Humam : Fath-al-Qadir, Cairo. Vol. iii. P-310 (1356 A.H.)
  12. Al-Hilli Najm al Din : Shara -i-al-Islam, Tehran, P-199 (1377 A.H.).
  13. Dr. Tahir Mahmood : The Muslim Law of India, P-153 (1980). Ref : British case : Clark V. Clark (no. 1) P-288 (1939).
  14. Fyzee, Outlines of Muhammadan law (4th Ed), P-191 (1968).
  15. Dr. Tahir Mahmood : The Muslim law of India, P-153 (1980).

disclaiming the child if he so likes. If he is not successful but still affirms it on oath, the law of lian will come into operation. Similarly child born within or after six months of marriage can be disclaimed by the man. By fixing minimum and maximum period of gestation, law has fixed up normal schemes of legal presumptions only but giving adequate right to the man to disclaim in a fit case.<sup>16</sup> The principle of acknowledgement of paternity (iqrar-e-nasab) can be used to rebut the normal presumption of law. Where a child is born within six lunar months from the date of marriage - the law will normally presume it as illegitimate. But the begetter may acknowledge it as his legitimate child, in that case, his acknowledgement will amount to an implied affirmation that unknown to others he and the child's mother were married at the time of its conception.

The rules regarding the presumption of legitimacy therefore, stand as follows :-

- i) A Child born within six months of the marriage is illegitimate, unless the father claims it or acknowledges it to be legitimate.
- ii) A child born after six months of the marriage is presumed to be legitimate unless the father disclaims it by lian.
- iii) A child born after the dissolution of marriage is legitimate if born. :-

Within 10 lunar months- in shia law (Ithna Ashari law),

Within 2 lunar years-in Hanafi law,

Within 4 lunar years-in Shafei or Maliki law.

This rule can be presented, in the light of other factors, in the following way :

- (a) Where the woman has not yet remarried after dissolution.

If the iddat was incumbent on her (e.g. if marriage whether consummated or not was dissolved by death or if a consummated marriage was dissolved by Talaq), paternity

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16. Baillie : Neil, B.E. : Digest of Mohammedan law, part-II P-153 (1869), The Evidence Act, 1872, Section 112.

would be established if the child is born within two years from the date on which the talag becomes irrevocable.

If she makes a declaration (at a time when her iddat may be reasonably supposed to have expired) that her iddat has expired then the paternity would be established in the case of birth within six months from the date of declaration but not otherwise

But if iddat was not incumbent on her (where the marriage was unconsummated and was terminated by talaq) descent would be established only if the child was born within six months of the talaq but not otherwise.

Under Shafei law, in case of a revocable talaq the child is legitimate, if born within four years from the time of talaq.

- (b) Where the women has remarried after dissolution
- (i) the child would be illegitimate if born beyond two years of dissolution of the first marriage and within six months of the second marriage.
  - (ii) The child would be affiliated to the first husband if born within two years of the dissolution of the first marriage but within six months of the second marriage.
  - (iii) The child would be affiliated to the second husband - if born beyond two years of the dissolution of the first marriage but after six months of the second marriage.

Under shafei law - if the second marriage is contracted after the expiry of iddat, the child would be affiliated to the first husband if born within six months of the dissolution and to the second husband if born after that.

The paternity of a child or the legitimate descent of a child can only be established by the proof of marriage, valid or irregular between the parents at the time of its conception. Marriage may be established by direct proof or by indirect proof i.e. by presumption drawn from certain facts or circumstances.<sup>17</sup>

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17. 29 D.L.R. S.C. 296 ; 33 D.L.R. 245.

Acknowledgment of legitimacy in favour of a child or of a woman as his wife, is an indirect way of proving marriage. The term *ikrar* (acknowledgement) literally means to confirm or establish. In law it is defined to be giving of information for the establishment of a right in favour of another against oneself.<sup>18</sup> The doctrine of acknowledgement is based on the Quranic provision : "call them after their fathers".<sup>19</sup>

In this sub-continent marriages take place, specially among the common people, without observing formal ceremonies or without publicity. Even marital records are not properly maintained. It is therefore possible that some marriages may not be proved by direct evidence. Acknowledgement, in such a case provides scope for a child to be declared legitimate who would otherwise be treated as illegitimate. Acknowledgement implies an affirmation that its maker and the child's mother were unknown to the others lawfully married at the time of its conception. It is rightly observed that "It is the same anxiety of Muslim law that we have referred to above to keep the children away from the stigma of illegitimacy - which forms the rationale of the principle of acknowledgement of paternity".<sup>20</sup>

In Muslim law, the doctrine of acknowledgement, is however subject to certain conditions.<sup>21</sup>

- 1) The doctrine of acknowledgement applies only to cases of uncertainty, that is where the marriage is only unproved - and is neither proved nor disproved.

If the court comes to a clear finding on evidence that no marriage at all took place between the begetter and the bearer of the child, the presumption of legitimacy which results from

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18. Baillie : Neil, B. E. : Digest of Mohammedan law part-I, 2nd Edn. P-406 (1875), C. Hamilton : Translation of Hedaya (S.G. Grady's Edn.) P-427 (1870).

19. Muhammad Allahadad V. Muhammad Ismail Khan, I.L.R. 10 All, 289 (327).

20. Dr. Tahir Mahmood : The Muslim law of India P-153 (1980).

21. C. Hamilton : Translation of Hedaya (S.G. Grady's Ed.) P-439 (1870).

acknowledgement can not be raised. Unless the marriage had been disproved, the acknowledgement could be used as substantive evidence to prove marriage and legitimate descent.<sup>22</sup>

- 2) Paternity should not be impossible. Legally, physically and practically there must be reasonable difference of age;<sup>23</sup> the woman must not be related to him in prohibited degrees etc.
- 3) The person acknowledged must not be known to be the child of another. A child who is certainly the child of another man can not become the child of the acknowledger only by his acknowledgement.<sup>24</sup> So there is no room in law for adoption.
- 4). A child who is definitely illegitimate at law (harami) can not become legitimate by virtue of the begetter's acknowledgement only. So there is no room in the Muslim law for legitimation.<sup>25</sup>

The difference between legitimacy and legitimation may be noted. 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 and in the proper sense of the term, there is no legitimation in Muslim law.<sup>26</sup> By the fact of acknowledgement, the law recognizes legitimacy of the child but not his legitimation i.e. the conferring of the status of legitimacy on him if as a matter of fact, he is illegitimate. Acknowledgement is this legitimation in a very limited sense. Children born of zina can not be legitimized by any kind of acknowledgement.

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22. Ghazanfar V. Kaniz Fatima. I. L. R. 32 All 545 (P.C.).
  23. Habibur Rahman V. Altaf Ali A. I. R. 1922 P.C. 159; The age fixed by Muslim jurists is twelve and a half years. Baill. 1.41.
  24. Baillie : Neil, B.E. : Digest of Mohammedan law part-I, 2nd Edn. P-408 (1875).
  25. Muhammad Alladad V. Muhammad Ismail Khan. I.L.R. 10 All. 289; Bail. I. 415.
  26. Habibur Rahman V. Altaf Ali, A.I.R. 1922 P.C. 159 at P-161.



- 5) The presumption of paternity arising from an acknowledgement may be rebutted by a disclaimer or repudiation on the part of the person acknowledged. So there must not be any disclaimer or repudiation by him.<sup>27</sup>
- 6) The acknowledgement must not be only of sonship but of legitimate sonship. Thus if a person acknowledges a child to be his by zina, paternity would not be established.<sup>28</sup>
- 7) It is not necessary that the acknowledgement of paternity should be specifically made. If a person habitually and openly treats a child as his legitimate issue his legitimacy may, from this fact, be presumed. It can be express or implied.<sup>29</sup>
- 8) Acknowledgement is irrevocable.<sup>30</sup>
- 9) Acknowledgement raises only a presumption of legitimacy which can be rebutted by contrary evidence.

It may be noted here that the principle of acknowledgement of paternity is not merely a mode of evidence, rather it is the part of the substantive law of shariat.

The Privy Council in *Habibur Rahman VS. Altaf Ali* (1921) 48, Indian Appeals, 114, 120-121, discussing in detail on the acknowledgement of parentage has observed : -

"As marriages among Mohammadans may be constituted without any ceremonial; direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgement of legitimacy in favour of a son. This acknowledgement must be not merely of sonship, but of legitimate sonship. Further, it must not be impossible upon the face of it as stated in the present section. If the conditions

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27. Agha Mohd. V. Zohra Begum, A.I.R. 1927 Oudh. 562 at P-565.

28. Baillie : Neil, B.E. : Digest of Mohammedan law part-I, 2nd Ed. P-414, 415 (1875).

29. Galstaun V. Mirza abid Husain A.I.R. 1924 oudh 19 at P-25.

30. Baillie : Neil, B. E. Digest of Mohammedan Law part-I, 2nd Edn. P-342 (1875).

stated in the section are satisfied, the acknowledgement has more than a mere evidential value... It raise a presumption of marriage - a presumption which may be taken advantage of either by a wife-claimant or a non-claimant. Being however a presumption of fact, and not juris at de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgement of legitimacy is in this position : the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgement the onus is on him to prove a marriage. Once he establishes an acknowledgement, the onus is on those who deny a marriage to negative it in fact".

#### **Statutory Law of Legitimacy :**

The provision of Evidence Act, 1872, Sec. 112, concerning the conclusive presumption of legitimacy is as follows : "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 any time when he could have been begotten".

We may now, examine the points of agreement and the points of disagreement between the statutory provision of legitimacy and the shariat provision of legitimacy.

The points of agreement are as follows : -

- (i) A child born after six months of the date of marriage is legitimate under both laws.
- (ii) A child born within 280 days of the dissolution of marriage is legitimate under both laws.

The points of disagreement : -

- (i) Under sec. 112 of Evidence Act, legitimacy depends upon birth of the child. Under Muslim law legitimacy depends upon the conception of the child.

- (ii) Under Evidence Act, the question is-" What was the nature of marriage between the begetter and the bearer of the child at the time of its birth? "under Muslim law, the question is, "what was the nature of marriage between the begetter and the bearer of the child at the time of its conception?".
- (iii) Under Evidence Act, the rule is based on the English doctrine of legitimation per subsequent matrimonium. According to this, a child conceived before marriage becomes legitimate by the fact that the parties have contracted marriage before the child is born. Thus a child born even after two days of marriage is legitimate.

A child, under Muslim law, to be legitimate must be conceived during the continuance of a valid or irregular marriage between the man and his wife. Any child born by illicit intercourse (zina) is illegitimate and can not become legitimate by the subsequent marriage of the begetter and the bearer of the child.

- (iv) Under Evidence Act, a child born anytime within six months of the marriage is, in the absence of the evidence of non-access, deemed to be legitimate.

Under Muslim law, a child born any time within six months of marriage is presumed to be illegitimate unless the father acknowledges.

- (v) Under Evidence Act, a child born after 280 days of dissolution is presumed to be illegitimate. But under Muslim law, a child born beyond 280 days but within 2 years of dissolution, is presumed to be legitimate.
- (vi) Presumption of legitimacy relates only to a valid marriage under the Evidence Act, while the presumption of legitimacy extends to both valid and irregular marriages.
- (vii) Under Evidence Act, the man can disclaim the child by the proof of non-access. In which case the law of adultery will apply under the penal code.

Under Muslim law, if the man can establish his disclaimer of the child, the law of adultery will operate. If he can not establish it by evidence but still affirms it on oath, the law of lien will operate and if marriage is existing, a divorce may follow.

Thus it appears that the provisions of section 112 of the Evidence Act, 1872 are in many points with direct contradiction to the Shariat injunctions.

Many Scholars have doubted whether the rules of Muslim law have been superseded by the Evidence Act. But on this point, the courts of this sub-continent have been divided into two opposite sides.

- (i) In Mohd. Allahdad V. Mohd. Ismail Khan, I.L.R. 10 All. 289 (1888), Syed Mahmood, J., of Allahabad High Court in his judgement on the principle of acknowledgement raised the issue but left it unanswered.
- (ii) In Sibte Muhammad V. Muhammad, A.I.R. (1926) All. 589, the Allahabad high court held that section 112 superseded the rules of Muslim law and was applicable to the Muslims.
- (iii) The above ruling of Allahabad High court was followed in a case decided after ten years in Sampatia V. Mir Mahbood Ali A.I.R. 1936 All. 528.
- (iv) In Mt. Rahim Bibi V. Chiragh Din, A.I.R. 1930 Lah. 97, the Lahore High Court pronounced its agreement with the 1926 Allahabad opinion. The relevant Bangladesh courts decisions are : 20 D.L.R. W.P. 176, PLD; (1975) S.C. 624, 1982 B.C.R. 49.
- (v) The Privy Council in Ismail Ahmed peepadi V. Monin Bibi, A.I.R. 1941, P.C. 11, applied the rule of Evidence Act.
- (vi) Madras High Court in Submma V. Venkata Reddi; A.I.R. 1950 Mad 394, held that the rule of Evidence Act constituted the general law for the determination of legitimacy. Similar decision in A.I.R. 1977. Md. 182.

On the other hand :-

- (1) Nagpur High Court in *Zakir Ali V. Sograbi* 43 I.C. 883 held that the section 112 does not apply to Muslimes.
- (ii) The Oudh Court has held in *Mt. Kaniza V. Hasan*, A.I.R. 1926 Oudh 231, that the section is not applicable to irregular marriage.
- (iii) The Kerala High Court in *Abdul Rahman Kutty V. Aisha Reevi* A. I. R. 1960 Ker. 101, held that the section 112 does not apply to a marriage void under Muslim law.

However, the view now generally accepted is that the section 112 applies to Muslims.<sup>31</sup>

Sec. 2 of the Evidence Act, 1872 repealed "all rules of evidence not contained in any statute, Act or Regulation". Hence, the question arose whether the Muslim law of legitimacy is a rule of evidence or a rule of substantive law. On this point further development was that by the Amending and Repealing Act of 1938, the provision of sec. 2, was itself repealed. Considering law of legitimacy as a rule of evidence, Lahore High Court in *Abdul Ghani. V Taleh Bibi* (P.L.D. 1962 Lahore P-531) held that the rule of the Muslim law of Evidence repealed by section 2 were revived by repeal of the section itself. Supreme Court of Pakistan similarly in *Hamida Begum V. Murad Begum* (P.L.D. 1975 S.C. 624 P-650) held that "on the Repeal of Section 2 of the Evidence Act by Act I of 1938, the rules of Muslim Personal law stood revived."

Opposite to this, in Nagpur Judicial Commissioners Court it was held that the provisions of Muslim law of legitimacy being part of the substantive law of Muhammadans the rule laid down in section 112 is not applicable to them (*Zakir Ali V. Sughra Bai*, A.I.R. 1938 Wag. 32 ; 43 I.C. 883).

Along with other cases, in *Sibt Muhammad V. Muhammad Hamed* (I.L.R. 48 All. 625) the court expressed the view : "Sir Roland Wilson in his Treatise on Anglo Muhammadan law expressed the opinion that section 112 of Indian Evidence Act is really, notwithstanding its

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31. B. R. Verma's Mohammedan law : 5th Ed. P-201 (1980).

place in the statute book, a rule of substantive marriage law rather than of evidence, and as such has no application to Muhammadans in so far as it conflicts with the Muhammadan rule that a child born within six months after the marriage of its parents is not legitimate".

Thus the courts are of different opinion as to the question whether the Muslim law of legitimacy is a rule of evidence or a rule of substantive law.

### **Conclusion**

The legitimacy of a child is an important issue in the discussion of Muslim matrimonial law so far it determines the legal status of a child. From the above discussion it appears that certain major controversies are existing in this area of Muslim matrimonial law which deserve the attention of both legal researcher and legal reformers. The loose wording of section 112 of the Evidence Act. 1872, "during the continuance of a valid marriage" provides the scope for the infiltration of the English doctrine of legitimation, i.e. legitimize a child conceived by an act of adultery (zina); which is quite antagonistic to the fundamental assumptions of Muslim law. The provision may result in some consequences which may hurt the feelings and emotion of the Muslims of this country. A comparison of the provision of the Muslim rule of legitimacy and the rule of sec. 112 of the Evidence Act. 1872 shows that the latter stands in many respect with contradiction to the rule of shariat law. Thus, (i) a child born within six months of the marriage is legitimate under the rule of Evidence Act whereas, illegitimate under Muslim law. and (ii) a child born after 280 days of dissolution, is illegitimate under Evidence Act, whereas legitimate under Muslim law being born within 2 years of dissolution.

The present issue involves not only a legal question of determining legitimacy for the purpose of inheritance, will, maintenance etc. rather involves a question of social stigma and even more a question of invoking law of divorce by lien or penal law of adultery. Therefore, the matter should be dealt with more care and with more patient.

With regard to the controversy - whether the Muslim rule of legitimacy - is a rule of Evidence or a rule of substantive law, my submission is

that it is undoubtedly a rule of substantive law since it confers upon a child a legal status, a legal right - not only a factual finding. It should be mentioned here that Sir Roland Wilson and Syed Ameer Ali hold the same view.<sup>32</sup>

Acknowledgement is regarded by the courts as a part of Muslim substantive law. By proving the fact that the putative father has acknowledged the child to be his legitimate child, the child acquires a legal status. Why not the other rule of legitimacy should be treated as a part of Muslim substantive law. Because by proving the fact that a child is born after six months of a valid marriage the child acquires a legal status. The principle of acknowledgement is in fact an integral part of the comprehensive Muslim law of legitimacy. It is not logical to treat one part of the law as substantive and the other as procedural.

In order to avoid the conflicts between the statutory provision (sec. 112 of Evidence Act) and the shariat law, Dr. Tahir Mahmood has suggested that "section 112 of the Evidence Act, should be interpreted in accordance with the rules of the Muslim law".<sup>33</sup> He has also given pointers to such an interpretation as an "intrinsic aid to construction within language of section 112" thus- "is a child born a few minutes or hours later than the solemnization of marriage to be treated as born during the continuance of a marriage? If this was the intention of the legislature would not a better expression have been : born at any time after marriage while the marriage subsists?"<sup>34</sup>

It appears that, this sort of suggestion looks for an alternative device to a radical change of the law and is quite temporary in nature. Moreover it guarantees no safeguard against the misuse of law by the courts. Interpretation is always the sole function of the courts and varies according to the line of thinking of each individual judge. In view of the existing decisions of the courts, I express my firm view

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32. Dr. Tanzil-ur-Rahman : A code of Muslim Personal law, vol. i, 1st Ed. P-701-2 (1978). Sir Roland Wilson : Anglo-Muhammadan Law 6th ed. (1930). Syed Ameer Ali : Mohammanan law, Lahore, 6th Ed, P-179 (1965).

33. Dr. Tahir Mahmood : The Muslim Law of India : P-159 (1989).

34. Ibid, P-160-1(1980).

that the existing rule of sce. 112, Evidence Act, 1872, shall be declared inapplicable by way of legislative reform, and at least, as a matter of exception to the rule where the parties are Muslims.