

**THE RIGHTS & PRIVILIGES OF MINOR IN CASE OF
SEPARATION BETWEEN PARENTS**

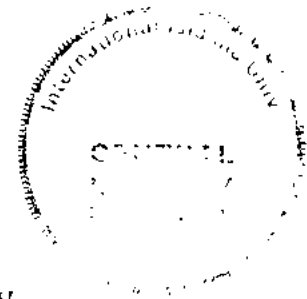
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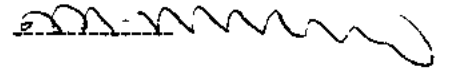


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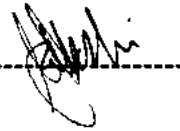
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DEDICATION

This effort is dedicated to my great parents whose help, support and motivation remain always with me in every hour of my life.

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INTRODUCTION

In the present world great attention has been paid to the rights of minor. There is a huge debate going on around the globe on this issue. In recent societies as long as the ties between family relationships are weaken the number of broken families is increasing. In such situations rights of their minor children are greatly affected. So it is important to sort out the rights and privileges of minor in case of separation between parents. Islamic law is one of the main legal systems in the world and Pakistani law being law of the land is also worth consideration; it will be fruitful to discuss these rights in both of these systems.

The impression about Islamic law is that it is against human rights and specially rights of minor has no significance in the eyes of Islamic legal system. As a Muslim it is our duty to contribute in efforts to remove this impression and to make the world realize that Islam is not against human rights or the rights of minor but it supports them. Comparison between the two systems will make easy for the readers to realize and judge the position of Islamic law towards these matters and to know that what value Islam gives to these rights and how we can bring Pakistani law in conformity with Islamic law.

With changing social factors new questions come in front of us. In Islamic law specially there is need to apply Islamic principles to answer these questions. In modern world human rights are given so much importance that it is made a standard to judge sense of justice in a given system. As long as Islamic law is concerned there is a lot to be done in the field of rights. Muslim scholar's work on the issue is not enough. One example of it is that no theory to describe working mechanism of rights is evolved. There are many unanswered questions related to the issue for example: what rights are justiciable and what are not? Whether State can suspend basic rights? If the rights given in Islamic law and Common law are almost the same then where the difference lies, in philosophy or in priorities? What is the concept of rights of the child? Who is a child? How these rights can be ensured or implemented and what's State's role in this field? etc. My endeavor would be to answer these questions and many others in both the systems.

Then there is national and international legislation on the issue. On the international level there are documents like 'Declaration of the Rights of the Child' and 'U. N. Convention on the Rights of the Child'. I would like to see what rights are given by these documents and what is Islam's position as to these rights.

On the national level there are laws which are directly related with the issue like Guardians & Wards Act (1890), Muslim Family Laws Ordinance (1961), Breast Feeding Ordinance (2002) etc. I would like to find if there are defects in these laws or not, and to make these laws more yielding and workable what changes should be made. A critical analysis of existing legislation would help to judge that these laws are compatible with Islamic law or not. Being an Islamic State it is our goal to implement Islamic law here. Although Personal law in Pakistan is based generally on Islamic law but still there are points of difference. I would try to take into account case law as well so that it could be judged that how these laws are interpreted in Pakistan.

This work is divided into four chapters. First chapter is devoted to the description of concept of rights in Islamic law with the discussion of rights of minor as well. In the second chapter I will discuss these concepts in Common law as the same approach is followed in Pakistan. Then in the third chapter I will take the issue of the rights of minor in case of separation between parents in Islamic law to show that how Islam protects rights of minor. There are issues of fosterage, legitimacy, maintenance, custody and guardianship that will be discussed by describing different school's positions towards these issues. In the last chapter I will take into account position of these rights in Pakistani law. It will entail the legislation made and interpretation and implementation of these laws by courts. Again I will discuss rights of fosterage, legitimacy, maintenance, custody and guardianship. I would try to analyze existing law critically to show that how far existing law is successful in providing solutions to recent problems. Finally conclusion will summarize my findings and proposals. I pray to Allah to help me in achieving this task.

Chapter no. 1

CONCEPT OF RIGHTS IN ISLAMIC LAW

INTRODUCTION

The whole Islamic law is based on a system of rights.¹ Right and its protection is the main consideration of Islamic law. Usually Islam is projected as rigid and irresponsible to social realities.² As a Muslim it is our responsibility to contribute in efforts to remove this misconception. In this chapter my endeavor would be to make clear Islamic law's stand towards 'rights' and the 'rights of minor'.

First of all I will discuss the concept of rights in Islamic law in which I will take into account the source of right, its elements, and kinds of rights with some emphasis on the right of State as it is a disputed issue. Correlativity of right and duty and the relation of rights with *maqāsid al-sharī'ah* will also be discussed.

Then I will switch to the concept of rights of minor. I will discuss who is a minor? Or what is the dispute of minimum age? and will elaborate Islam's stand on the issue. In it capacity of minor and its relation with his rights will also be discussed. It will be followed by the discussion that do children really have rights? If they have rights then how they will exercise them? I will elaborate that the interest of the child is Islamic law's main consideration in this respect. At the end I will summarize my findings in the conclusion.

1.1 CONCEPT OF RIGHTS IN GENERAL

1.1.1 MEANING OF THE 'RIGHT'

In Arabic the word used for 'right' is '*haqq*' it literally means justice, right or

¹Imran Ahsan Khan Nyazee, *Theories of Islamic law*, ed. Zafar Ishaq Ansari, (Islamabad: International Institute of Islamic Thought & Islamic Research Institute, 1994), 73. [Hereinafter Nyazee,1994].

rightness, truth or reality or fact.³ The word *haqq* is used in meaning of right, title and claim.⁴ According to Tabandeh a right is translated as the 'others duty'.⁵

In basic sources 'right' is not formally defined by the *fuqahā*. Probably the reason was that it was a widely understood concept and there was no need to properly define it. But modern jurists tend to define the term 'right'.⁶ The word is some times defined as 'a benefit to which one is legally entitled'⁷ or it is 'a specific relation between person entitled and the benefit or interest'.⁸ The word *haqq* or *haqūq* means legal rights or claims, and corresponding obligations.⁹

As mentioned above *haqq* or right includes all kinds of rights, titles and claims. It includes proprietary rights, personal rights, positive and negative rights, vested and contingent rights, legal rights and natural rights etc. Rights are protected through social obligations i.e. by creating duties.¹⁰

1.1.2 SOURCE OF THE RIGHT

Source of right in Islamic law is *Shār'e*.¹¹ *Shār'e* or lawgiver established these rights to organize man's life. He gave us system of rights and duties, and made it an important part of Islamic legal system. This is the most important feature of concept of rights in Islamic law. As the *Shār'e* gives rights so the *Shār'e* alone can take these.

³Katerina Dalacoura, *Islam, Liberalism & Human Rights*, (London & New York: I. B Tauris Publishers, 1998), 43. [Hereinafter Katerina, 1998].

³E. W. Lane, *Arabic-English lexicon*, (Lahore: Islamic Book Center, 1982), 609-610, s.v. 'haqq'

⁴Al-Mawrad, (*Dār-ul-Ilm Lilmalāyīn*, 1997), 480. [Hereinafter Al-Mawrad, 1997].

⁵Katerina, 1998, 54.

⁶Al-Qutab Muhammad Qutab, *Al-Islām Wa Huqūq ul-Insān*, (*Dār-ul-Fikr Al-Arabī*, 1994), 32. [Hereinafter Al-Qutab Muhammad Qutab, 1994].

⁷Shaikh Zain-ud-Dīn Ibn-e-Nujaim, *Al-Bahr Al-Rāiq Sharh Kanz Al-Daqāiq*, (Quetta: Al-Maktaba Al-Mājadiyya), Vol. 6, 136. [Hereinafter Ibn-e-Nujaim].

⁸Wahba Al-Zuhailī, *Fikh-al-Islāmī Wa Addillatuh*, (Damascus: *Dār-ul-Fikr*, 1989), 9. [Hereinafter referred to as Wahba Al-Zuhailī, 1989].

⁹The *Encyclopedia of Islam*, (E. J. Brill, Lieden, 1979), 199, s.v. 'hak, hakūk'.

¹⁰Katerina Dalacoura, 1998, 44.

¹¹Wahba Al-Zuhailī, 1989, 9-10.

State has no power to take these rights¹² because rights are not given by it. In this respect Islamic law is more protective for rights especially with reference to human rights as an Islamic State can not suspend these rights in any circumstance.¹³ The reason behind this is that how a State can take those rights which are not given by it? Here one can go to the court for enforcement of his right whether it is recognized by the State or not, as it is recognized by the lawgiver. In Western law, according to positivists, State is the source of all rights. As a result it can take these rights back and can suspend them in case of emergency. This is the approach, which is followed in Pakistan. One example of it is suspension of fundamental rights during the government of *Nawaz Sharif* in 1998.

Islamic law gives so much importance to rights that every person is commanded to defend his right and fight for it in case of threat of infringement.¹⁴ At the same time a person having a right has obligation towards other people: to exercise his right in a way which is not detrimental to them, and people in general have obligation to respect that person's right.

1.1.3 ELEMENTS OF THE RIGHT

Following are the elements of a right.

1- Owner of the right

It is the person entitled to the right and is called *Sāhib-ul-haqq*. *Sāhib ul- haqq* may be Allah or a natural person or a legal person like companies, corporations etc. Allah has rights, which are called *huqūq Allah* like prayer, fasting etc. These rights will be

¹²Sulaimān bin Abdurrehmān Al-Hagīl, *Human Rights in Islamic law & their application in Saudi Arabia* (Translated by Omar F. Atārī), (Imām Muhammad Bin Sa'ud Islamic University, 2001), 128. [Hereinafter Sulaimān bin Abdurrehmān Al-Hagīl, 2001].

¹³In this respect the approach of Islamic law is similar to the approach of Naturalists. According to them as well rights are not creation of the State & State has no power to take these rights or suspend them in emergency or in any other situation.

¹⁴ Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 125.

discussed later.

Natural personality starts from birth and ends at death. But in Islam a fetus or dead person also has some rights. Islamic law also acknowledges legal personality or artificial personality. Companies, corporations, mosques etc can have rights and also have certain liabilities.¹⁵

2- Subject of the duty

He is a person on which corresponding duty lies. As every right gives rise to a duty. Subject of the duty is that person who is bound to perform certain acts or omissions in respect of the right holder.

3- Subject matter of the right

It is the object from which a right arises like property, debt, *mahr*, or any other act. There is a condition that the subject matter should not be prohibited by *Sharī'ah*. If it is prohibited, like wine etc, the right is not considered by Islamic law.¹⁶ A person in an Islamic State cannot claim a right on a subject matter, which is prohibited.

1.1.4 KINDS OF RIGHTS

Discussion of rights and its kinds are mostly found in details of '*mahkūm beh*' i.e. the act of the subject. As every rule is associated with a kind of right so *fuqahā* discussed issue of rights under this heading.

Islamic law gives four kinds of rights.¹⁷

¹⁵Wahba Al-Zuhailī, 1989, 10-11.

¹⁶Al-Qutab Muhammad Al-Qutab, 1994, 39.

¹⁷Sadr-al-Sharī'ah Ubaid Ullah bin Masūd, Al-Tawdīh Sharh-ul-Tanqīh, (Peshawar: Maktaba Farūqiyah, 1996), Vol. 2, 315. [Hereinafter Sadr-ul-Sharī'ah, 1996]; Abī Bakr Muhammad bin Ahmad bin Abī Sahl Al-Sarakhsī, Usul-al-Sarakhsī, (Beirut: Dār-ul-Ma'arif), vol. 2, 288. [Hereinafter Al-Sarakhsī]; Ibn-e-Nujaim, vol. 6, 136; Alā-ud- Dīn Abd-ul-Azīz bin Ahmed Al-

1.1.4.1 Right of Allah

According to *Sarakhsī* right of Allah is of eight kinds.¹⁸

1. Pure worship: It includes belief in Allah, prayer, *zakāt*, fasting (and *ʿitikāf* as it is associated with fasting), *haj* (*ummrah* as it is associated with *haj*), and *jihād*.
- 2- Pure punishments: It includes *hudūd* punishments like theft, drinking etc.
- 3- Imperfect punishments: These punishments are called *uqūbah qāsirah*. One example of it is prevention of inheritance for murderer from victim.
- 4- The acts vacillating between worship and punishment. Example of it is act of expiation. In it there is an element of punishment as well as element of worship.
- 5- Worship in which there is element of financial liability. Example of it is *sadaqa-tul-fitr* and *zakāt*.
- 6-Financial liability in which there is element of worship like *ʿusher*.
- 7-Financial liability in which there is element of punishment and its example is *khirāj*.
- 8- Those which exists independently

Sarakhsī described it in three kinds.

- 1- Those which are initially laid down as a rule.
- 2- Those which are laid down as an addition to a rule.
- 2- Those which are associated with a rule. Example of these are the *khums* levied on cattle, minerals and treasure-troves.¹⁹

Bukhārī, *Kashaf-al-Asrār*, (Cairo: Dār-ul-Kitāb Al-Islāmī), Vol. 4, 134. [Hereinafter Alā-ud-Dīn Abd-ul-Azīz bin Ahmed Al-Bukhārī].

¹⁸ Al-Sarakhsī, Vol.2, 290 onward.

Sadr-al-Sharīʿah, 1996, Vol.2, 316 onward.

¹⁹ Nyazee, 2000, 95.

1.1.4.2 Right of man

These are civil rights or claims of a human. It includes all those rights, which are not included in other categories. Examples of it is property rights, *nikāh*, *talāq*, agency, *kafālah*, *mudārabah* etc.²⁰

According to *Mālikī* Jurists there are further three kinds of rights of man.²¹

- 1- Right, which an individual owed to God. It includes worship and its purpose is to acquire pleasure of Allah.
- 2- A complete right of man. It is completely right of man and is for his own benefit like prohibition of drinking etc.
- 3- Right of man owed to other people. These are those rights which an individual owed to other individuals like debt etc.

Third and fourth kinds of rights are following.

1.1.4.3 Cases in which right of Allah and right of individual exists side-by-side and right of Allah is predominant. One example of it is case of *qadf* in it right of Allah is predominant over man.

1.1.4.4 Cases in which right of Allah and right of individual exist side-by-side and right of individual is predominant. A good example of it is *qisās* or retaliation; here right of man is predominant.

²⁰Dayāb Abdul Jawād, 1980, 95.

²¹Muhammad Alī Bin Shaikh Hussain Muftī Al-Mālikīyyah, *Tahzīb al-furūq Wa al-qawā'id al-sunniyyah fil-asrār al-fiqhiyya*, (Beirut: Ālam Al-Kutb), Vol. 1, 157. [Hereinafter Muhammad Alī Bin Shaikh Hussain Muftī Al-Mālikīyyah]

1.1.4.5 RIGHT OF STATE OR COMMUNITY

This is a right of the individuals collectively or the State. Muslim jurists differ about this right. Some jurists did not consider right of the State, according to them there are only four kinds of rights in Islam. Some modern jurists confused this right with the right of Allah.²² But the fact is that these rights are distinct. One result of this classification is that where an offence against right of State is committed State can pardon it, but it cannot pardon an offence, which is committed against the right of Allah.²³

Muslim jurists as stated above were not much concerned about this kind of right. *Shāf'ī* jurist *Al-Māwardī* and *Hanbalī* jurist *Abū Ya'alā* discussed rights and duties of *imām* or the State. *Al-Māwardī* called this right *haqq-al-saltanah* i.e. right of State.²⁴

As far as duties of the State or the ruler are concerned it includes preservation and protection of religion, defence of State, to implement *hudūd*, to conduct day to day affairs of State according to the rules of *Sharī'ah*.²⁵

According to *Muhammad Yūsaf Mūsā* concept of a welfare State and duties of a welfare State can also be derived from teachings of Islam and history of *khulafā-e-rāshidīn*.²⁶

²²Abdul Rahim, *Muhammadian Jurisprudence*, (Lahore: All Pakistan Legal Decisions, 1911), 201. [Hereinafter Abdul Rahim, 1911];

Abdullah Muhammad Jamāl-ud-Dīn, *Nizām-ud-Dolāh fil Islām*, 315.

²³Nyazee, 2000, 92; Nyazee, 1994, 73.

This confusion can be seen in *Hakim Khan v Govt. of Pakistan*, PLD 1992 SC 595. Where Supreme Court discussed rights of individual & right of Allah but there is no mention of right of State & at the same time some inconsistencies also comes forward as right of State is not acknowledged.

²⁴*Al-Māwardī*, *Al-Ahkām Al-Sultāniyyah* (urdu translation by Maulvi Syed Muhammad Ibrahim. Lahore: Qanūni Kutabkhana), 373.

²⁵ Zāfir Al-Qāsimī, *Nizām-ul-hukm fi al-sha'riah wa al-tarikh al-Islāmī* (Al-kitāb al-ahwāl al-hayāt al-dustūriyah), (Beirut: Dār-ul-Nafāis, 1985), 352-353. [Hereinafter Zafir Al-Qasimi, 1985]; Badr-ud-Dīn Bin Jamā'ah, *Tahrīr-ul-Ahkīm fi tadbīr Ahl-al-Islām*, (Qatar: Al-Mahākam Al-Shar'iyyah wa Al-Shaoun Al-Dīniyyah, 1987), 65-69. [Hereinafter Badr-ud-Din Bin Jama'ah, 1987].

²⁶Muhammad Yūsaf Mūsā, *Nizām-ul-hukm fil Islām*, 91, mentioned in Zāfir Al-Qāsimī, 1985, 345.

About rights of the State or *Imām* it is said that the two main rights of the ruler are obedience and support if the ruler works under orders and limits of *Sharī'ah*.²⁷ Islamic State also has the right to legislate for the people in cases where no rule in The *Qur'ān* or The *Sunnah* is given. Mostly this is described as right of *imām* or the ruler.²⁸ But in fact it is right of the State exercised by the ruler on State's behalf as the ruler represents the State. There are some other rights of the ruler as a head of a State which are discussed by modern jurists like advice of the people, respect from them and with this he also has right to be informed by the people about performance of his inferiors.²⁹ Although these rights are enumerated separately but these fall either under heading of obedience or support.

As far as children are concerned Islamic State has power to legislate for them and to make laws for protection of their rights. There is a *hadīth* to this effect '*the sultān is the guardian of one who does not have a guardian*'³⁰ So where the natural guardian is not fulfilling his duties or there is no guardian for the child, State has authority to protect minor's person and property.

There is a lot to be done in the field of rights of the State as it remains a neglected field till now but there is no scope to discuss it here in detail.

1.1.5 Correlativity of rights & duties.

Like Common law, in Islamic law as well for every legal right there is a corresponding duty.³¹ One example of it is *iqāmat-ul-hudūd*, it is right of Allah this right creates a corresponding duty in the ruler or *imām* to establish it. In Islamic law every rule is linked with a kind of right whether it is right of Allah or right of individual or right of State. The rules create corresponding obligations or duties.³² The rule for a ruler

²⁷Zāfir Al-Qāsimī, 1985, 345.

²⁸*Ibid*, 356.

²⁹*Ibid*, 358-360.

Badr-ud-Dīn Bin Jamā'ah, 1987, 61-64.

³⁰Imran Ahsan Khan Nyazee, *Islamic Law & The CRC*, Islamabad Law Review, Spring & summer 2003, 113. [Hereinafter Nyazee, 'A', ILR, 2003].

³¹Zāfir Al-Qāsimī, 1985, 325.

regarding *iqāmat-ul-hudūd* is linked with right of Allah and creates obligation or duty in *imām* to establish these *hudūd*. In Islamic law rights are always associated with duties. So a right of an individual is considered as a duty for others and also for the owner of the right. His duty is to defend his right and to fight for it if it is infringed.³³

1.1.6 RIGHTS & THEIR RELATION WITH *MAQĀSID AL-SHARĪ'AH*

There are five objectives or *maqāsid* of *sharī'ah*. Islamic Law is supposed to serve these *maqāsid*.

1. *Hifz alā dīn*.
2. *Hifz alā naḥs*.
3. *Hifz alā nasl*.
4. *Hifz alā aql*.
5. *Hifz alā māl*.

The whole system of Islamic law revolves around these objectives. These Objectives or *maqāsid* are definitive. *Hifz* include establishment and protection.³⁴ From establishment we mean to establish its elements and foundations and from protection we mean to protect it from what damages the aspect of establishment and produce disharmony.³⁵

When we use the term Islamic State it means that in that State Islamic law or *Sharī'ah* should be the supreme law of the land i.e. the State should adhere to strict application of *Sharī'ah* and to its *maqāsid* or objectives.³⁶ Most of the rights and duties emerge from these *maqāsid*.³⁷ It is duty of the State to establish *dīn* and to protect it. This duty

³²Nyazee, 2000, 96.

³³Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 125.

³⁴Abū Ishāq al-Shātībī, *Al-Mawafaqāt fī Usūl Al-Sharī'ah*, (Cairo: Dār-ul-Fikr Al-Arabī), vol.2, 8.

³⁵*Ibid*.

³⁶Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 35.

corresponds a right in people to have freedom to practice religion. Right to life emerges from *hifz alā nafs*. This is a primary right and gives rise to many accessory rights like right to food, health, shelter, livelihood etc. These are the rights, which increase scope of primary rights. It is the approach of Pakistani courts as well, in a judgment it is said by the Supreme court that '*right to life doesn't mean vegetative or animal life but includes such amenities, facilities and personal rights as should be enjoyed by a person born in a free country*'.³⁸ Right to marriage and a child's right to the status of legitimacy emerge from *hifz alā nasl*. *Hifz al-aql* give rise to right of education and right of freedom of expression of opinion. *Hifz alā-māl* give rise to rights related to property.

These rights further develop and give rise to other rights. There are accessory rights to these primary rights. Every other right, which facilitates, support or increase scope of these rights is termed as accessory right. Sanctioning rights can also be derived from these *maqāsid*, if a right is violated, as a result there will be another right to receive remedy. If your right to life or education or any other right is violated you as a result have right to receive remedy, this may be in form of compensation or specific performance etc.

From these *maqāsid* duties and rights of the State can also be determined. It is duty of the State to establish and protect these objectives. It is duty of the State to prohibit all acts detrimental to these objectives and their preservation.³⁹

The order in *maqāsid* also show a priority list.

Deen has priority over *nafs*.

Nafs has priority over *nasl*.

Nasl has priority over *aql*.

³⁷Nyazee, 1994, 262.

³⁸The State v Muhammad Hasham Babar, PLD 1997 Lahore 605;
Shehla Zia v Wapda, PLD 1994 SC 693

³⁹Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (Islamabad: Advanced Legal Studies Institute, 1998), 26. [Hereinafter Nyazee, 1998].

Aql has priority over *māl*.

This priority list works in case of clash between interests or rights. No person can exercise his right of freedom of expression of opinion by detrimenting *dīn*; a good example of it is case of blasphemy. Because *hifz alā dīn* has priority over *hifz alā aql*, so in case of clash first will prevail. Right of life can be sacrificed for *dīn* as in case of *jihād* because *dīn* has priority over *nafs*.⁴⁰

These five *maqāsid* forms *darūriyāt* i.e necessities.

Each objective has three kinds of rights: right of Allah, right of community and right of individual.⁴¹ Where right of Allah clashes with any other right, it prevails. As in case of *zinā* when a *muhsan* is stoned to death, it seems that *hifz alā nafs* is given priority to *hifz alā nafs*. Actually right of Allah in *hifz alā nafs* prevails over right of individual in *hifz alā nafs*. Every objective has underlying three rights. Right of Allah is always preferred when it clashes with any other right whether it belongs to most preferred *maqṣad* or least preferred. The priority shown above among *maqāsid* works when both conflicting rights belong to the same category. Where right of man clashes with right of State or vice versa there is no strict rule. In some cases right of State prevails and in others right of individual.

1.2 CONCEPT OF RIGHTS OF MINOR IN ISLAMIC LAW

Concept of rights is discussed above now I will discuss the concept of rights of minor in Islamic law.

1.2.1 WHO IS A MINOR?

The word used in Islamic law for minor is *sabī* or *saghīr*. *Sabī* means as lad, youth or

⁴⁰Nyazee, *Islamic Law & Human Rights*, ILR, 2003, 61. [Hereinafter Nyazee, B, ILR, 2003].

⁴¹Nyazee, 2000, 208.

boy⁴² and *saghīr* means young, child, minor, and junior.⁴³ The word *saghīr* is opposite of *kabīr* which means grown-up, adult or old aged.⁴⁴

In legal terms what majority means is the particular age at which a person has right to undertake certain acts or where he will be held fully responsible for his acts. This all is dealt in Islamic law under capacity for execution. According to majority of jurists this capacity is only attained at puberty.⁴⁵ It means that in Islamic law a person is minor until he attains puberty. After attaining puberty every one has full capacity to exercise his rights and to perform his duties. In case signs of puberty are not there, Muslim jurists fix a particular age. A person who attains that age although there are no signs of puberty is declared as major in Islamic law.

This age according to majority of jurists is 15 years and according to *Abū-Hanīfa* it is 18 years for a boy and 17 years for a girl.⁴⁶ According to the two disciples of *Abū-Hanīfa* minority ceases at the completion of 15th year.⁴⁷ The reason behind this is that at this stage it is presumed that discretion is attained in the case of both sexes i.e. male and female.⁴⁸ According to one tradition of *Abū-Hanīfa* puberty of a boy will be established on his completion of nineteen years.⁴⁹ If we take *Hanaḥī* view which looks more appropriate here, a boy before age of 18 and a girl before age of 17 are declared as minors if there are no signs of puberty.

⁴²Al-Mawrad, 1997, 688.

⁴³Al-Mawrad, 1997, 695.

Ibn-e-Manzūr, *Lisān-ul-Arab*, (Beirut: Dar Lisān-ul-Arab), vol. 1, 444. [Hereinafter *Lisān-ul-Arab*].

⁴⁴Al-Mawrad, 1997, 881.

⁴⁵Nyazee, A, ILR, 2003, 114.

⁴⁶Dayāb Abdul Jawād Attā, 1980, 158.

⁴⁷Al-Marghenāni, *Hadāya*, English Translation by Charles Hamilton, (Lahore: Premier Book House, 1975), Vol. 3, 529. [Hereinafter Al-Marghenāni, 1975].

⁴⁸Liaquat Ali Khan Niazi, *Islamic law of Contract*, (Lahore: Research Cell Dayal Singh Trust, 1990), 134.

⁴⁹Al-Marghanāni, 1975, Vol. 3, 529.

At this point we see that Islamic law has clearer stand than Common law as in Western law it is still not decided that person of which age should be declared as a minor. There, for different purposes different age limits are fixed. As a result there is confusing disparity in this regard.⁵⁰ Probably the main reason for this disparity in definition of child and in deciding minimum age is that there is no theory about the basis of majority in Western law. So the law is arbitrary and there is no fix age of majority, it varies from case to case. For example in case of law related to employment it is mainly based on hazard, if work is of hazardous nature the minimum age is increased and if the work is of light nature the minimum age for employment is lowered. Whereas in Islamic law the age of majority is puberty. The theory working behind is the theory of '*rushd*' i.e. *aqal* and *tamyeez* (intellect and discretion). There is no method to judge whether a person possess *rushd* or not, and so it is associated with puberty. Under Islamic law minority is a state of human being after birth and before puberty.⁵¹

1.2.2 LEGAL CAPACITY OF MINOR

Rights of minor are related with his legal capacity. It will be appropriate here to discuss capacity of minor so that concept of rights of minor becomes clear. First I will define legal capacity and then I will go to the capacity of minor.

1.2.2.1 LEGAL CAPACITY

Legal capacity in Islamic law is defined as 'the ability or fitness to acquire rights and exercise them and to accept duties and perform them'. Legal capacity is connected with

⁵⁰For e.g. we see that in Majority Acts usually age is fixed at 18. In acts related to employment of children, some times age is fixed at 14 or 15 etc. Even international documents on this issue have same problem. (Article 2 of ILO Minimum Age Convention No.138, 1973, The Minimum Age Industry Convention, 1919 etc. stated in The State of Pakistan's Children 1998, p-2.)

In Pakistani law also there is no decided minimum age; the upper limit is between 12 & 18. (Section 3, The Majority Act 1875. Section 2(3), The Constitution Of Pakistan 1973. Section 2, The Employment of Children Act 1991.) So in Pakistan also for different purposes different age limits are laid down.

⁵¹Nyazee, 2000, 126.

dhimmah, it means liability. It is a condition requisite for existence of legal capacity.⁵² *Dhimmah* is an attribute by which one acquires capacity for acquisition of rights and duties. It is a covenant between lawgiver and the subject⁵³ and it can be assigned to a natural person and to an artificial person as well.⁵⁴

The definition of legal capacity talks about two types of capacities: capacity of acquisition i.e. capacity to acquire rights and duties, and capacity for execution i.e. capacity to execute these rights and duties.⁵⁵ These capacities are some times called receptive legal capacity and active legal capacity respectively.⁵⁶

Because of capacity of acquisition a person becomes able to acquire rights and liabilities. *Manāt* or basis for capacity of acquisition is the attribute of being a human. It is of two kinds' complete capacity and deficient capacity. A person having deficient capacity posses only some rights and no obligation is imposed on him.

Capacity for execution is defined as 'the capability of a human being to issue statements and perform acts to which the law giver has assigned certain legal effects'.

This capacity is further divided into three kinds.

1- Legal Capacity for Criminal Liability: It is based on the ability to comprehend the communication pertaining to criminal act.

2- Legal Capacity for *Ibadāt*. This capacity is based on the ability of subject to understand or comprehend the communication of lawgiver pertaining to *ibadāt*.

⁵²Nyazee, A, ILR, 2003, 111

⁵³Sadr-al-Sharīah, 1996, 336-337.

⁵⁴Nyazee, 'A', ILR, 2003, 111

⁵⁵Nyazee, 1994, 75; Nyazee, 2000, 110

⁵⁶Abdur Rahim, 1911, 217.

3- Legal Capacity for *Mu'amalāt* or Transactions. It is legal capacity based on the ability of subject to comprehend communication pertaining to transactions.⁵⁷

After this brief introduction now I will switch to capacity of minor and elaboration of rights of minor as related with this capacity. First I will discuss legal capacity of unborn child or *janīn* and rights which an unborn child possesses then I will discuss capacity and rights of minor.

1.2.2.2 LEGAL CAPACITY OF *JANĪN* OR UNBORN CHILD

A *janīn* or unborn child possesses deficient capacity i.e. only some rights are established for unborn child, these are those rights which do not require acceptance,⁵⁸ and no duty is imposed on him. The reason that why unborn child is assigned deficient capacity is that basis of legal capacity in case of unborn child is not fully developed. He is not considered as an independent personality because in some respects he is considered as a part of her mother. But in other respects he is considered as an independent personality as he has a separate life. So he is assigned deficient capacity. As said earlier he has some rights like inheritance, parentage etc. but no obligation can be imposed upon him. For e.g. if guardian of the *janīn* buys some thing on its behalf, he is not liable for the price. He is also not liable to maintain his close relatives.⁵⁹ A child after birth acquires capacity for imposition of obligations. But this capacity is also of defective character. This will be discussed later.

In Islamic law *janīn* is considered a separate legal person as if it is aborted a special indemnity (*ghurrah*) is to be paid⁶⁰ and this indemnity or money is devolved on the heirs

⁵⁷Nyazee, 2000, 112.

⁵⁸Like parentage, inheritance etc.

⁵⁹Abdur Rahim, 1911, 240; Ala-ud-Dīn Abd-ul-Azīz bin Ahmed Al-Bukharī, vol.4, 239-240; Nyazee, 1994, 79.

⁶⁰Muhammad bin Idrīs Al-Shāf'ī, Kitāb-ul-Umm, (Beirut: Dar-ul-Ma'arifa), vol.6, 107. [Herein-

of the child.⁶¹

Janīn or unborn child has following rights; right of parentage or lineage, right to inheritance, right of *itāq*, right in *wakaf*. These rights would be assigned to *janīn* only if it is born within six lunar months from the establishment of right.⁶²

1.2.2.3 LEGAL CAPACITY OF CHILD AFTER BIRTH

After birth a child possesses complete capacity for acquisition of rights and duties. As far as capacity for execution is concerned a minor before puberty lacks this capacity. If he attains some discretion then he is assigned deficient capacity for execution. For this purpose jurists determine the age at 7. Before age of seven minor is called *sabī ghair mumayyaz* and after seven till puberty he is called *sabī mumayyaz*. This deficient capacity for execution is with respect to transactions.⁶³ These transactions are divided in three categories.⁶⁴

1- Beneficial Transactions.

These transactions are those which are purely beneficial like acceptance of gift etc. A minor is allowed to make such transactions but with permission of *walī*.

2- Harmful Transactions.

These transactions are those which are purely harmful or which results in financial loss like *sadaqa*, loan, *wasiyyah* or bequest etc. These transactions are void even if made by

after Al-Shāfī]; Alī Abdul Hamīd Baltarjee & Muhammad Wahbī Sulaimān, *Al-Mu'tamid fi Fikh Al-Imām Ahmad*, (Dār-ul-Khair, 1991), vol.2, 375; Mālik bin Anas, *Al-Mudawanah Al-Kubrā*, (Beirut: Dār-ul-Kutb Al-Ilmiyyah, 1994), Vol.4, 630.

⁶¹Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 124. [Hereinafter Joseph Schacht, 1982].

⁶²Joseph Schacht, 1982, 124.

⁶³As far as criminal liability is concerned a person is not liable till he attains puberty, and *Ibadat* are not obligatory on the minor because he did not possess capacity for execution. *Ibadat* are right of Allah so are not imposed on minor.

⁶⁴Sadr-al-Sharī'ah, 1996, vol.2, 344-346.

walī because he has no authority to enter in such transactions.

3- Transactions vacillating between profit and loss.

These are the transactions which vacillate between profit and loss like partnership, sale etc. These transactions are only valid after ratification of *walī* otherwise these will be void.

This all is according to *Hanafi* jurists because majority of jurists are of the view that minor lacks capacity for execution till puberty.⁶⁵

1.2.3 DOES A MINOR REALLY HAVE RIGHTS?

There is an approach that children do not have rights. What we called children's rights are in fact parent's duties. But approach of Islamic law is different it does not agree with this approach. In Islamic law children do have rights. As it is discussed earlier children have capacity of acquisition so they have rights. Even unborn child posses some rights.

Although children have rights, but they are not free to exercise these rights because they don't posses capacity for execution.⁶⁶

1.2.4 HOW A MINOR EXERCISE THESE RIGHTS?

Islamic law provides us with institution of *wilāyah* (guardianship). A child exercises her rights through this institution. If father or grand father is guardian of a child they are called *walī*. If there is no natural guardian or the natural guardian is not fulfilling his responsibilities as enunciated by *Shari'ah* then State has power to appoint guardian through court. In Islamic law guardian appointed by the court is called *wasī*. This power of State is derived from the *hadīth* 'the *sultān* is the guardian of one who does not have a

⁶⁵Wahba Al-Zuhailī, 1989, Vol.1, 166-168.

⁶⁶Nyazee, A, ILR 2003, 113.

guardian'. So State has power to appoint a guardian where there is no guardian for a minor.⁶⁷

The guardian, whether a parent or a person appointed by the court, has authority to make a contract on behalf of the minor. According to jurists transactions made by *wali* on behalf of minor are enforceable and valid even after his majority except contract of marriage.⁶⁸

But authority of *wali* is restricted by the condition that he can make only those transactions which are beneficial to the minor. If there is a disposition or transaction, which is harmful to him, it cannot be enforced.⁶⁹

In Islamic law there are also certain conditions for guardian like he should be adult and sane person, should follow the same religion as followed by the minor and he should be capable of performing his duties as a guardian.⁷⁰

All these conditions are laid down to protect interest of the minor. So *wali* can make any transaction, within the limit of his authority, if it is in the interest of the minor and he cannot make any transaction, which is against the interest of the minor. It is a general rule laid down by the jurists.

1.2.5 ISLAMIC LAW'S MAIN CONSIDERATION: INTEREST OF THE MINOR

From all this discussion we can conclude that Islamic law's main consideration while

⁶⁷*Ibid.*

⁶⁸Hussain Hamid Hassan, *An Introduction To The Study Of Islamic law*, (Translated by Ahmad Hassan), (Islamabad: Leaf Publications, 1997), 397. [Hereinafter Hussain Hamid Hassan, 1997].

⁶⁹Sadr-ul-Shari'ah, 1996, vol.2, 345

⁷⁰Hussain Hamid Hassan, 1997, 397.

laying rules for minor is his interest.⁷¹ This is the reason behind institutions of *wilāyah* and *wasāyah*. To make it sure that the interest of the minor must be protected Islamic law imposes restrictions on the authority of guardian. As discussed earlier a guardian can make only those transactions, which are beneficial and cannot make any transaction which is harmful. Even if he enters in such transaction it would be void. So the main consideration in Islamic law is interest of the minor. For this consideration a minor is not liable for criminal acts and *ibadāt* are also not imposed on him. In financial transactions Islamic law gives a way because it is need of a minor. A minor who attains maturity i.e. discretion is also allowed to make beneficial transactions with permission of *walī*.

These all rules are there to save and protect minor's interests so that he and his wealth could be protected till he himself becomes able to exercise his rights and fulfill his duties.

CONCLUSION

The concept of right is the base of whole Islamic law. It gives so much importance to the protection of rights that its protection is made a duty of the right holder as well as of the other people. In Islamic law source of right is *Shār'ē* or lawgiver that's why State is not empowered to suspend or take away these rights. Every citizen can go to the court for enforcement of his right whether it is guaranteed by the constitution of the State or not as the lawgiver does guarantee it. There are four kinds of rights in Islamic law: right of Allah, right of man, where right of Allah and right of man exists side by side and right of State or community. This fourth kind is not clearly mentioned by *fuqahā*, they sometimes mix it with right of Allah but these are distinct.

Like Common law in Islamic law also for every legal right there is a legal duty so right and duty are correlative. All basic rights can be derived from *maqāsid al-sharī'ah*. These

⁷¹Nyazee, 'A', ILR 2003, 117.

maqāsid also indicate priority among rights in case of clash.

In Islamic law minority is a stage between birth and puberty. If there are no signs of puberty then jurists determined a particular age at which a person would be considered an adult. Notion of rights is linked with legal capacity so it is also relevant here. Not only child after birth but unborn child is also considered as a legal person and possess some kinds of rights. Islam didn't agree with the viewpoint that children don't have rights and what are considered their rights are in fact duties of the parents. A minor possesses capacity for acquisition so he has rights but he lacks capacity for execution so he exercises these rights through his guardian.

The main point in all this discussion is that the main consideration of Islamic law in all these issues is interest of the child as the whole law related to minor is supposed to protect interest of the child through various institutions.

At the end I emphasize on the point that Islamic law contributes a lot in the field of rights and especially in field of the rights of minor. What we need is to develop our law in this field and let it contribute in our legal systems to make it clear that this law is more effective in enforcement and protection of rights.

Chapter no. 2

CONCEPT OF RIGHTS IN COMMON LAW

INTRODUCTION

In this chapter I will discuss the concept of rights in Common law.¹ This discussion is more relevant here as the same law is followed in Pakistan. I will elaborate in its first section the concept of rights in general and in the second section concept of rights of minor. In that section international legislation on the issue will also be taken into consideration.

2.1 CONCEPT OF RIGHTS IN GENERAL

The law consists of rules for governing human conduct. This is to govern relationship among human beings. To govern the conduct, the law creates rights and duties.² Duty and right are correlative. According to Sir John Salmond and some other jurists like Hohfeld, Sir Fredrick Pollock and Dr.Hearn the concept of duty is more important because right is only to facilitate the operation of a duty. But Dr.Holland didn't agree with them. According to him the main and important is the concept of right. He advanced further and said that the basic object of the law is to create rights.³

With concept of right concept of duty and wrong are closely connected. Before defining a legal right it is necessary to understand concept of wrong and duty.

WRONG

Jurists defined wrong as disregard of a right. Wrong also means injury, harm or

¹Common law is the judge-made law of England based on custom.

²D. N. McCormick, '*Rights in Legislation*', in *Law, Morality & Society: Essays in Honour of H. L. A. Hart*, Ed. P. M. S. Hacker & J. Raz, (Oxford: Clarendon Press, 1979), 189. [Hereinafter D. N. McCormick, 1979].

³M. Farani, *Jurisprudence*, (Lahore: Nadeem Law Book House, year of publication is not mentioned), 91. [Hereinafter Farani].

damage. As right and duty are correlative, the wrong also involve breach of a duty. It means that it is an act contrary to justice.

There are two kinds of wrongs: moral wrong and legal wrong.

Moral wrong is an act contrary to morality or natural justice. It may or may not be recognized by the State as a wrong i.e as a legal wrong whereas legal wrong is an act contrary to the law of the land or in other words, it is an act recognized by the State as a legal wrong. A legal wrong may or may not be a moral wrong and vice versa.

We can further divide it in public wrong and private wrong. A private wrong is one which infringes a private right and a public wrong is one in which a public right is infringed.⁴

DUTY

A duty is an obligatory act. It may be positive i.e duty to do something, or negative i.e duty to refrain from doing something. According to Dais law creates duties to regulate human conduct.⁵ Breach of a duty is a wrong.

A duty and an obligation are not same things. Duty is an act which is obligatory by the State, whereas an obligation is an act which becomes obligatory by that person's own choice e.g. an obligation arisen out of a contract.

Duties are also of two kinds, moral and legal.

Moral duty is an act, which one ought to do according to natural justice or morality. It may or may not be recognized by the State.

⁴A private right is right of an individual whereas a public right is right of the community or the State. A private wrong is also called civil wrong or civil injury and a public wrong is termed as a crime.

⁵R.W.M. Dias, Jurisprudence (London: Butterworths, 1976), 301. [Hereinafter Dias 1976].

Legal duty is an act, which is binding according to the law i.e the State recognizes it as a legal duty. Sometimes this recognition is followed by sanctions. But sanction is not a test for a legal duty because in most of the cases sanctions are there but in some other, these are not.⁶

2.1.1 DEFINITION OF THE 'RIGHT'

Right means that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law that which one person ought to have or receive from another.⁷ So a right holder is a person 'who may at his option demand the execution of the duty or waive it'.⁸

As it is said that rights and duties are correlative, it means that if 'A' has a duty to do something, that particular act [done by A] would be the right of B. The reason why it is obligatory on A is that it is the right of someone else. As rights are concerned with interests it is said by Salmond that rights are those interests which are protected by the rules of right i.e by moral or legal rules.⁹ An interest protected by a legal rule is a legal right and an interest protected by a moral rule is a moral right. It means that every interest doesn't give rise to a legal right. For an interest to be a legal right it should not only be protected but also be recognized.

According to Holland and Jhering protection of an interest by law is the essence of a legal right. They define a right as 'a legally protected interest'. According to Jhering protection and according to Salmond recognition is the base of a legal right.¹⁰

⁶Dias 1976, 311.

⁷Francis J. Ludes & Harold J. Gilbert, *Corpus Juris Secundum*, (St. Paul, Minn. West Publishing Co.), Vol. 77, 391, s.v 'Right'.

⁸Geoffrey Marshall, *Rights, Options, and Entitlements* in *Oxford Essays in Jurisprudence: Second Series*, Ed. A. W. B. Simpson, (Oxford: Clarendon Press, 1973), 228. [Hereinafter Geoffrey Marshall, 1973]

⁹Salmond, *Jurisprudence*, (London: Sweet & Maxwell, 1966), 217. [Hereinafter Salmond, 1966].

¹⁰Farani, 93.

Holland defines it as 'a right is a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others, that which gives validity to a legal right is, in every case, the force which is lent to it by the State. Any thing else may be the occasion, but is not cause of its obligatory character'. According to this definition an interest which is recognized by the State is a legal right.¹¹

Austin defines the term right from the prospect of duties. According to Austin 'a party has a right when another or others are bound or obliged by the law, to do or to forbear, towards or in regard of him'.¹²

An example to illustrate this definition can be that a citizen has a right to pay tax and in case of nonpayment he has a right to be punished as the relevant authority has a duty to punish him. According to him there are two kinds of duties, absolute and relevant. Relevant duty is that which gives rise to a corresponding right and an absolute duty is one which doesn't give rise to a corresponding right e.g. State imposing a duty.

Austin's definition is not much acceptable. A number of jurists completely disagree with him. According to them no right can be without a corresponding duty and vice versa.

2.1.2 DISCUSSION OF NATURAL RIGHTS

There are two completely opposite approaches towards rights. One is of Naturalists and other is of Positivists.

According to Natural Law rights are derived from God, reason or morality or we can say that Natural Law is a law standing above the law of man whereas according to Positivists rights are derived from the laws of the State.¹³

¹¹Salmond 1966, 217.

¹²Farani, 94.

¹³Scott Davidson, Human Rights, (Buckingham & Philadelphia: Open University Press, 1995),

Positivists headed by Bentham completely deny natural rights. They only accept those rights which are created by the law, or in other words they admit only those as legal rights which are protected and recognized by the State. Bentham said that natural law and natural rights are two kinds of fictions. He called these rights 'not only nonsense but nonsense on stilts'.¹⁴ If there is any non legal natural right, it is of no use as it can not be enforced by the court.¹⁵ According to positivists only State can take these rights back. They give the State power to suspend fundamental rights in case of emergency.¹⁶

Natural rights or in modern terminology human rights are a major or fundamental component of public welfare or common good. Every natural right is limited by other right, public morality and general welfare.¹⁷ As said earlier natural law is a law standing above the law of man so nowadays it is considered as a yard stick against which positive law can be measured and natural rights or human rights are considered as a 'common standard of achievement for all peoples and all nations'.¹⁸

In Pakistan Bentham's approach is followed probably because it was prevalent in Britain at a time and Pakistan being a colony of Britain inherited this approach. One example of

30. [Hereinafter Scott Davidson, 1995];

C. G. Weeramantry, *An Invitation to the Law*, (New Delhi: Lawman Private Limited, 1998), 196. [Hereinafter C. G. Weeramantry, 1998].

¹⁴Vol.1 of collective works of Jeremy Bentham, (London 1968), 121 mentioned in H. L.A Hart, *Essays in Jurisprudence & Philosophy*, (Oxford: Clarendon Press, 1983), 182. [Hereinafter H. L.A Hart, 1983].

¹⁵H.L.A Hart, 1983, 182.

¹⁶Fundamental rights are those rights which are secured by constitution. These are those rights which cannot be suspended even in time of war or any other emergency. (Scott Davidson 1995, 40) Natural rights are given by natural law, for these rights the term human rights is being used since the U.N came into being. John Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon Press, 1980), 198. [Hereinafter John Finnis, 1980]

¹⁷John Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon Press, 1980), 213-218. [Hereinafter John Finnis, 1980]

¹⁸Raymond Wacks, *Jurisprudence*, Ed. C. J. Carr, (London: Blackstone Press Limited, 1995), 107. [Hereinafter Raymond Wacks, 1995]; Human rights are declared as a 'common standard of achievement' in preamble of Universal Declaration of Human Rights 1948.

it is suspension of fundamental rights by the government of *Nawaz Sharif* in Pakistan.¹⁹

Here another point which is important is regarding the enforcement of rights. As only those rights are legal rights which are recognized by the State, you cannot go to the court for a right which is not recognized by the State i.e your right is in this case mere natural right and not a legal right. According to second group headed by John Lock i.e naturalists, rights are given by natural law and not by the State. It is said that the rights were there long before the State came into being. Same thing was said by Mary Robinson in following statement.²⁰ '*Human rights are inscribed in the hearts of the people, they were there long before the law makers drafted their first proclamation*'.²¹ According to this view one can go to the court for the enforcement of his natural rights.

This discussion of source of right is not only of academic use but it has practical implications too. First implication is that according to naturalist's view State cannot suspend basic rights in any circumstance like emergency etc. Second implication is that any citizen in a State can go to the court for enforcement of these rights no matter these are recognized by the State or not. It is reverse of the theory of Bentham.

¹⁹In May 1998, when Pakistan conducted its first nuclear tests, the government imposed a state of emergency and fundamental rights were suspended in an apparent move aimed at freezing the foreign currency accounts. www.imaginepakistan.com, Last visited 4th August, 2005.

This is against Islamic law and at the same time it is against Article 2A of the Constitution of 1973 as it states that no law should be made against injunctions of The *Quran* and The *Sunnah*. According to Kelsen's theory of grund norm every legal system has a grund norm i.e. an ultimate value. In a State no law can be made which is against its grund norm. www.law.mq.edu.au/staff/stewarti/CLPKelsen.doc . Last visited 17th September, 2005.

In case of Pakistan if we consider Article 2A as *grund* norm then the law based on Bentham's approach is against it so it should be declared as null and void. But when we see Supreme Court's decision in *Hakim Khan v. Govt. of Pakistan*, PLD 1992 SC 595, the court said that this article is at equal par with other articles of constitution so we can not call it *grund* norm. According to some jurists *grund* norm for our legal system is Islam or according to some others it is *maqāsid al-shariah*. So according to kelsen's theory, such laws which are repugnant to the *grund* norm of our legal system should be null and void. I suggest here that provision of constitution which empowers Govt. to suspend basic rights in case of emergency should be amended as soon as possible.

²⁰United Nation's High Commissioner for Human Rights.

²¹Statement mentioned in Nyazee, 'A', ILR 2003, 30- 31.

2.1.3 CHARACTERISTICS OF A LEGAL RIGHT

Every legal right has five characteristics. These are following.

1. Owner of the right. It is the person in whom a legal right is vested. It is also called the subject of the right or the person entitled or the person of inherence.
2. Subject of the duty. He is the person upon whom correlative duty lies. He is also called the person bound or the person of incidence.
3. Content of the right. Some thing to which the act or omission relates, or the act or omission which is obligatory on the person bound in the favour of the person entitled.
4. Object or subject matter of the right. Some thing over which the act or omission is exercisable is called object or subject matter of the right.
5. Title of the right. Title of the right is the set of facts or events by reason of which the right has become vested in its owner.

Here five characteristics are mentioned. According to some jurists like Keeten and Holland there are only four characteristics of a right as they didn't recognize title as one of the characteristics. They termed it as a source of the right.²²

From the characteristics of a legal right, which are given above, the object of the right is more important and essential. Object of a right is not a material thing in all cases. There are many cases where the object is immaterial. Some jurists are of the view that the object is not an essential element; there exists some rights in which there is no object.²³

²²Farani, 98.

²³In fact in these cases the object is there but is immaterial.

Whereas according to others object is an essential element of a legal right. Every right has an object but it needs not to be material.²⁴ If it is recognized and protected by the State, though the object is immaterial, it is a legal right.

Following are the kinds of rights where the object is immaterial.

1. A right of a man in respect of his own person like his health, liberty, reputation etc.
2. Right in respect of domestic relations like right of a child to the affection and care of her parents.
3. The third kind is rights in respect of other rights e.g. If 'A' buys a house from 'B', he has a right against 'B' to have a right vested in him to be transferred to 'A'.
4. Another illustration of this kind of right is rights over immaterial property like copyrights, trademarks, patent rights etc.
5. A right vested in one person to the service of another is also a right over immaterial object i.e service.

As it is said earlier some jurists believe that the object of a right may not be immaterial. This view is no more acceptable in this era. Intellectual property rights, trade marks etc are example of rights over immaterial object and are now considered as an important part of the law.²⁵

²⁴E.g. Intellectual property Rights, Trade Marks etc.

²⁵Intellectual property means 'the legal rights which accrue from intellectual activity in the industrial, scientific, literary and artistic field and include patents and other rights in inventions, rights in trade marks and industrial designs are also copy rights and allied rights mainly in literary, musical, artistic and cinematographic works such as rights of films, records, broadcasts

2.1.4 LEGAL RIGHTS IN A WIDER SENSE OF THE TERM

What we have discussed up till now is the meaning of right in strict sense in which it is correlative of the duty. The term right includes some other concepts too if it is used in a wider sense.

Hohfeld was the first to explain it.²⁶ He said that the word right entails four concepts.

1. Claim
2. Privilege
3. Power
4. Immunity

If 'A' has a right to recover his property from 'B' it is a claim.

If 'A' has a house, his right to enjoy his house is a privilege.

If 'A' has a right to appoint an agent this kind of right is termed as power.

If 'A' has a right not to be tried by a jury it is called immunity.

etc'. Naseem Hasan Shah, '*Intellectual Property Situation in Pakistan*', Law, Justice & Islam, (Lahore: Wajidalis Ltd, 1989), 139.

Trademark means 'a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or registered user, to use the mark whether with or without any indication of the identity of that person'. [Sec. 2 of The Trade Marks Act, 1940] A trademark works as an identity to the product itself. In Pakistan there are several acts by which intellectual property rights are protected there are The Patent and Designs Act of 1911, it was amended by Patents and Designs (Amendment) Ordinance 1983, Antiquities Act of 1976, Trade marks Act of 1940. These acts were inherited by Pakistan and further amended according to needs of the time. By these acts intellectual property is protected and aggrieved person or one whose right is violated is provided with remedies like injunctions, damages, and accounts etc. [Sec.60, Copy Right Ordinance, 1962]. The reason behind protection of intellectual property is the principle that no one should be permitted to appropriate to himself the result of another's brain, skill, labor, and judgment. [Abbas Hussain Farouqi v Royal Printing Press (PLD 1970 Karachi 565)] In Pakistan protection has been provided to these rights by statutes and by providing adequate remedies for infringement of these rights.

²⁶J. W. Harris, *Legal Philosophies*, (London: Butterworth, 1980), 16-18. [Hereinafter J. W. Harris, 1980]; John Finnis, 1980, 199; J. G. Riddal, *Jurisprudence*, (London: Butterworth, 1999), 177. [Hereinafter J. G. Riddal, 1999]; C. G. Weeramantry, 1998, 165; *Law and Philosophy: Readings in Legal Philosophy*, Ed. Edward Allen Kent, (Englewood Cliffs & New Jersey: Prentice-Hall, Inc., 1970), 115-116.

Hohfeld said that all these rights have co-relatives.

Correlative of right/claim is duty.

Correlative of privilege is no-right.

Correlative of power is liability.

Correlative of immunity is disability.

Hohfeld also describe that each of these rights have their opposites.

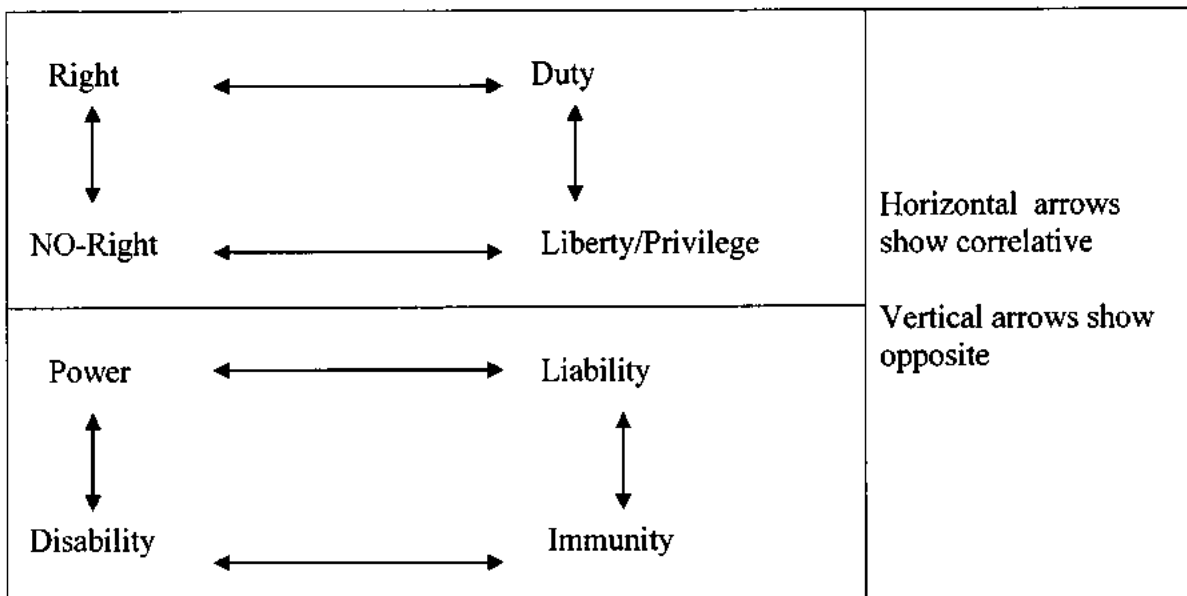
Opposite of right is no-right.

Opposite of privilege is duty.

Opposite of power is disability.

Opposite of immunity is liability.

Following is the diagram which shows this relationship.



7/11. 4480

1. LIBERTIES AND NO RIGHTS

Liberty means what one can do with out being prevented by others. Liberty is an exception from right of another.²⁷

If we say that 'A' is at liberty to do such and such things, it means that the law is content to leave 'A' alone in that particular area. It was decided in *Abdur Rashid Butt V. The State and Others* that it is privilege of an accused person that he should not be condemned unheard and he has an opportunity to defend himself. The honorable court said that this privilege operates as a right.²⁸

Correlative of liberty is no-right. No-right means absence of a legal right with respect to some particular area. If 'A' has a right or is at liberty to do what he wants with his own person or property but he has no-right to do the same thing with some one else e.g. 'A' has a right to go into his own house and enjoy living there, but 'B' has no right to do so. On the other hand 'A' has no right of living in respect of some one else's house.

The opposite of liberty is duty. If 'A' has a liberty to use his property according to his will he is not at the same time under a duty to do so. Here 'A's rights are benefits which he derives from the absence of legal duties imposed upon himself.²⁹

2. POWER AND LIABILITY

Power is defined as 'ability conferred upon a person by the law to alter by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself, or of other persons'.³⁰

²⁷Salmond 1966, 231.

²⁸PLD 1997 Lahore 394.

²⁹Salmond 1966, 225.

³⁰*Ibid*, 229.

Exercise of power results in change in relationship. When one person exercises his powers he actually brings a change in an existing relationship e.g. 'A' has a right to appoint an agent, or if he has a right to sell his property, it is actually his power by which he made a transaction and by making a transaction he changes the legal relationship.

The correlative of power is liability or subjection. It is the position of one who is affected by the exercise of a power, for better or for worse.³¹ If 'A' sells his land to 'B', he changes his own position and position of 'B' aswell. The opposite of power is disability i.e. if 'A' has power to sell his land to 'B'. He can not be under a disability to do so at the same time.

3. IMMUNITIES AND DISABILITIES.

Immunity is an exemption or freedom from the power of another. A power is a legal ability to change legal relationship or to effect a transaction, immunity is an exemption from exercise of that power. If a foreign agent has a right to not to be tried by an ordinary court it is his immunity from an ordinary trial. Another example is that if a defaulter or a bankrupt has a right that his personal belongings should not be seized by the court it is his immunity.

The correlative of immunity is disability. Disability means absence of power. In the above given example the court or the court's officer is under a disability to seize his personal belongings.

The opposite of immunity is liability. If 'A' has no immunity in the above given example from seizer of his personal belongings then he would be under a liability i.e his position will be changed by exercise of the power by the court to seize his personal belongings.

It is clear from the discussion that the word 'right' entails various concepts. But in strict

³¹Farani, 102.

sense of the word it is a claim. This is the meaning which the courts are following. 'Meaning of right in a wider sense' is a juristic discussion; usually courts are not appearing to follow these distinctions.

2.1.5 THE CLASSIFICATION OF RIGHTS

Following are the kinds of rights.

2.1.5.1 PERFECT AND IMPERFECT RIGHTS

Each right has a corresponding duty. A perfect right is that right which correspond a perfect duty and a perfect duty is that which is not only recognized by the law but also enforced by it.³² This enforcement is through the courts. When an action or legal proceedings, whether civil or criminal will be there in case of breach of a particular duty, the duty is called to be enforced. According to Salmond enforceability is the essence of a perfect right. Pollock agrees with Salmond in it and said: *'Where there is a perfect duty or obligation, there is a right coupled with a remedy i.e an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right'*.³³

If the right is not enforceable although it is recognized by the State it is called imperfect right and it corresponds an imperfect duty. A time barred debt is a good example of it. Although the right is a legal right but can not be enforced because of lapse of time. By lapse of time it became an imperfect right.³⁴

The point here is that although these rights lack enforceability but these are legal rights i.e recognized by the State. By lapse of time or any other reason these rights become imperfect but are not destroyed. These rights although can not be enforced but serve

³²Salmond 1966, 233.

³³Farani, 104.

³⁴PLJ 2004 SC 236;
PLJ 2004 Tr.C (service), 64.

some other purposes like they may serve as a ground of defence but not as a ground of action.³⁵ These rights may become perfect rights like where a right is imperfect because of lack of a particular document (e.g. in case of a contract) it will become perfect on availability of that document. An imperfect right may be good to support any security given for it. If a debt is secured by a mortgage or pledge and became time barred, the mortgage or pledge will remain valid.

The general rule is that for every right there is a remedy but these rights are exceptions to this general rule.³⁶

2.1.5.2 POSITIVE AND NEGATIVE RIGHTS

A positive right is one which corresponds to a positive duty and a negative right is one which corresponds to a negative duty. Positive duty means duty to do something and a negative duty means duty to refrain from an act. So a positive right means that the person bound shall perform an act for benefit of the person entitled and a negative right means that the person bound shall refrain from doing an act which is harmful to the person entitled. As prevention of harm is more important than the enforcement of beneficence, the law is more inclined towards making of rules preventing infliction of harm on others. Rules to confer benefit on others are there in exceptional cases.

Example of it is that 'A' has a right not to be hurt or injured but if he is injured then right of medical aid confers on determinate persons only. A right not to be hurt is a negative right but right to have medical aid is a positive right.

2.1.5.3 *JUS IN REM AND JUS IN PERSONAM*

Jus in rem and *jus in personam* denotes right in *rem* and right in *personam* respectively. These terms are derived from Roman law. Right in *rem* means a right against people in

³⁵PLJ 2004 SC (India) 134.

³⁶There is a maxim- *ubi jus ibi remedium*. Where there is a right there is a remedy.

general, it is also called a real right. A right in *personam* means a right against a particular person or persons. It is also called a personal right. If I have a house I have a right in *rem* to the enjoyment of my property without interference by others but if I leased out my house, my right to receive rent exists only against the lessee, it is right in *personam*.

Right in *rem* confers duty on the world at large whereas right in *personam* confers duty on determinate persons. It is said that right in *rem* is not a single right but it is bundle of as many rights as there are duties but right in *personam* is a single right as it is availed against single person or group of persons.³⁷ Although exceptions are there, but most of the rights in *rem* are negative rights and most of the rights in *personam* are positive rights. The reason behind this is that the right in *rem* usually comprised of a right not to be interfered and a right of *personam* usually comprised of a right to be done something by other. In above given example my right to the enjoyment of my property with out interference of others is right in *rem* i.e it exists against the whole world. It is a negative right which refrain others from doing some thing. After leasing, my right to receive rent is a right in *personam* i.e it exists against a determinate person or a determinate group of persons. In this case that determinate person is lessee. It is a positive right; lessee is obliged to perform an act to pay rent.

Right in *rem* literally means right over a thing and right in *personam* means right against a person. Right in *rem* and right in *personam* are usually considered as right in a thing and right against a person respectively but Austin rejects this concept, he claims that right in *rem* is a right against persons generally and it is not necessary that it is a right over a thing.³⁸

³⁷Farani, 112.

³⁸ *Ibid*, 109.

2.1.5.4 PROPRIETARY AND PERSONAL RIGHTS

Proprietary rights are related to the property, estate or any other valuable thing like house, chattels, and business etc. On the other hand personal rights are related to status like right to life, reputation etc.

Personal rights emerged from one's status or personal condition and related to its wellbeing. Proprietary rights are the rights which are worth money. These constitute one's property or estate.

The term status entails many concepts, it may include a person's legal condition³⁹ or it may refer to personal legal condition⁴⁰ or a person's capacities and incapacities.

But here according to most of the jurists this term refers to one's personal legal condition to the extent it is imposed by the law.⁴¹ An example of it is status of a slave. This status was conferred upon him without his consent. As it has been said that proprietary rights are valuable or worth money and personal rights are not, this is position of Salmond but sometimes it is criticized. The argument is that some personal rights are also valuable like health and reputation because a man's economic condition or livelihood depends on health and reputation. In courts also, when one's personal right is infringed monetary compensation is awarded.

Another distinction is being made in personal and proprietary rights that personal rights are inalienable or nontransferable whereas proprietary rights are transferable but there are some proprietary rights which can not be transferred like right to pension. So a satisfactory test for a proprietary right is that it is worth money.

³⁹It includes both proprietary and personal legal relations. Here it is sum total of his all rights, liabilities, duties or any other legal relation whether it is proprietary or personal.

⁴⁰It only includes personal rights or duties.

⁴¹There is no role of consent in this.

A contract is also a proprietary right as it is held by courts in different cases that a contract amount to property.⁴²

2.1.5.5 RIGHTS IN *RE-PROPRIA* AND RIGHTS IN *RE-ALIENA*

The distinction between proprietary rights and personal rights has been discussed above. Proprietary rights are further divided into rights in *re-propria* and rights in *re-aliena*. Salmond defined these rights as '*A right in re-aliena is one which limits or derogates from some more general right belonging to some other person in respect of the same subject matter. All other are jura in repropria.*'⁴³ Right in *re-aliena* is also called encumbrance or dominant. It is a right which limits a more general right. That general right is a right in *repropria*, it is also called servient.

This can be illustrated by an example. If 'A' has a house, his right to lease out his house is right in *repropria* but if he leased out his house to 'B', his right become limited or subordinate to the right of 'B'. If 'A' mortgaged his property to 'B'. 'A' the real owner has right in *repropria* and 'B' the mortgagee has right in *re aliena*. Right of 'A' to use his property becomes limited and is a servient right whereas right of 'B' over property is a dominant right which limits right of 'A'.

An encumbrance may be subjected to another encumbrance. If 'A' leases out his house to 'B' and 'B' further sublets it to 'C'. Here right of 'A' is right in *re propria* and right of 'B' is right in *re aliena* by subletting this property he confers on 'C' a right in *re aliena*. Here A's right is servient in respect of B's right which is dominant in respect of A's right but servient where C's right is concerned, here C's right is dominant over B's right. Right in *re-aliena* and right in *re-propria* always run concurrently. It means that a dominant right must follow the servient right even in case of change of ownership. Where

⁴²AIR 1954 SC 119;
1995 CLC 1662.

⁴³Salmond 1966, 43.

it doesn't follow the servient right like if change of ownership free from encumbrance is possible it is not a true encumbrance. In this case dominant right did not limit or derogate from servient right otherwise transfer free from encumbrance would not possible. Where transfer free from encumbrance is possible, the encumbrance is mere personal and not legal. Example of personal encumbrance is an agreement to sell a chattel which doesn't run with the property.

Every right is limited and restricted by the rights vested in other persons. There is a saying that '*your liberty ends where his nose begins*'. So one must exercise his right as it should not infringe or harm rights of others. These are natural limitations. No right is absolute, it must subject to some limitations.

This view was expounded in a judgment of Supreme Court of Pakistan while talking about right of freedom of speech or expression.

The Supreme Court said,

'In a democratic setup, freedom of speech/expression and freedom of press are the essential requirements of democracy.....but it is however absolutely clear that the above given right is not absolute but reasonable restrictions on reasonable grounds can always be imposed. Reasonable classification is always permissible and law permits so'.⁴⁴

Some other judgments of other courts also support the issue.⁴⁵

Every right is subject to some limitations but those limitations should be such that servient right's ordinary boundaries should not be infringed.

⁴⁴PLJ 2004 SC 108.

⁴⁵1993 SCMR 1718.

2.1.5.6 PRINCIPAL AND ACCESSORY RIGHTS

Every right is affected by another right. From above given discussion it is clear that right in *re-propria* is affected adversely by right in *re-aliena* as later limits the operation of former but in case of principal and accessory rights later increases operation of the former. A person's right of ownership of his property is principal but if he leases out his property, his right to receive rent is accessory.⁴⁶

Every one has right to life, this right is principal but his right to receive education to lead his life in better manner is accessory. It is the approach of courts in Pakistan that right to life includes all such amenities, facilities and personal rights as should be enjoyed by a person born in a civilized society.⁴⁷ Here the right to life is principal and right to education, health or other facilities is accessory.

2.1.5.7 PRIMARY AND SANCTIONING RIGHT

A sanctioning right is which originates from violation of another right i.e a wrong. It means that source of sanctioning right is a wrong. If 'B' breaches a contract with 'A', he has a right to compensation or specific performance. A's right originates from wrong done by 'B' to 'A', so it is a sanctioning right.

On the other hand a primary right doesn't originate from a wrong. It may have some other source. A sanctioning right arises from violation of a primary right. In above given example A's right in respect of his contract over B that he should perform his duty is a primary right, but when his primary right is violated his sanctioning right to receive compensation arises from violation of his primary right.

⁴⁶Farani, 109.

⁴⁷Mst. Sajida Bibi v In charge Chowki no 2 Police Station Sadar Sahiwal, PLD 1997 Lahore; Shehla Zia v Wapda, PLD 1994 SC 693.

A sanctioning right is always a right in *personam*; it is a right against determinate person or persons. It is a positive right aswell. On the other hand a primary right can be a right in *rem* or a right in *personam*. A's right not to be killed is right in *rem* as it exists against the whole world. Whereas A's right over B to perform the contract made with him is right in *personam* as it exists against a determinate person. So a sanctioning right is always right in *personam* and a primary right can be a right in *rem* or a right in *personam*.

A sanctioning right may be divided further in two kinds.

1. Right to receive a pecuniary penalty
2. Right to receive pecuniary compensation

These kinds arose from violation of a primary right, some times violation of a right give rise to a right to receive penalty and sometimes to receive compensation.

2.1.5.8 VESTED AND CONTINGENT RIGHTS

Vested and contingent rights can be distinguished as, in vested rights all the facts conditional for a person to have a right have occurred and the right is called vested in that particular person. Whereas in contingent right one or more facts which constitute a vested right have not occurred. Some conditions are fulfilled but others are not. Here the right is contingent and depends on occurrence of that fact or facts.

If A grants his land in fee simple to B. Here B will have a vested right of ownership. But if A grants his land to B for life and then to C in fee simple if he would be alive at the death of B this may happen and may not. Here C's right is contingent because his right is dependent on a condition. If this condition is fulfilled i.e C survives B, the right will become vested.

2.1.5.9 LEGAL AND EQUITABLE RIGHTS

Formerly there were two parallel systems of courts i.e courts of common law and courts of chancery. The rights which were recognized and protected by the common law courts were called legal rights and the rights which were recognized and protected by the equity courts or chancery courts were called equitable rights. With development in law these two systems were merged and they work as supplementary to each other, as a result distinction between two kinds of rights is also blurred.

In Roman law this was done by the Justinian codifications and in England by passing of Judicature Acts 1873-1875. Now all the rights whether legal or equitable obtain recognition in all the courts. Although both systems fused in each other but still there are some differences in both kinds of rights.

In legal rights method of creation is complex than equitable right. As in equity the system depends on conscience and good faith, it doesn't give much importance to form e.g. a legal mortgage of land must be created by deed, but an equitable mortgage may be created by a written agreement or by a mere deposit of title deeds.⁴⁸

Legal rights may invoke both legal and equitable remedies whereas by equitable rights only equitable remedies can be invoked. Legal rights have more 'legal strength'. These can be enforced by proving existence of right whereas in equitable right it totally depends upon discretion of the court.

In case of a clash between a legal right and an equitable right the latter will prevail. This was decided in the Earl of Oxford case, 1615. Francis Bacon, the Attorney General decided that when ever there was a conflict between the Common law and equity, equity will prevail. In the Judicature Acts 1873-1875 it was given statutory force and

⁴⁸Salmond, 1966, 244.

ascendancy of equity was preserved in section 25.⁴⁹

These rights are also classified as Legal and Natural rights. As said earlier Natural rights are those which are recognized by natural justice whereas legal rights are those which are recognized by legal justice. Salmond is of the opinion that rights may be either legal or natural but according to Bentham rights can be legal only.

According to him only State can give rights. The right recognized by the State is a legal right. His view has some practical implications as well it has been discussed under the topic of natural rights that here State can suspend legal rights in any circumstances as it gives the right so it can also take it away. Bentham follows the maxim '*nothing is right and nothing is wrong save that which the State establishes and declares as such*'.

Salmond didn't agree with Bentham and criticized him. According to him rights may be moral, legal, or natural. When one admits existence of natural rights it means that State has no power to suspend these rights even in case of emergency because these are not given by the State.

⁴⁹Tina Cockburn and Melinda Shirley, The Nature and History of Equity, www.findlaw.com.au, Last visited 4th August, 2005.

Under Islamic law there is no difference between equity and law. Legal right is one which is recognized by *Shar'e*. There is no difference between legal right and equitable right. Justice Naseem Hasan Shah while analyzing importance of '*ehsan*' in Islamic law laid down this characteristic of Islamic Law as:

'.....under the Islamic system, law and equity are not different concepts. There are no separate courts of equity in Islam nor do different principles govern the grant of equitable remedies. 'Restitutio in integrum' and specific performance are the rule and not an exception. Damages are allowed only where specific performance becomes impossible or to enforce it would result in hardship'. [Justice Naseem Hasan Shah, Law, Justice & Islam (Lahore: Wajidalis Ltd, 1989), 25. [Hereinafter Naseem Hasan Shah, 1989].

2.2 CONCEPT OF RIGHTS OF MINOR IN COMMON LAW

In Common Law minority is a status which ceases at attaining the age of 18 years. A major possesses full capacity to have rights and duties whereas a minor does not. The limitations imposed upon his capacity are to protect him so that he can not be exploited or abused.

Jurists differ at the point that children really have rights or not. There is one group who called for denial of rights to children. Another group of jurists is of the opinion that children possess some of the rights not all of them. Whereas third group said that they have all the rights which an adult has.⁵⁰

Although they all have arguments to support their views but the most correct view is that children have rights as a human being but as they are not competent enough because of their mental immaturity so they have some rights only. Rights with respect to children can be categorized in three groups. In first category there are some rights which they possess to their full extent. In second category there are rights which they possess but can not exercise them i.e they need a representative to exercise them. In third category there are other rights which they don't have.

Inspite of this difference between jurists nowadays children's rights is a widely accepted phenomenon. After signing Convention on the Rights of the Child and other documents related to the rights of the child, most of the States endorse the fact that children have rights.

2.2.1 WHO IS A MINOR?

It is a disputed issue that who is a minor or what is the age of majority under common

⁵⁰<http://plato.stanford.edu/entries/rights-children/documents>, Last visited 15th of January 2005.

law. Age of majority is the age at which the law grants a person rights (e.g. right to sue and right to make a contract) and duties (e.g. liability under a contract).⁵¹

As we see there are different ages prescribed according to different considerations. Example of this can be seen in international documents related to employment of children. Conventions adopted by International Labor Organization show that age of majority varies according to conditions of the work.⁵²

But now after Convention on the Rights of the Child it is decided that person below the age of 18 is a minor unless '*under the law applicable to the child majority is attained earlier*'.⁵³ But this article does not bind States parties to the Convention to follow it strictly. They can set age of majority according to their conditions and laws but physical and mental maturity of children and their needs should be taken into consideration while determining this issue.⁵⁴

Although States are not bound to follow this article but practical implication of it is that the International Criminal Court will not try children under the age of 18. Generally speaking most of the States have this age i.e. 18 years as age of majority. In Pakistan also age of majority is 18 years.⁵⁵

⁵¹www.answers.com/topics/age-of-majority, Last visited 15th of January 2005.

⁵²Article 2 of ILO Minimum Age Convention No. 138, 1973, The Minimum Age Industry Convention 1919 etc.

⁵³For example in Islamic Law majority is not based on age but there are some other considerations or standards to determine majority. It is discussed in previous chapter in detail.

⁵⁴www.amnesty.org/ailib/intcam/juvenile/feature.htm, Last visited 15th of January 2005.

⁵⁵The Majority Act 1875, Section III.

In Pakistani Law also there is no decided minimum age; the upper limit is between 12 & 18. (Section 3, The Majority Act 1875, Section 2(3), The Constitution of Pakistan 1973, Section 2, The Employment of Children Act 1991) So in Pakistan also for different purposes different age limits are laid down.

2.2.2 THEORIES OF RIGHT & RIGHTS OF MINOR

There are two theories of right: interest theory and will theory.

According to the will theory right is legal recognition of an individual's choice and according to interest theory right is a protected interest of an individual.⁵⁶

As far as rights of child are concerned according to choice theory child or minor can not have rights as they are not capable of exercising choice. Whereas according to interest theory they have rights as they may have interests which should be protected. This theory gives the child capacity to have rights. Even in will theory also there is one situation in which child may have rights i.e. he may have representative to exercise choice on his behalf until he attains majority.

In rights of the child there is a further distinction between liberty rights and welfare rights. Minor has welfare rights not liberty rights. Liberty rights are those rights which have a content of choice. Right to vote and right to associate etc are examples of liberty rights. Welfare rights are those rights which protect interests like health care etc. To make a choice needs mental growth and maturity which minors don't possess whereas to have interests may be attributed to minor because it does not depend on age.

Along with welfare rights children also possess protection rights. These are the rights which are given to them because of their tender age like right to have food, shelter, love and care.⁵⁷

Here we can conclude that according to interest theory minors have rights whereas

⁵⁶Neil Maccormick, *Legal Right & Social Democracy: Essays in Legal & Political Philosophy*, (Oxford: Clarendon Press, 1984), 154. [Hereinafter Neil McCormick, 1984].

D. N. McCormick, 1979, 192.

⁵⁷www.plato.stanford.edu/entries/children/documents, Last visited 15th of January 2005.

according to will theory also there can be a situation where minors can have rights i.e. if rights are exercised by a representative. But one point should be noted even if we give children rights they can not be given power to waive their rights which in other cases remain with every right. The reason behind this is that as minor lacks maturity so they can not decide what is good for them i.e. to exercise a right or to waive it.⁵⁸

2.2.3 CORRELATIVITY OF RIGHTS & DUTIES & RIGHTS OF MINOR

As I have said earlier that rights and duties are correlative it means that when there is a duty there must be a right, or in other words every right correspond a duty and vice versa.

It is agreed upon that parents and State in some matters have duties towards children like duty to care for them and nurture, duty to give them opportunities to use their potential and to gain education etc, we can infer from it that they have rights to these objects as right and duty are correlative. For example we can say that if parents have a duty to care and nurture minors then minors have a right to this care and if parents are not there to fulfill or satisfy their rights then other means are used to fulfill them.⁵⁹

2.2.4 MORAL RIGHTS & LEGAL RIGHTS OF A MINOR

It is been stated above that there is a group of jurists which deny children of their rights. The important point there is that even then they acknowledge that a minor has moral rights though not legal rights.

These moral rights can also act as a base for legal rights.⁶⁰

⁵⁸Neil Maccormick 1984, 155.

⁵⁹*Ibid*, 163-164.

⁶⁰*Ibid*, 161.

These moral or natural rights are possessed by children. If we go back to discussion of natural rights and legal rights we would recall that positivists totally render redundant natural rights, so according to them these moral rights are not much important as these are not recognized by the State. But according to naturalists these rights are important as these are given by nature and are prior to State.

As far as theories of rights are concerned will theory did not recognize these moral rights it gives recognition to that legal right only which can be exercised by a representative. Interest theory recognizes most of these rights as they are interests of minors and should be protected.

The difference between moral and legal right is of enforcement, both exists but only legal rights can be enforced and not moral rights.

2.2.5 BEST INTERESTS OF THE MINOR

Interest and welfare of a minor is main consideration of all laws and decisions related to him. Interest means safety, well being and welfare of the minor. It means minor's moral, religious, financial and health interests. 'Interest of the minor is main consideration' means that no law or decision of the court should be made if it is detrimental to the interests of the minor. 'Interest' includes minor's wishes, his relationships, effect of any change which is going to be made in his life, his personal characteristics, protection of harm etc. But one thing should be cared of that child's wishes or personal interests should be considered only if minor is mature enough and capable to make good choices. If his wishes contradict with his interests then his interests must prevail. As wishes are based on choices and children are not capable to make choices.⁶¹

Especially after Convention on the Rights of the Child and its ratification by most of the

⁶¹www.unicef.org/crc/bg005.htm, Last visited 15th of January 2005.

States 'interests of the child' becomes more important. In article 3 best interests of the child are made 'a primary consideration' and some times the provisions of the Convention make it paramount in actions and decisions concerning children.⁶² The principle of best interest applies to those decisions aswell in which child is not the object of the decision but the decision affects her.

Best interest of the child should be considered by legislature, judiciary and other institutions of the government while dealing with issues related to her. State may intervene to protect interests of the minor if parents who have responsibility to decide for him, don't make interests of the child basic consideration.⁶³

If interest of the child contradicts with interest of community or State, latter prevails because interest of the child is 'a primary consideration' but not 'the primary consideration'.⁶⁴

2.2.6 INTERNATIONAL LEGISLATION ON THE ISSUE

There are many international documents which seek to protect rights of the child. This list includes:

- Geneva Declaration on the Rights of the Child (1924)
- Declaration on the Rights of the Child (1959)
- Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement & Adoption Nationally and Internationally
- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

⁶²Art. 3.1, 9.1, 9.3, 21, 18.1 of CRC.

⁶³Art. 5, 18.1, 9.1.

⁶⁴www.answers.com/topics/age-of-majority, Last visited 15th of January 2005.

- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- The Hague Convention on the Protection of Children and co-operation in Respect of Intercountry Adoption
- ILO Convention 138 Concerning the Minimum Age for Admission to Employment
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

Although all these documents have their importance but the Declaration on the Rights of the Child and the Convention on the Rights of the Child are most significant and has contributed most in recognition and protection of the rights of the child. That's why we will discuss these two in little detail.

2.2.6.1 DECLARATION ON THE RIGHTS OF THE CHILD

This document was proclaimed by General Assembly Resolution 1386 (XIV) of 20th November, 1959.⁶⁵ The Declaration entitled the child of basic human rights and ask for care and legal protection of the child, before and after birth, because of her tender age and immaturity. She should be given good environment and opportunities so that she can develop physically, mentally, spiritually and socially in a healthy and normal manner.

The principle 2 and 7 of the Declaration makes interest of the child the paramount consideration. The rights given to the child includes right to a name, nationality, right to enjoy benefits of social security, right to adequate nutrition, housing, recreation and

⁶⁵www.unhcr.ch/html/menu3/b/25.htm, Last visited 15th of January 2005.

medical services, and most importantly his right to free education specially in elementary stages.⁶⁶ A child should not be admitted to employment which would prejudice his health or education, or interfere with his physical, mental or moral development.⁶⁷

By adopting Declaration on rights of the child the international community recognizes special relevance of human rights to children.⁶⁸ After this Declaration the most important document on the rights of the child is Convention on the rights of the Child.

2.2.6.1 THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child⁶⁹ is most important document related to rights of children. It was adopted by General Assembly in 1989 and entered into force in 1990. As said by Carol Bellamy⁷⁰ that CRC 'not only recognizes but protects their human rights'.⁷¹ This instrument is ratified by 192 countries except Somalia and USA. It is most universally accepted human rights instrument in the history.

This Convention recognizes and protects basic human rights of the child which include right to a name, the right to know and be cared for by his or her parents, the preservation of child's identity, freedom from sexual abuse and exploitation, narcotic drugs and trafficking, the right to survival, to develop to the fullest, to protection from harmful influences and to participate fully in family, cultural and social life.⁷²

The Convention provides standards against which progress in the field of rights of the child can be assessed. The Convention recognizes civil, political, economic, social and cultural rights of the child. The states which ratified the Convention are obliged to make

⁶⁶Article 3, 4 & 7.

⁶⁷Article 9.

⁶⁸www.bic-un.bahai.org/pdf/91-0224.pdf, Last visited 15th of January, 2005.

⁶⁹Hereinafter CRC or the Convention.

⁷⁰UNICEF's Executive Director.

⁷¹www.unicef.org/crc/crc.htm, Last visited 15th of January, 2005.

⁷²www.unicef.org/crc/crc.htm, Last visited 15th of January, 2005.
Scott Davidson 1995, 95.

their domestic laws according to the principles formulated in articles 2, 3, 6 and 12 which govern the interpretation and implementation of the Convention.⁷³ These are following.

1. Non Discrimination: The Convention applies to every child without discrimination irrespective of child's race, color, sex, language, religion, ethnic or social origin, property, disability, birth or any other status etc. Every child without discrimination should enjoy rights enunciated in the Convention.⁷⁴

2. Best Interests of the Child: In every law or decision affecting children interests of the child should be the main consideration.⁷⁵

3. Right to Life, Survival, and Development. Every child has a right to life, survival and development. Here development include physical, mental, emotional, cognitive, social and cultural development.⁷⁶

4. Right to be Heard. Children have a right to be heard in all matters affecting them and their views should be given due weight in accordance with their age and maturity.⁷⁷

These are basic principles in the light of which the Convention should be interpreted and implemented.

There is a Committee on the Rights of the Child which was first elected in 1991 and is a monitoring body which monitors obligations of the States parties to implement principles of Convention in all their laws.⁷⁸

⁷³Nyazee, 'A', ILR 2003, 75.

⁷⁴Article 2 of the CRC.

⁷⁵Article 3 of the CRC.

⁷⁶Article 6 of the CRC.

⁷⁷Article 12 of the CRC.

⁷⁸Nyazee, 'A', ILR 2003, 78.

As it is said earlier that this document has major affect on the rights of the child. To strengthen provisions and impact of this Convention two optional protocols, on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, were adopted. These Protocols were entered in to force, respectively on 12th of February and 18th of January 2002.⁷⁹

CONCLUSION

To regulate human conduct the law creates rights and duties. The concept of right is more important as the whole legal system revolves around it. As far as its definition is concerned there is no single definition agreed upon by the jurists. They define it in different ways but generally it means an interest which is legally protected and recognized.

According to Naturalists rights are prior to the State. Rights are provided by Natural Law which is superior to all man made laws and these rights do not need recognition by the State. Positivists assert that a right will be a legal right only if it is recognized by a State.

Right in its wider sense entails four concepts i.e. claim, privilege, power and immunity. These four have their correlatives and opposites. But in its strict sense right is a claim and this is the meaning which the courts are following. There is another classification of rights on the basis of content, object and enforcement. On the same basis duties are also classified.

Minor has a special status in Common Law. He lacks capacity to possess rights and duties to their full extent. That's why there is a difference of opinion among jurists that a minor possess rights or not.

⁷⁹www.unicef.org/crc/crc.htm, Last visited 15th of January, 2005.

There are two theories of rights: interest theory and will theory. Interest theory supports the view that children are capable to have rights but according to will theory they are not. There is only one situation in which will theory gives concept of rights of minor i.e. if right is exercised by a representative.

As said earlier according to some jurists minor does not possess rights. But there are some arguments in favour of the notion that children have rights which makes position of advocates of rights of minor strong. First is that rights and duties are correlative, when we say that the State and parents have duties towards children so children automatically have rights to same objects. Secondly, even the jurists who deny rights to children say that they possess moral rights. Although they deny legal rights to children but these moral rights can be a basis for their legal rights.

There are lots of international documents on the issue. Among them the most important is the Convention on the Rights of the Child. The main features of this Convention are that, first of all it determine age of majority at 18 years, secondly it makes interest of the minor a primary consideration and as said earlier the Convention not only recognize but protect basic human rights of a minor. As it is ratified by most of the States it means that all these States accept the notion of rights of minor.

So children possess rights and are capable to have them but because of their tender age and immaturity they are given some rights not all of them. Purpose of it is not to deprive them of their rights but to protect them.

RIGHTS & PRIVILIGES OF MINOR IN CASE OF
SEPARATION BETWEEN PARENTS IN
ISLAMIC LAW

Shari'ah issued rules to protect minor and to ensure that his affairs are managed in a right way. There are five main rights, which a child possesses and which are affected in case her parents are separated. In this chapter I will discuss these rights in detail. First of all I will discuss right of fosterage, it will be followed by discussion of rights of legitimacy, custody and maintenance. I will take into account right of guardianship also. At the end I will summarize my findings in conclusion.

3.1 FOSTERAGE

In Arabic the word used for fosterage is *radā'ah* which literally means suckling and nursing.¹ In its legal sense the word means 'a child sucking milk from the breast of a woman for a certain time, which is termed the period of fosterage'.²

Suckling is one of the natural responsibilities of a mother. Both the child and the mother have this right. In The *Qur'ān* fosterage is discussed in detail in the following verse.

The mothers shall give suck to their children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child, or father on account of his child. And on the (father's) heirs is incumbent the like of that (which was incumbent on the father). If they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. And if you decide on a foster suckling-mother for your children, there is no sin on you, provided you pay (the mother) what

¹Al-Mawrad, 1997, 587.

²Al-Marghenāni, *Hadāya* (English translation by Charles Hamilton), (Lahore: Premier Book House, 1975), 67. [Hereinafter Al-Marghenāni, 1975].

you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is All-Seer of what you do.³

Suckling is a religious duty of a mother. There is agreement among jurists that suckling is incumbent upon her and she will be questioned about it but they differ at the point that whether she can be compelled to suckle her child or not?

According to majority of jurists she can not be compelled to suckle the child because it is *mandūb*⁴ and not *wājib*.⁵ The reason behind it is that it is the right of the child as well as right of the mother and no one can be compelled to exercise his right.⁶ Secondly fosterage comes under the head of maintenance and maintenance is duty of the father.⁷

According to these jurists there are only three situations in which mother can be compelled to suckle her child.

1. If the child doesn't suckle another woman.
2. If no woman is found except her to suckle the child.
3. If the father is not well-off to pay another woman for suckling.⁸

According to *Mālikiyyah*, she can be compelled as in *Mālikī* school suckling is incumbent upon the mother whether she is in wedlock or in *iddah* for *talāq raj'ee*. But it is not

³Al-Baqrah, 233.

⁴If the demand of commission of an act is not absolute the act is called commendable or *mandūb*. Abdul Rahim, 1911, 61; Sadr-ul-Sharī'ah, 1996, Vol. II, 258.

⁵*Wājib* is an act with reference to which there is an absolute demand by the law giver to perform that act and is proved or established by *dalīl zannī*. (A *dalīl* in which there is some doubt). Abdul Rahim, 1911, 259; Sa'd-ud-Dīn Masūd bin Umar Al-Taftazānī, Al-Taudīh alā Al-Tawdīh li-Matan Al-Tanqīh fi Usūl-ul-Fikh, (Peshawar: Maktaba Farūqiyyah, 1996), Vol. II, 259.

⁶Alā-ud-Dīn Abī Bakr bin Mas'ūd Al-Kasānī, Bada'i-us-Sana'i fi Tartīb-al-Shara'i, (Beirut: Dār-ul-Kitāb Al-Arabiyyah, 1982), Vol. 4, 40. [Hereinafter Al-Kasānī, 1982];

Wahba Al-Zuhailī, 1989, 698-699; Neil B. E. Baillie, A Digest of Muhammadan Law, (Lahore: Premier Book House), 457. [Hereinafter Neil B. E. Baillie]

www.jamiat.org.za/al-jamiat/radaat.html, Last visited 20th of February 2005.

⁷Ibn-e-Nujaim, 166.

⁸Shaikh Hasan Khālid & Adnān Najā, Ahkām al-Ahwāl al-Shakhsiyyah fi Shar'iah al-Islāmiyyah, (Beirut: Dār-ul-Fikr, 1982), 60. [Hereinafter Shaikh Hasan Khālid & Adnān Najā, 1982].

incumbent upon the mother during *iddah* for *talāq bā'in*. In case mother is from *ahl-al-sarwah* then also there is no harm if another woman suckles the child. This difference of opinion is based on the difference in interpretation of the verse above.

Another important point is that if she refused then it is duty of the father to hire a woman and this will not affect her right to custody. Both these are distinct rights and exists independent of each other.⁹

3.1.1 PERIOD OF FOSTERAGE

In the verse 233 of *Al-Baqrah* it is said: '*And the mothers shall suckle their children for full two years.*'

Basing their opinion on this verse *Abū Yūsaf, Muhammad, Ahmad, Shāf'ī & Mālik* said that period for suckling is two years.¹⁰ They also rely on the verse in which Allah says:

'.....[the child's] time in the womb and [until] his weaning is thirty months'. (Al-Ahqāf, 15)

and on *hadīth* narrated by *Ibn-e-Abbās* that

*'suckling applies only to infants during the first two years of their age.'*¹¹

As smallest period of pregnancy is six months so the period of fosterage remains two years.¹²

⁹Wahba Al-Zuhailī, 1989, 698-700.

¹⁰www.jamiat.org.za/al-jamiat/radaat.html, Last visited 20th of January 2005.

Abd-ur-Rehman I. Doi, *Women in Shariah*, (London: Tā-Hā Publishers Limited, 1996), 111. [Hereinafter Abd-ur-Rehman I. Doi, 1996]; Alexander David Russel & Abdullah Almamun Suharwardy, *A Manual of The Law of Marriage: From The Mukhtasar of Sidikhalīl*, (Lahore: Law Publishing Company, 1979), 289. [Hereinafter Alexander David Russel & Abdullah Almamun Suharwardy, 1979];

Shaikh Hasan Khālid & Adnān Najā, 1982, 258.

¹¹Ibn-e-Hajar Al-Asqalāni, *Bulūgh Al-Marām min Adillat-ul Ahkām*, (Gujranwala: Dār Nashr Al-Kutb Al-Islāmiyyah, 1986), 265. [Hereinafter ⁹Ibn-e-Hajar Al-Asqalāni, 1986].

¹²Al-Marghenāni, 1975, 68.

According to *Abū Hanīfa* time period is thirty months and according to *Zufar* it is three years. The argument of *Abū Hanīfa* is based upon the verse above: '.....[the child's] time in the womb and [until] his weaning is thirty months.'

According to him here two things are mentioned i.e. time of gestation and weaning. For these both period of thirty months is mentioned. As stated in the verse no. 233 of *Al-Baqrah* period of two years is period of claim: it means that after two years payment for fosterage can not be claimed. Extra six months are there as this milk is best food for the child and so that child may incline to other food during that period. According to *Zufar* the additional period to the period of fosterage, which is needed, is fixed at one year.¹³

3.1.2 DEGREE OF FOSTERAGE WHICH CAUSE PROHIBITION

Jurists agree that inter-marriage between persons having fosterage relationship is prohibited. Two children having foster relations or the male child with his foster mother can not marry. It is according to the verse '*marry not your mothers who have suckled you, or your sisters by fosterage*',¹⁴ but there is a difference of opinion at what degree of fosterage prohibition is caused.

According to *Mālikī* and *Hanafī* schools of thought prohibition will be caused by fosterage irrespective of its degree. Their opinion is based on the verse '*your mothers who have suckled you are prohibited unto you*' and a *hadith* '*whatever is prohibited by consanguinity is also prohibited by fosterage*'.¹⁵ In this Verse and *Hadīth* no distinction is made between smaller and greater degree of fosterage.¹⁶ The only condition according

¹³*Ibid.*

¹⁴Al-Nisā, 24.

¹⁵Abī Abdullah Muhammad ibn Yazīd Al-Qazwini Ibn-e-Māja, Sunan Ibn-e-Māja, (English translation by Muhammad Tufail Ansāri), (Lahore: Kazī Publications, 1995), Vol. III, 168. [Hereinafter Ibn-e-Māja, 1995].

¹⁶David Pearl, 1987, 67.

There are many sayings of *sahaba* to that effect like *Hazrat Ali, Ibn-e-Masood, and Ibn-e-Abbas & Ibn-e-Umar*. Shaikh Hasan Khālid & Adnān Najā, 1982, 259.

to them is that the milk should reach in the stomach of the child.¹⁷

According to *Shāf'ī* and some others prohibition is established on five sucks not on less than that.¹⁸ Their opinion is based on the *Hadith* reported by *Āyeshā*. She said:

*'In what was sent down in
The Quran ten sucklings made marriage unlawful, but they were abrogated by five known
ones, and when the Prophet (peace be upon him) died, these words were among what was
recited in The Quran'.¹⁹*

There is another hadith to this effect '*Āyeshā* reported the Apostle of Allah (peace be upon him) as saying, one or two sucks don't make marriage unlawful'.²⁰

To *Ahmad* there are three opinions associated. In the first he agrees with *Shaf'ī*. In the second he agrees with *Ahnāf* and in the third tradition he said that prohibition will be established on three sucks.

At this degree prohibition will be caused if it is in childhood not in adulthood. This is the opinion of the majority of jurists. According to *Āyeshā* it will cause prohibition in both cases.²¹

3.1.3 HOW FOSTRAGE CAN BE ESTABLISHED?

By two ways fosterage can be established.

1. Acknowledgement
2. Evidence/Witnesses

¹⁷*Ibid.*

¹⁸Ibn-e-Qudama, *Al-Mughni*, (Cairo: Hajr, 1992), Vol. 11, 309-310. [Hereinafter Ibn-e-Qudama, 1992]; Shams-ud-Dīn Muhammad bin Abī Al-Abbās Ahmad bin Hamza Ibn-e-Shahāb Al-Ramlī, *Nehāyatul Muhtāj ila Sharh Al-Minhāj*, (Al-Maktaba Al-Islāmiyah), Date & place of publication is not mentioned, Vol. 7, 164. [Hereinafter Al-Ramlī].

¹⁹Sunan Abū Dawūd, 550.

²⁰*Ibid*; Ibn-e-Māja, 1995, 170.

Ibn-e-Hajar Al-Asqalāni, 1986, 263-264.

²¹Al-Kasāni, 1982, 5.

Fosterage can be established by acknowledgement. If both man and woman, or any one of them acknowledges that they are foster brother and sister, fosterage will be established. It is according to the *Hanafī* school of thought. These persons now can not marry, if they are married, they will be separated.²²

According to *Mālikī* school fosterage can be established by the man or woman or their parent's acknowledgements, or by both man and woman's acknowledgement. In all these cases two persons having foster relations can not marry, if married they will be separated.²³

If the person, who acknowledges, retracts from his statement, according to *Ahnāf* this retraction is acceptable. But according to *Mālikī* and *Shāf'ī* schools this retraction is not accepted.²⁴

There is consensus of opinion in the four schools of thought that fosterage is established by testimony of two men, or one man and two women, if they are just. But they differ in establishment of suckling if there is testimony of one man or one woman or four women.

According to the *Hanafī* school of thought testimony of single woman is not sufficient to establish fosterage. Testimony of two men or one man and two women is acceptable. *Imām Mālik* is of the opinion that evidence of single woman is sufficient to establish fosterage.²⁵

According to *Shāf'ī* school fosterage can be established by two men or by a man and a woman or by four women.²⁶

²²Wahba Al-Zuhailī, 1989, 712.

²³*Ibid*, 713.

²⁴Shaikh Hasan Khālid & Adnān Najā, 1972, 262.

²⁵Al-Marghenāni, 1975, 72.

²⁶Al-Ramlī, 175.

Testimony of the woman who suckled them is accepted²⁷ if she didn't demand payment for it. If she demands then her testimony will not be accepted because it creates doubt that probably she is doing this for her benefit.²⁸

3.1.4 PAYMENT FOR SUCKLING

As regard to the payment for the suckling there is also difference of opinion among jurists.

According to the majority of jurists (*Hanafi*, *Shāfi'i*, and *Hanbalī* jurists), mother is not entitled for payment for suckling during marriage or *iddah* from *talāq-e-raj'ee* because husband is already liable to pay maintenance to her. As these two liabilities can not be imposed upon him together.

Mālikī School differs with them. According to them if suckling is incumbent upon mother she is not entitled but if it is not incumbent (e.g. if she is from *ahl-al-sarwah* or *sharīfa-tul-qadr*) she is entitled to payment. In *iddah* from *talāq-e-bā'in* she will receive payment. According to *Ahnāf* there is no difference between *iddah* from *talāq-e-raj'ee* and *iddah* from *talāq-e-bā'in*.²⁹

Time period for payment of suckling is two years. There is consensus of opinion on this matter. Only in first two years mother can claim payment for fosterage, after that even if she suckles she has no right to claim payment.³⁰ If father died before payment this will be a debt upon him.

²⁷Ibn-e-Qudāma, 1992, 341.

²⁸Wahba Al-Zuhailī, 1989, 716.

²⁹*Ibid*, 701.

³⁰Al-Marghenāni, 1975, 68; Muhammad Amīn ibn 'Ābidīn, *Hāshiyah Raddul Mukhtār alā Al-Durr ul Mukhtār*, (Egypt: Mustafā Al-Bābī -Al-Halbī wa Aulāduh, 1984), Vol. III, 222. [Hereinafter Ibn-e-'Ābidīn, 1984].

There is consensus of opinion that mother is preferred than any other woman for suckling if she doesn't demand payment. If she demands payment, less or equal to any other woman, she will be preferred because of her love and care for the child as to stop mother from suckling her child is detrimental to her and is prohibited according to the verse.

'.....neither will the mother be made to suffer any difficulty or loss on account of her child nor a father because of his child'. (Al-Baqrah, 233)

In case mother demands payment and another woman is volunteer or asking for less money, according to *Hanaḥī* and *Shāḥī* schools the other woman will be preferred.³¹ According to *Hanābla* and *Mālikiyyah* mother will be preferred for *ajr-e-mithl*. Both based their arguments on following verses:

'.....neither will the mother be made to suffer any difficulty or loss on account of her child nor a father because of his child' and '.....but if you decide to engage a wet nurse for your children, you shall not be blameworthy provided you promise and remunerate in fairness'.

Father is liable for this payment because of the verse *'.....and on the father shall be their sustenance and clothing in fairness'*.³²

3.2 CUSTODY

In Arabic the term used for custody is *'hadānah'* which literally means nursing, nurturing, upbringing, care and raising.³³ In Islamic law custody or *hadānah* is defined as *'the caring for the infant during the period when it can not do without the woman in a prohibited degree who have the lawful right to bring it up'*.³⁴

Custody is a right of the child from her birth. At this stage she is in need to have

³¹Abū Bakr Ahmad bin Alī Al-Rāzī Al-Jassās, *Ahkām-ul-Qur'ān*, (Beirut: Dār Ahyā Al-Turāth Al-Arabī), Vol. 5, 362.

³²*Al-Baqrah*, 233.

³³Al-Mawrad, 1997, 475.

³⁴J. J. Nasir, 1990, 173.

some one who can take care of her and can manage her affairs especially financial affairs. These duties are given to parents according to their abilities. That's why responsibility of bringing up the child is given to mother and responsibility to manage her affairs is given to father or grandfather because they are more able to manage financial affairs.³⁵

3.2.1 PERSONS ENTITLED TO CUSTODY

There is consensus of opinion that mother is entitled to custody of children³⁶ at first because there are different *ahādīth* to this effect.

According to one tradition a woman once applied to the prophet saying, '*O Prophet of God! This is my son, the fruit of my womb, cherished in my bosom and suckled at my breast and his father is desirous of taking him away from me into his own care;*' to which the Prophet replied, '*thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger.*'³⁷

Abū Bakr Siddeeqe also supported this when he addressed *Omer* when he and his wife separated and he wanted to take his son *Aāsīm* from his wife at that time he was an infant on breast. *Abū Bakr* said,

'the spittle of the mother is better for thy child than honey, O Omer!'

Abū Bakr said this in presence of lot of companions and none of them contradicted him.³⁸

Abū Huraira narrated that '*A woman said, 'O Allah's Messenger, my husband wants*

³⁵Ibn-e-Nujaim, 166.

³⁶Abī Muhammad Abdullah bin Ahmad bin Muhammad ibn Qudāma, *Al-Muqna'*, (Shaikh Khalīfa bin Hamdān Al-thānī, 1972), Vol. III, 327 [Hereinafter Ibn-e-Qudāma, 1972]; Al-Kasānī, 1982, 41; Shams-ud-Dīn Muhammad Al-Dasūqī, *Hashiyah Al-Dasūqī ala Sharh al-Kabīr*, (Dar Ahyā Al-Kutb Al-'Arabiyah), (Place & year of publication is not mentioned), Vol. II, 526. [Hereinafter Al-Dasūqī]; Ibn-e-'Ābidīn, 1984, Vol. III, 585; C. M. Shafqat, *The Muslim Marriage, Dower & Divorce*, (Lahore: Law Publishing Company, 1979), 73. [Hereinafter C. M. Shafqat, 1979].

³⁷Al-Marghenāni, 1975, 138.

³⁸*Ibid.*

to take away my son, and yet he has availed me and provided me with drinking water from Abu Inaba's well'. Then her husband came and the Prophet said, 'Lad, this is your father and this is your mother, so take whoever of them you wish by the hand'. He took his mother's hand and she went off with him.³⁹

Even if the father is dead and the child is under supervision of the guardian still the mother has right to custody. This is her right irrespective of her social and religious status.⁴⁰ In case of absence of mother the relatives through her gets preference over the relatives through father's side. After her this responsibility falls on the relatives in following order; the maternal grandmother, how-high-soever, the paternal grand mother, how-high-soever, the full sister, the uterine sister, the consanguine sister, the maternal aunts, the paternal aunts.

If there are no women, custody lies with men in following order; the father, paternal grandfather how-high-soever, full brother, sons of the consanguine brother, their decedents how-low-soever, paternal uncle, paternal uncle's son. All this is according to *Hanafi* School. Here in the case of a female brother, their descendents how-low-soever, paternal uncle, paternal uncle's son. All this is according to *Hanafi* School. Here in the case of a female child it is necessary that the male custodian is her *mahram* i.e. with whom marriage is prohibited.⁴¹

In *Hanbali* school after mother the following persons are entitled to custody in the given order; maternal grand mother, mother's grand mother, the father, paternal grand mother, how-high-soever, grand father, grand father's mother, the sister, the maternal aunts, the paternal aunts. In all these relations the order is from full to the uterine to the consanguine relatives.⁴²

³⁹Al-Asqalāni, 1996, 406.

⁴⁰Is'haq Oloyede, *Al-Hadānah: An Integral Part of Islamic Matrimonial Law*, Islamic and Comperative Law Quarterly, Vol. IX, June-December 1989, 143-145. [Hereinafter Is'hāq Oloyede, A, ICLQ, 1989].

⁴¹John L. Esposito, 1982, 38; Fazil-ur-Rehman Hilal Usmani, 1989, 108-109.

⁴²J. J. Nasir, 1990, 176; Alexander David Russel & Abdullah Almamun Suharwardy, 1979, 323.

According to *Mālikī* school after mother custody goes to maternal grand mother, how-high-soever, then to the full uterine maternal aunt, then the mother's maternal aunt, then mother's paternal aunt, then father's mother, then his maternal grandmother, then his paternal grandmother. If these women do not exist the right of custody shall go to the father, then the sister, then the father's sister, then the father's paternal aunt, then the father's maternal aunt, then the daughter of the full brother, then the daughter of the uterine brother, then the daughter of the consanguine brother, then the daughter of sister, the order is from full to the uterine to the consanguine relation.

If these relatives are not there the custody shall go to the guardian, then the brother, then his son, then the paternal uncle, then his son. In all these relatives preference will be given to the nearer then the further.⁴³

In *Shāf'ī* law after mother custody shall go to the maternal grandmother, then to paternal grandmother, then sisters, then maternal aunts, then daughters of brothers and daughters of sisters, then paternal aunts, after this point they give same order as *Hanafīs* has given i.e. it goes to agnates according to their order in inheritance.⁴⁴ Whether mother has the custody or father, the other parent have right to see his or her child. Neither father nor mother can prevent the other from visiting the child.⁴⁵

3.2.2 PERIOD OF CUSTODY

As in The *Qur'ān* or The *Sunnah* no limitation of time period is mentioned there is difference of opinion among jurists as to the period of custody.

According to Muslim jurists period of custody with respect to a boy ends when he becomes able to do his everyday affairs. With respect to a girl this period ends when she

⁴³Ziba Mir-Hossieni, 2000, 146.

Al-Ramlī, 217.

⁴⁴Wahba Al-Zuhailī, 1989, 722.

⁴⁵Ibn-e-Qudāma, 1972, 329.

attains puberty.⁴⁶

In *Hanafī* school mother is entitled to the custody of a male child until he attains the age of seven. According to *Abū Bakr Al-Rāzī* this age is set at nine⁴⁷ but the preferred opinion is the first one. In case of a female child mother retains custody until she attains puberty. For puberty the age is set at nine and according to some at eleven. But the preferred opinion is of nine years for a girl. After attainment of these ages custody shall go to the father. In *Hanafī* law the child has no right to choice.⁴⁸

According to *Shāfī* and *Hanbalī* schools the mother is entitled to the custody of her female child until she gets married and for her male child she has the right till seven years. At the age of seven he can choose any one of his parents.⁴⁹

In *Mālikī* Law the mother has the right of custody of the male child till he attains full power of speech and of her female child till she gets married and the marriage is consummated.⁵⁰ About right of choice in *Mālikī* law there is difference of opinion, according to one opinion the child has right to choice and according to other opinion at the end of the period of custody the child is passed to the father and they have no choice.⁵¹

3.2.3 WHOSE RIGHT IS CUSTODY?

There is difference of opinion that custody is right of the child or right of the mother, or it is right of both of them.⁵²

⁴⁶Shaikh Hasan Khālīd & Adnān Najā, 1972, 207.

⁴⁷Syed Ameer Ali, *Muhammadan Law*, (Lahore: Law Publishing Company, Seventh Edition), Vol. II, 225. [Hereinafter Syed Ameer Ali]

⁴⁸Al-Marghenāni, 1975, 139; Zakī-ud-Dīn Sha'bān, *Al-Ahkām Al-Shar'iyah lil Ahwāl Al-Shakhsiyyah*, (Cairo: Dār Al-Nahda Al-Arabiyyah, 1969), 681. [Hereinafter Zakī-ud-Dīn Sha'bān, 1969]; John L. Esposito, 1982, 37. *Is'hāq Oloyede, A, ICLQ, 1989, 144.*

⁴⁹Shaikh Hasan Khālīd & Adnān Najā, 1972, 269; Syed Ameer Ali, 224.

⁵⁰Tanzil-ur-Rehman, 1978, vol. 1, 719; *Is'hāq Oloyede, A, ICLQ, 1989, 144.*

⁵¹*Is'hāq Oloyede, A, ICLQ, 1989, 145.*

1. According to *Ahnāf* it is right of the child. Here mother can not refuse to take custody because it is right of the child. She can be compelled to take custody.⁵³

2. According to *Shāf'ī*, *Ahmad*, *Thawrī* and one tradition of *Imām Mālik* it is right of 'hādinah'. Here she can refuse to take custody.⁵⁴

3. Some *Ahnāf* are of the opinion that it is a right of both of them. This opinion is more appropriate because here interests of both mother and the child are to be taken into consideration before any decision.⁵⁵

3.2.4 CONDITIONS FOR CUSTODIAN

There are some conditions, which are agreed upon by the jurists. These are: the custodian must be wise, mature, free and not a debauch. For a female child the custodian should be appointed from agnates and should be honest and trustworthy.⁵⁶ Another condition is that the custodian who is agnate relative should be Muslim. The four *Imāms* agree that the mother when separated from the father should not remarry with a person who is *ghair mahram* to the child and she must not turn apostate. Here *Hasan Basrī* disagree, according to him her remarriage with a *ghair mahram* does not disqualify her for custody of the child.⁵⁷

According to *Mālik*, *Al-Shāf'ī* and *Ibn-e-Hanbal* the custodian must be a Muslim. But *Abū Hanīfa*, *Ibn-e-Qāsim* and *Abū Thaur* disagree with them. According to them it is not a condition for the custodian of the child. In *Hanafi* school if mother is not a Muslim she has the right to custody of her child till the child attains maturity to understand and think

⁵²Shaikh Hasan Khālīd & Adnān Najā, 1972, 270.

⁵³*Ibid.*

⁵⁴Wahba Al-Zuhailī, 1989, 719.

⁵⁵*Ibid.*

⁵⁶Al-Dasūqī, 528-529.

⁵⁷Al-Kasāni, 1982, 41-42; Alexander David Russel & Abdullah Almamun Suharwardy, 1979, 324; Tanzil-ur-Rehman, 1978, 734.

about religion.⁵⁸

3.2.5 WAGES FOR CUSTODY

In *Hanafi* law a mother who is not divorced is not entitled to wages. Same is the case of *mu'tada* of a revocable divorce because they are already liable to get maintenance.

But the *mu'tada* of death of the husband, if she has completed the *iddah*, is entitled to get wages for custody as she does not receive any other maintenance.⁵⁹ If custodian is not the mother she is entitled to wages in all schools except she herself offers it free.

According to majority of jurists except *Hanafiyyah* mother is not entitled to wages for custody but if she needs servant then she is entitled to wages.⁶⁰

In *Hanafi* law if mother asks for wages and there is a volunteer who does not ask for wages the volunteer will be preferred with two conditions: First, she is a relative in prohibited degree. Second, father is a poor person. If father is a rich person and volunteer custodian is not a relative in prohibited degree, mother will be preferred.

Wages for custody are on father and shall be payable from the date mother takes this responsibility, or from court's order.⁶¹

3.2.6 PLACE FOR CUSTODY

During the marriage the child should live in house of her parents.⁶² In case of *iddah* of revocable divorce or death child will stay at the house of her father. Mother can not travel with the child with out permission of father. After expiry of *iddah* period mother can

⁵⁸Ibn-e-Nujaim, 167

⁵⁹J. J. Nasir, 1990, 181.

⁶⁰Wahba Al-Zuhaili, 1989, 734.

⁶¹J. J. Nasir, 1990, 182-183; Wahba Al-Zuhaili, 1989, 735-736.

⁶²Al-Kasani, 1982, 44.

travel or move to a town where it is possible for the father to visit the child and come back to his residence to spend night there, or she can move to a place where marriage was held. If these two conditions are not fulfilled she has to ask for permission from the husband.⁶³ If she moved to that place with out his permission, her right to custody will end and the right shall go to the next person in order.⁶⁴

3.3 MAINTENANCE OF THE CHILD

Maintenance is a right of the child. This responsibility is upon the father according to his financial status.⁶⁵ In its literal sense it means what a person spends on his family.⁶⁶ Maintenance includes bread and butter, a place to live and other necessary expenses of a child from birth till adulthood.⁶⁷

It is a religious as well as legal duty of the father. Allah said in The *Qur'ān*

'and on the father shall be their sustenance and their clothing in fairness'. (Al-Baqrah, 233)

In this verse the word *rizq* is mentioned which includes sufficient food, adequate clothing and other necessary provisions.⁶⁸

There are many *ahādīth* to this effect also.

Abu Mas'ūd Al-Ansārī narrated that the Prophet said, *'when a Muslim spends something on his family intending to receive Allah's reward, it is rewarded as sadaqa for him'*.⁶⁹

It is narrated by *Āysha* that *Hind* daughter of *Utba*, wife of *Abū Sufyān*, came to Allah's

⁶³*Ibid*, 45.

⁶⁴Shaikh Hasan Khālid & Adnān Najā, 1972, 272; Wahba Al-Zuhaili, 1989, 737; J. J. Nasir, 1990, 183.

⁶⁵Ibn-e-Qudāma, 1972, Vol.III, 319; Mansūr ibn Yūnas ibn Idrīs Al-Bahūtī, *Kashāf Al-Qanā' an Matan Al-Iqnā'*, (Beirut: Dār-ul-Fikr, 1982), Vol. 5, 501. [Hereinafter Al-Bahūtī, 1982].

⁶⁶Ibn-e-Nujaim, 173.

⁶⁷Fazil-ur-Rehman Hilal Usmani, 1989, 106.

⁶⁸Abdul Rehman I. Doi, 1996, 108.

⁶⁹Muhammad ibn Ismā'il Al-Bukhārī, *Sahih Al-Bukhārī*, English translation by Muhammad Muhsin Khān, (Lahore: Kāzi Publications, 1979), Vol. VII, 201. [Hereinafter Al-Bukhārī, 1979].

Messenger (peace be upon him) and said,

'O Allah's Messenger, Abū Sufyān is a miser who does not give me and my son enough maintenance, except what I take from his property without his knowledge. Is there any blame on me? He replied, 'Take from his property what is reasonable and enough for you and your son'.⁷⁰

In another tradition narrated by *Abū Huraira* a man came to the Prophet and said, *'I have a dinār'*. He said, *'spend it on yourself.'* He said, *'I have another.'* He replied, *'spend it on your children.'*⁷¹

From these *ahādīth* it is evident that maintenance of the child is incumbent upon the father. No one other share this duty with him. Jurists agree that maintenance of direct descendants is incumbent upon the father but to maintenance of indirect descendants they differ. According to majority of jurists for it also father is responsible but according to *Malikiyyah* maintenance of direct descendants is only incumbent. The reason is that according to them inheritance is the base of maintenance.⁷²

3.3.1 CONDITIONS FOR MAINTENANCE

There are five conditions to render maintenance incumbent upon the father.⁷³

1. That the children are poor. If they are well-off then maintenance is not incumbent upon the father. Father can sell property of the child for her maintenance.⁷⁴

2. That the child is unable to earn for herself because of her tender age or any disease. An adult who can earn for himself is himself responsible for his maintenance.⁷⁵

⁷⁰Al-Bukhārī, 1979, 208; Ibn-e-Hajar Al-Asqalānī, 1986, 266-267; Abī Bakr Ahmed bin Al-Hussain bin Alī Al-Baihaqī, Al-Sunan Al-Saghīr, (Mecca: Al-Maktaba Al-Tijāriyyah Mustafā Ahmed Al-Bāz), Vol. II, 148

⁷¹*Ibid*, 404-405.

⁷²Wahba Al-Zuhailī, 1989, 822.

⁷³Shaikh Hasan Khālid & Adnān Najā, 1982, 276.

⁷⁴Ibn-e-Nujaim, 213.

⁷⁵Ibn-e-‘Ābidīn, 1984, Vol. III, 645.

3. That the father is rich enough to spend on the child or he is able to earn for them.

In Arabic the word used by *fuqahā* is ‘*yasār*’ and it is defined by the jurists as following.

- i. The person must possess *nisāb* of *zakāt*.
- ii. He must possess such *nisāb* that he is not among receivers of *sadaqah*.
- iii. He possess maintenance for himself and his family for the whole month.⁷⁶

If father is a poor person the responsibility to maintain the child shifts to other rich relatives e.g. grand father or maternal uncle or mother of the child etc.⁷⁷

4. The child should be free and not a slave.

5. The father should be free and not a slave.⁷⁸

Father is liable to maintain his male child until he attains puberty but in case of a female child, father is responsible for her maintenance till she attains puberty and gets married.⁷⁹ After marriage her maintenance is upon her husband. But in case of breaking down of marriage again the father becomes responsible for her. The father has no authority to enforce her to earn money for herself. In case she earns money within the limits prescribed by *Sharī‘ah* then he will not be responsible for her.⁸⁰

Hanābala laid another condition that father and child both should belong to the same religion. Because maintenance is incumbent because of inheritance and a non-Muslim can not inherit from a Muslim and vice versa.⁸¹ Majority of jurists differ with *Hanābala* at

⁷⁶ Ibn-e-Nujaim, 211-212.

⁷⁷ Ibn-e-‘Ābidīn, 1984, Vol. III, 644.

⁷⁸ As slavery is abolished these two conditions are irrelevant now.

⁷⁹ Asaf A. A. Fyze, *Outlines of Muhammadan Law*, (London, New York and Bombay: Oxford University Press, 1955), 183. [Hereinafter Asaf A. A. Fyze, 1955]; Neil B. E. Baillie, 462.

⁸⁰ Wahba Al-Zuhailī, 1989, 824.

⁸¹ Ibn-e-Qudāma, 1992, 375.

this point and are of the opinion that 'to belong to the same religion' is not a condition in this case.⁸²

3.3.2 WHO IS RESPONSIBLE FOR MAINTENANCE OF THE CHILD?

As said earlier father is responsible for the maintenance of the child.⁸³ There are lots of verses and *ahādīth* that supports this notion, some of them are mentioned earlier.

There are many other traditions also, which speaks for this responsibility of the father and reward for fulfilling it. The Holy Prophet said,

*'When a person spends on his wife and children intending to receive Allah's reward, it is rewarded as sadaqa for him.'*⁸⁴

Although it is duty of the father but if he is unable to earn for his children, the wife who earn for his children, will be rewarded.

Umme Salma narrates that she asked the Prophet, 'Shall I be rewarded for spending upon the sons of Abu Salma? I can not leave them in want and hunger wandering like beggars from door to door. After all, they are my sons'. The Holy Prophet said, 'Yes you will definitely be rewarded for what ever you spend on them'.⁸⁵

If father is dead or unable to earn, maintenance of children will be incumbent upon close relatives. According to *Ahnāf* if there are legal heirs, maintenance will be incumbent according to their share of inheritance. If there are no heirs then maintenance will be on closest relative.⁸⁶ According to *Mālikiyyah* maintenance is upon the father alone not on any other relative. According to *Shāf'iyyah* if father is dead or unable to earn the maintenance is upon mother. According to *Hanābala* in this situation the responsibility is shifted on all heirs each according to his share.⁸⁷

⁸²Al-Marghenāni, 1975, 146.

⁸³*Ibid.*

⁸⁴Al-Bukhārī, 1979, 201.

⁸⁵Abī Bakr Ahmed bin Al-Hussain bin Alī Al-Baihaqī, Al-Sunan Al-Kubrā, (Beirut: Dār-ul-Fikr), Vol. VII, 478.

⁸⁶Shaikh Hasan Khālīd & Adnān Najā, 1982, 278.

3.3.3 WHAT DOES MAINTENANCE INCLUDE?

Maintenance of the child include

1. Payment for fosterage,⁸⁸
2. Payment during custody,
3. Expenses for every day necessities,
4. Payment for premises in which the mother during custody period lives,
5. Payment of servant if child needs that,⁸⁹

Father is responsible for each necessity and need of the child, not only material needs but also spiritual needs like education etc. It is proved by different *ahādīth* that it is responsibility of the guardian to show children right path and to take care that they should not go astray.⁹⁰

3.4 PARENTAGE

It is the most important right of a minor because his other rights like inheritance, maintenance and guardianship depend on this right. Legitimacy is established for a child if she is born during a regular or irregular marriage but not in a void marriage, or by acknowledgement by the father. Parentage is established on legitimacy and other rights are established on the basis of paternity.⁹¹ The status of legitimacy is very important with respect to the rights of the child.

Any child from valid or irregular marriage will be associated to the father. A child from

⁸⁷Ibn-e-Qudāma, 1992, 380-383.

⁸⁸Al-Marghenāni, 1975, 146; Alexander David Russel & Abdullah Almamun Suharwardy, 1979, 112.

⁸⁹Wahba Al-Zuhaili, 1989, 704.

⁹⁰www.jamiat.org.za/al-jamiat/radaat.html. Last visited 15th of January, 2005.

⁹¹John L. Esposito, *Women in Muslim Family Law*, (Syracuse University Press, 1982), 28. [Hereinafter John L. Esposito, 1982].

irregular marriage can not be disowned by father on the basis of *li'ān*.⁹² A child of adultery will not be given status of legitimacy even if the mother claims that child is fathered by a particular person. The Prophet (Peace be upon him) said: '*A child belongs to the bed, and to the adulterer belong stones*'.⁹³

3.4.1 LIGITIMACY BY BIRTH

Because of the importance of status of legitimacy Muslim jurists tend to be very lenient in this respect. The main important point here is maximum and minimum period of gestation. Jurists agree that minimum period of gestation is six months.⁹⁴ Six months will be counted from the time of sexual intercourse according to majority of jurists, and from the contract of marriage according to *Abū Hanīfa*.

The consensus on the minimum period of gestation is based on the verses:

*'And we have commanded unto man kindness to his parents: in pain did his mother bear him, and in pain did she give him birth, and the bearing of him and weaning of him is thirty months.'*⁹⁵

*'And we have commanded upon man concerning his parents: his mother bore him in weakness, and his weaning is in two years.'*⁹⁶

First verse tells that period for pregnancy and weaning is thirty months and second verse tells that time period for weaning is two years. By subtraction of two years from thirty months it seems that period of pregnancy is six months.⁹⁷

⁹²J. J. Nasir, 1990, 161.

⁹³Abī Al-Hussain Muslim ibn Hajjāj Al-Qashīri, *Sahih Muslim*, (Beirut: Dār Ahyā Al-Turāth Al-Arabī), Vol. II, 1080;

Women in Islam: An Anthology from the Qur'ān and Hadīths, Translated & Edited by Nicholas Awde, (England: Curzon Press, 2000), 109;

⁹⁴Ibn-e-'Ābidīn, 1984, Vol. III, 567; Ziba Mir-Hossieni, *Marriage on Trial, A study of Islamic Law*, (London, New York: I. B. Tauris Publishers, 2000), 134. [Hereinafter Ziba Mir-Hossieni, 2000]; C. M. Shafqat, 1979, 69.

⁹⁵Al-Ahqāf, 15.

⁹⁶Luqmān, 14.

⁹⁷Al-Marghenāni, 1975, 134; Shaikh Hasan Khālid & Adnān Najā, 1972, 243; Ibn-e-Nujaim, 163;

If a child is born six months after the marriage she will be legitimate unless the father disowns her paternity.⁹⁸ There is only one way by which this legitimacy can be rebutted i.e. by *li'ān*. In *li'ān* a husband disowns the paternity of the child by swearing four times that the child is not his child. He then calls upon himself the curse of Allah if he has sworn falsely. After that the wife, if she denies blame of adultery, swears four oaths and invokes upon herself the curse of Allah if she is guilty.⁹⁹

If the period after *nikāh* till the birth is less than six months the child will not be legitimate.¹⁰⁰

As to maximum period of gestation there is difference of opinion among jurists. According to *Abū Hanīfa* maximum period is two years.¹⁰¹ He based his opinion on the *hadīth* narrated by *Hazrat Āyeshā* that the Prophet said, '*the child don't stay in the womb of the mother more than two years*'. According to *Ahmad, Shāf'ī* and *Hanbalī* jurists the maximum period is four years. If the child born four years after divorce and the wife declare that her *iddah* is not over nor she remarried, the child will be associated to her father.

According to *Mālikiyyah* the maximum period is five years. *Imām Mālik* is of the opinion that the maximum period is seven years.¹⁰² According to *Zāhiriyyah* it is nine months.

In medical opinion period of gestation is nine months. The minimum period is seven

J. J. Nasir, 1990, 157.

⁹⁸John L. Esposito, 1982, 28.

⁹⁹David Pearl, *A Text Book on Muslim Personal Law*, (London, Sydney, Hampshire: 1987), 90. [Hereinafter David Pearl, 1987].

¹⁰⁰Ibn-e-Nujaim, 155.

¹⁰¹*Ibid*;

Ibn-e-'Ābidīn, 1984, Vol. III, 567; Fazil-ur-Rehman Hilal Usmani, 1989, 110.

¹⁰²Wahba Al-Zuhailī, 1989, 677.

months and the maximum is ten months.¹⁰³ Usually period of gestation is 266-269 days or according to some it is 280 days but in medical history there are cases in which this period goes to 330, 342 or 389 days. There is consensus of opinion among jurists that *fatwa* can not be given on the basis of medical facts. Although two or four year's period of gestation is an exceptional case but Muslim jurists even consider these situations so that no legitimate child be stigmatized as illegitimate. As minor's most of the rights depend on his status of legitimacy so Muslim jurists have been very careful while dealing with this issue.¹⁰⁴

3.4.2 LIGITIMACY BY ACKNOWLEDGEMENT

Legitimacy can be established by acknowledgement.¹⁰⁵ There are four conditions laid by jurists for such an acknowledgement to be accepted.

1. Paternity of child should be unknown. If it is known in the society it will not be changed by acknowledgement.¹⁰⁶

2. By the circumstances it would be possible that the acknowledged person is a child of the acknowledger. For example minimum period of puberty is twelve years and the minimum period of gestation is six months so the child must be twelve years and six months younger than the acknowledger.¹⁰⁷

3. If the child has attained puberty she should support the acknowledgement. Here puberty is a condition according to majority of jurists and discretion is a condition according to *Hanafiyyah*. But if the child is under age or insane then this is not the

¹⁰³ Abū Alī Al-Husain ibn Abdullah Ibn-e-Sīnā, *Al-Qanūn fi Al-Tib*, (Beirut: Dār-ul-Sādr), Vol. II, 570.

¹⁰⁴ Tanzil-ur-Rehman, 1998, Vol. III, 858-860

¹⁰⁵ Ibn-e-‘Ābidīn, 1984, Vol. III, 567; Ibn-e-Nujaim, 158.

¹⁰⁶ Asaf A. A. Fyze, 1955, 166.

¹⁰⁷ David Pearl, 1987, 90.

condition. *Mālikiyyah* differ with majority of jurists and did not lay this condition.

4. No one other should claim paternity.¹⁰⁸ If two persons claims paternity of the same child, her paternity will not be established to both of them because both statements of acknowledgement clash with each other.

If any other person claims paternity on the basis that she is his child from *zinā*, paternity will not be established. His claim or acknowledgement will be void here.

According to *Hanafiyyah* the child, whose paternity is going to be established, must be alive. If she is dead this acknowledgement will not establish paternity. Here *Mālikiyyah* differ with *Hanafiyyah*.¹⁰⁹

3.4.3 LIGITIMACY BY EVIDENCE

Parentage can be established by witnesses or by furnishing any other evidence. Jurists differ as to number of witnesses required to prove parentage.

The testimony by which parentage is established is two male witnesses according to *Abū Hanīfa*, *Muhammad* and *Mālikiyyah*. According to *Shāfī* and *Hanbalī* schools it is established by testimony of all heirs. *Abū Yūsaf* also agree with them.¹¹⁰

3.4.4 ADOPTION

Status of adoption in Islamic law is determined by the following verses of The *Qur'ān*.

*'Allah has not made for any man two hearts inside his body. Neither has he made your wives whom you declare to be like your mother's backs, your real mothers nor has he made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, & he guides to the right way.'*¹¹¹

¹⁰⁸Wahba Al-Zuhailī, 1989, 690-691.

¹⁰⁹*Ibid*, 292.

¹¹⁰*Ibid*, 695.

¹¹¹Al-Ahzāb, 4.

'Call them (adopted sons) by (the names of) their fathers: that is more just with Allah. But if you know not their father's (names, call them) your brothers in faith and Mawalikum (your freed slaves).'¹¹²

'And (remember) when you said to him (Zaid bin Harītha the freed slave of the Prophet) on whom Allah has bestowed grace (by guiding him to Islam) and you (O Muhammad, too) have done favour (by manumitting him): 'keep your wife to yourself, and fear Allah'. But you did hide in yourself (i.e. what Allah has already made known to you that He will give her to you in marriage) that which Allah will make manifest, you did fear the people (i.e. their saying that Muhammad married the divorced wife of his manumitted slave) whereas Allah has a better right that you should fear him. So when Zaid had accomplished his desire from her (i.e. divorced her); we gave her to you in marriage, so that (in future) there may be no difficulty to the believers in respect of (the marriage of) the wives of their adopted sons when the latter has no desire to keep them (i.e. they have divorced them). And Allah's command must be fulfilled.'¹¹³

These verses abolished the custom of adoption of pre-Islamic era. In Islam there is no concept of legal adoption according to majority of scholars.¹¹⁴ There are some scholars who are of the opinion that adoption is not prohibited, it is *mubah*.¹¹⁵ But most of the jurists, as mentioned earlier, don't agree with them. In all Muslim countries opinion of majority of jurists is followed.¹¹⁶ This can be seen in Muslim countries reports to the CRC, in which they all say that in Islam institution of adoption does not exist.¹¹⁷

¹¹²Al-Ahzāb, 5.

¹¹³Al-Ahzāb, 37.

¹¹⁴Asaf A. A. Fyzee, 1955, 163.

¹¹⁵David Pearl, 1987, 89.

Mubah is an act, with reference to the doing or omission of which there is no demand. It is just a recommendation. Abdurahim, 1911, 61; Sadr-ul-Sharīah, 1996, Vol. II, 258.

¹¹⁶Same is followed in Pakistan. This can be seen in Supreme Court's judgment in Sher Afzal V. Shamin Firdaus, PLD 1980 SC 228.

¹¹⁷Nyazee, 'A', ILR 2003, 88-98.

An Islamic State can not conclude a treaty which permits any prohibited act or which has immoral objectives or these objectives are against principles and purposes of Islam. Same is the case where a treaty is prohibiting an act which is obligatory in Islam. Besides the stand took on the un-Islamic provisions of CRC a demonstration of this approach by Muslim States can also be seen at the 40th and 41st sessions of the General Assembly where draft declaration on 'Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally' was discussed. As a result of this difficulty of Muslim States that they can not sign or ratify any treaty which entails any act prohibited by Islam, Islamic principle of *kafālah* was introduced in preambular paragraphs 6 and 7 and article 22. For detailed discussion see Jamshed A. Hamid, Status of Treaties in Islam: A Comparison with Contemporary Practice, (Islamabad: Shari'ah Academy International Islamic University, 2001), 130. [Hereinafter Jamshed A. Hamid, 2001]

In spite of prohibition of legal adoption it is a pious deed to look after an orphan or to be his guardian. The thing which is prohibited is to change parent's names or change his lineage. It is ordered that if you don't know who his parents are then call him as '*my brother in faith*'. Legal adoption of a child is totally prohibited.¹¹⁸

3.5 GUARDIANSHIP

Wilāyah or *wasāyah* is the term used for guardianship in Islamic law. It is defined as 'the carrying through of decision affecting a third person whether the latter wishes or not'.¹¹⁹

For a young child mother is her custodian but guardianship rests with father. Guardianship includes upbringing as a Muslim, education, training and maintenance.¹²⁰ Guardianship is an institution established for the persons who have imperfect or no legal capacity¹²¹ like minor or insane person or for a female. As far as minor is concerned it is his right that he should have someone to manage his affairs which he himself could not do because of his immaturity or tender age. Duty of guardianship can be incumbent upon a person on three grounds:¹²²

1. Kinship
2. by testament
3. by court

There are two types of guardianships; guardianship over property and guardianship over the person. Guardianship over person of a minor has been discussed before. Now I will discuss guardianship over property.

¹¹⁸Tanzil-ur-Rehman, 1978, 712.

¹¹⁹J. J. Nasir, 1990, 205.

¹²⁰Ziba Mir-Hossieni, 2000, 146.

¹²¹Legal capacity has been discussed in first chapter in detail.

¹²²J. J. Nasir, 1990, 205.

3.5.1 GUARDIANSHIP OF PROPERTY

Guardian is responsible to manage minor's affairs pertaining to property. Guardianship lies with father.¹²³ Father is natural guardian, after father's death the guardianship lies with the father's executor, then the paternal grandfather, then the paternal grand father's executor.¹²⁴ This all is according to *Hanaḥī* law.

In *Shāḥī* school after father guardianship falls on paternal grandfather then on their executors. According to *Mālikī* and *Hanbalī* schools following is the order for guardianship; executor of the father, judge, Muslim community if there is no judge.¹²⁵

The guardian is not all powerful and free in matters relating to property. There are limitations on him. He can not buy or sell minor's property but in exceptional circumstances where this transaction is in the interest of the minor.

3.5.2 CONDITIONS FOR GUARDIAN

Following are the conditions for a guardian.

1. Legal Capacity. A person with full legal capacity can be a guardian. There are three conditions adjacent to full legal capacity.¹²⁶

1. Puberty
2. Sanity
3. Freedom

A person who has attained puberty and is sane and free can be a guardian.

2. The guardian should have same religion as the ward has. If his religion is different

¹²³Yūsaf Qāsim, 1987, 429.

¹²⁴David Pearl, 1987, 98.

¹²⁵Wahba Al-Zuhailī, 1989, 750.

from the ward he will not be entitled to guardianship.¹²⁷

3.5.3 POWERS OF GUARDIANS

First I will discuss powers of a natural guardian and then powers of a testamentary guardian.

3.5.3.1 NATURAL GUARDIAN

Father is the natural guardian of a minor if he is reliable and is of sound judgment. In case he lacks these characteristics he does not deserve to be a guardian. A father has absolute power in matters pertaining to property except the transaction which is purely harmful.¹²⁸

In case of absence of father grandfather is guardian. According to the opinion of *Muhammad Al-Shaibānī* grandfather is like a father and has same powers. Whereas according to *Abū Hanīfa* and *Abū Yūsaf* his powers are equal to a testamentary guardian.¹²⁹

3.5.3.2 TESTAMENTARY GUARDIAN

A testamentary guardian should possess four characteristics; puberty, sound judgment, Islam and honesty.

Testamentary guardian has same powers as natural guardian possess except he can not sell or buy ward's property without any just reason like if such a transaction is for the

¹²⁶*Ibid.*

¹²⁷Zakī-ud-Dīn Sh'abān, 1969, 681.

¹²⁸Shaikh Hasan Khālīd & Adnān Najā, 1964, 757.

¹²⁹J. J. Nasir, 1990, 214.

benefit of the minor. This is according to *Abū Hanīfa*. Whereas in the opinion of *Sahibān* and other jurists he has no power to sell or buy his property in any circumstance.¹³⁰

CONCLUSION

There are five rights of minor in case of separation between parents. These are fosterage, custody, maintenance, parentage and guardianship.

Fosterage is a religious duty of mother. A mother should suckle her child for first two years. Although it is a religious duty but according to majority of jurists mother can not be compelled to suckle her child. Fosterage cause prohibition of marriage among persons having foster relations. According to *Shāfi* school of thought five sucks cause prohibition but according to majority there is no specific degree of fosterage for this purpose. Fosterage can be established in three ways: by acknowledgement, evidence and witnesses. A mother can claim payment for suckling in first two years not after that.

Custody is a right of the child as well as of the mother. This is established by traditions of the prophet (Peace be upon him) that mother is prior to other persons in having custody. Period of custody ends with respect to boy at attaining seven years and with respect to girl at attaining puberty. The person who wants to be a custodian must fulfill certain conditions like he or she must be wise, mature, free and not a debauch, and must be a *mahram* to the child. A mother after separation can ask for wages for custody according to *Hanafi* School. Mother can not travel with the child to a place where it would not be possible for father to visit or look after the child.

Maintenance of the child is upon father with the condition that the child is poor or unable to work and the father is rich enough to spend on the child. Maintenance includes payment for fosterage, wages for custody, expenses for every day necessities, payment

¹³⁰Wahba Al-Zuhailī, 1989, 757

for premises in which the mother during period of custody resides, payment for servant if child needs that.

Parentage is established for legitimate child only. It is established by birth in valid and irregular marriage. Period of gestation is relevant here. The least period of gestation is six months and most is two years. Legitimacy can be established by acknowledgement and by evidence also. In Islamic law there is no concept of legal adoption. To look after an orphan is a pious deed but you can not change her parentage.

Guardianship of property rests with father or in his default goes to male relatives. There are certain conditions for a person to be a guardian that he should possess full legal capacity. There are three conditions for attaining full legal capacity: puberty, sanity and freedom. Secondly he should belong to the religion of the minor. Natural guardian has more powers regarding property of minor than testamentary guardian. He can not sell or buy minor's property. Both kinds of guardians can not make any transaction which is purely harmful to the minor.

Chapter no. 4

RIGHTS & PRIVILIGES OF MINOR IN CASE OF SEPARATION BETWEEN PARENTS IN PAKISTANI LAW

INTRODUCTION

Here I will take into account the law relating to rights of minor in case of separation between parents in Pakistani law. At first I will discuss right of fosterage, the law related to custody, maintenance, parentage and guardianship would follow it. I will present critical analysis of the laws with important cases, suggestions and proposals. At the end there will be conclusion.

Before discussing these rights two things should be mentioned. Firstly, it is expressly provided in Pakistani law that in questions relating to marriage, divorce, dower, adoption, guardianship, minority, legitimacy, family relations etc., the rule of decision shall be the Muslim Personal Law (*Sharī'at*) in cases where both parties are Muslims.¹ Secondly, where there is statute law and *Muhammadan* law on the same issue, statute law will prevail until and unless they were brought in conformity with injunctions of the *Qur'ān* and the *Sunnah* by legislature.²

4.1 FOSTERAGE

Suckling is right of minor on his mother³ as there is no food better than mother's

¹Section 2, The Muslim Personal Law (Shariat) Application Act, 1937.

Section 2, The Punjab Muslim Personal Law (Shariat) Application (Amendment) Act, 1951.

Section 2, The Punjab/ Sindh/ N. W. F. P/ Balochistan Muslim Personal Law (Shariat) Application Act, 1962.

²Section 31(5), Interim Constitution Act, 1974 mentioned in S. A. Abid, Encyclopedia of Family Laws in Pakistan: Amendments & case law upto date, (Lahore: Shan Book Corporation, 2002), 476-477.

³Mst. Intiaz Begam v. Tariq Mahmood, 1995 CLC 800.

In Pakistani law a minor is a person who has not attained the age of eighteen years. Pakistan Penal Code 1860, Section 299, The Majority Act 1975, Section 3.

milk for the child. But suckling is a religious or moral duty of mother not a legal duty. Mother according to majority of jurists cannot be compelled to suckle her child. Same is the case in Pakistani law. In Pakistani law it is encouraged that mother should suckle her child but she cannot be compelled.

Efforts are being made to create awareness among people that it is a religious duty, which should be fulfilled as it is also medically best food for the child.

4.1.1 LAW RELATING TO FOSTERAGE

The only law relating to fosterage is Ordinance XCIII of 2002, Protection of Breast-Feeding and Child Nutrition Ordinance, 2002. This ordinance contains the following main points.

The safe & adequate nutrition for children shall be ensured by promoting and protecting breast-feeding, and by regulating the marketing and promotion of designated products including milk substitutes, feeding bottles etc. The Ordinance defined 'infant' as a child upto the age of twelve months and a 'young child' as a child from the age of twelve months upto the age of two years.⁴

A National Infant Feeding Board and Provincial Infant Feeding Committees shall be constituted. These Boards and Committees shall check the implementation of the provisions of this ordinance and will advise the federal government and the provincial governments on national policies for the promotion and protection of breast-feeding and other designated products through national or provincial education compaigns.⁵

The Ordinance prohibits the assertion by any person that any designated product is a

⁴Section 1.

⁵Sections 3-4.

substitute for mother's milk, or that it is equivalent to or comparable with or superior to mother's milk.⁶

No label of a designated product shall be designed to discourage breast-feeding and every label shall contain a conspicuous notice in bold characters stating the following:

*'MOTHER'S MILK IS BEST FOOD FOR YOUR BABY AND HELPS IN PREVENTING DIARRHOEA AND OTHER ILLNESSES'.*⁷

Health workers should be properly educated and they shall encourage, support & protect breast-feeding. They shall not accept or give samples of any designated product to any person particularly pregnant women, mothers of infant and young children, or members of their families.⁸ Rest of the Ordinance deals with rules for manufactured products for infants and young children. The ordinance provides for the imprisonment upto two years with fine which shall not be less than fifty thousand rupees or more than five hundred thousand rupees for a manufacturer or distributor⁹ who contravenes provisions related to prohibited practices¹⁰ and quality assurance.¹¹

Based on Islamic law the Pakistani law also provides that maintenance for breast-feeding is on the father. Wife is entitled to maintenance allowance even after period of *iddah* for breast feeding for two years.¹² This is a fundamental right of a child for atleast two years and no person can deprive her of this supreme and fundamental right.¹³ During period of fosterage the woman should live at the house of her husband if marriage subsists. In case of separation between parents, however, mother could take minor to the place where

⁶Section 7

⁷Section 8.

⁸Section 10.

⁹Section 17.

¹⁰Section 7 & 8.

¹¹Section 11.

¹²Muhammad Aslam v. Muhammad Usman, PLJ 2004 Lahore 1075.

¹³Naveeda Naz v. Arshad Mehmood, PLJ 1995 Cr. C (Lahore) 92.

nikāh between spouses was performed and that was also permanent domicile of the woman. Minor could not be taken to any place other than that. In case where father was living not far away from the place where minor was to be kept, this restraint would not apply. Minor can not be kept in less civilized atmosphere.¹⁴

SUGESTIONS

It is evident from these provisions and case law that all this is to create awareness among people. The right of fosterage can not be legally enforced what we can do is to create awareness among people in general and mothers in particular and this ordinance is an effort to do so. Electronic media and print media should be used for this purpose to make people realize that this is not only a religious duty but also it is medically best food for the child.

4.2 MAINTENANCE OF CHILD

Maintenance of a child is upon the father.¹⁵ Although maintenance is not defined in Pakistani law however from case law it can be inferred that maintenance includes food, raiment, lodging and other necessary expenses for mental and physical wellbeing.¹⁶

4.2.1 LAW RELATING TO MAINTENANCE OF CHILD

Sections related to maintenance of child were 488-490 of Code of Criminal Procedure, 1898. These sections were repealed in Pakistan¹⁷ and are now only enforced in Azad Jammu & Kashmir. As these sections are enforced in one part of the State it would not be useless to discuss them.

¹⁴Mst. Imtiaz Begam v. Tariq Mahmood, 1995 CLC 800.

¹⁵PLD 1954 Pesh. 13, Umara Khan v. Sultana;
1992 CLC 5, Razak v. Ijaz Mehmood.

¹⁶1992 MLD 219, Maqsood Ahmed Sohail v. Abida Hanif.

¹⁷These sections were repealed by Section 41(8), Ordinance XXVII of 1981: Federal Laws (Revision and Declaration) Ordinance, 1981.

Section 488 made it incumbent upon the father to maintain his wives and children both legitimate and illegitimate. Monthly allowance should not exceed four hundred rupees. Non-fulfillment of the order of the court to pay maintenance will result in imprisonment.

Section 489 and 490 deals with enforcement of above mentioned section. Here the power of judgment and decree is given to Magistrate of first class but according to section 5 of Family Courts Act 1964 a judge functioning as Family Court can also exercise his powers to pass the judgment and decree.¹⁸ On the points where there is no statute law Muhammadan law applies which is comprised of rules enunciated in case law by superior courts.

Maintenance is a right of quasi-civil nature, which is protected by criminal law to avoid usual delays in civil proceedings.¹⁹

In the section father is liable to maintain his legitimate and illegitimate children. For legitimate child it is an established right, which cannot be disputed.²⁰ Liability of the putative father to maintain his illegitimate child is greatly criticized by different sects but the Federal Shariat Court defends this provision as following:

'It was said that in Islam there is no concept of a putative father, but the law as envisaged above does not give any right to the person whose adulterous relationship with the mother of the child resulted in his birth. According to the Sunnah the child is considered the child of his mother and does not inherit from the person who is responsible for his earthly existence nor does such a person inherit from the child. The above subsection does not in any manner belittle or make any incursion on this well-known principle. For the limited purposes of the Act, it merely makes him, responsible for bearing the expenses of the child. The Shariah proposition (the parentage is determined by the conjugal bed and the person committing adultery has only disappointment in store) applies to right of being a parent. It does not concern itself with liability. The word 'putative father' does not mean that any paternal right is to vest in him. This is only a manner of description to make him responsible for

¹⁸PLJ 1982 Lahore 475.

¹⁹Ibid.

²⁰NLR 1991 Civil Lahore 548.

maintenance. The same liability is fixed in S. 488 Cr. P. C. which was not held to be invalid by the Council of Islamic Ideology vide its report on Criminal Procedure Code.

It would be very strange to lay down that only the adulteress is to bear the brunt of the burden of the child and the law is powerless to make the adulterer liable to maintenance of the child though he was at least an equal partner in sexual enjoyment and in the birth of the unwanted child. There is no prohibition in Shariah for this. I am of the opinion that this section is not repugnant to Shariah but it would be better to avoid any doubt and to replace the words 'putative father' with the expression 'the person from whom he was begotten'.²¹

After annulment of these sections Muhammadan law governs these matters in Pakistan except Azad Jammu & Kashmir.

In Pakistani law a Father is entitled to maintain his minor and not major children except:

1. Major is incapacitated or unable to earn his livelihood.
2. He is getting education.

If the child is disobedient she is not entitled to maintenance.²² If father is dead grandfather will be liable to maintain grandchildren.²³

Extent of maintenance allowance will be determined after considering financial position of the father.²⁴ Maintenance of son is upon the father until he attains puberty²⁵ and of daughter until she gets married.²⁶ It doesn't matter whether they stay with father or

²¹SSM 14/S/1984 mentioned in Rashida Patel, *Islamization of Laws in Pakistan?*, (Karachi: Faiza Publishers, 1986), 186. [Hereinafter Rashida Patel, 1986].

²²*Mukhtarul Hassan Siddiqui v. Judge Family Court Rawalpindi & 4 others*, 1994 CLC 1216.

²³*Abdullah v. Jawaria Aslam*, PLJ 2004 Lahore 9.

²⁴*Shahid Raza v. Dr. Fauzia Shaheen*, PLJ 2004 Peshawar 234 (DB).

PLJ 2004 Lahore 1075, *Muhammad Aslam v. Muhammad Usman*.

²⁵In case there are no signs of puberty the age is fixed at 15 by disciples of Abu Hanifa & at 18 by Abu Hanifa himself. In Pakistani Law the Majority Act gives age of 18 years, which is in conformity with the opinion of Abu Hanifa.

²⁶*Shabbir Ahmed v. Mst. Ghulam Sakina*, 1993 CLC 1880;

Syed Zia-ul-Hassan Gilani v. Mian Khadim Hussain, PLD 2001 Lahore 188;

Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945;

mother.²⁷

Even if the wife is deserted and children are with her, father is liable for their maintenance.²⁸ In case father is not maintaining the mother he is duty bound to maintain her children.²⁹ Father can not escape from his responsibility on the basis of his poor financial condition.³⁰

SUGGESTIONS

As said earlier sections 488-490 makes it incumbent upon putative father to maintain his illegitimate child. It is totally un-Islamic. Here it is strongly recommended that these provisions should be abolished in Azad Jammu & Kashmir. In Islamic law one of the conditions to render father responsible for the maintenance of the child is that the child should be legitimate. Father is liable to maintain his legitimate child only, because maintenance is established on parentage and parentage is established on legitimacy. Even it is decided by Kerala High Court that in Muhammadan law a father is not liable to maintain his illegitimate child.³¹

4.3 PARENTAGE

Parentage is based on legitimacy. Minor's rights of maintenance, custody and guardianship are also based on it.

4.3.1 LAW RELATING TO PARENTAGE

In Pakistani law section 128 of the *Qanun-e-Shahadat* Order 1984 provides that the child born during a valid marriage if not born before expiration of six lunar months from the

²⁷NLR 1991 CLJ 430; 1985 CLC 487; PLJ 1986 Lahore 272.

²⁸NLR 1985 Cr.LJ 190 mentioned in M. Farani, *Manual of Family Laws in Pakistan*, (Lahore: Law Times Publications, 1999), 709. [Hereinafter Farani, 1999].

²⁹PLJ 1985 AJK 15.

³⁰PLD 2001 Lahore 188, *Syed Zia-ul-Hassan Gilani v. Mian Khadim Hussain*.

³¹1959 A. Ker. 319, *Pavitri v. Kathesumma* mentioned in M. A. Mannan, 1995, 551.

date of marriage, or within two years after its dissolution, the mother remaining unmarried, shall be legitimate. Legitimacy will not be established if the husband had refused, or refuses, to own the child, or, the child was born after expiration of six lunar months from the date on which the woman had accepted that the period of *iddah* has expired.

Section 112 of The Evidence Act 1872 provided that a child born after valid marriage or 280 days after dissolution of marriage will be legitimate except where it is proved that husband and wife had no access to each other. In section 112 no minimum and maximum period of gestation was given that's why this law was greatly criticized by the scholars of Muhammadan law. In section 128 of *Qanun-e-Shahadat* Order this gap was filled and the legislators tried to cover all important points of Muhammadan law relating to legitimacy. According to section 112 of the Evidence Act a child born one day after the marriage would be legitimate as minimum period of pregnancy is not fixed in this section and a child born 290 days after the dissolution of marriage would be illegitimate as in case of dissolution the period was fixed at 280 days.³² This was totally un-Islamic. In Islam the time of birth is not important for legitimacy but time of conception is important and legitimacy depends upon time of conception. This point was totally neglected while framing this section. The section 128 of *Qanun-e-Shahadat* Order 1984 is according to *Hanafi* law in which the maximum period is fixed at two years basing on *hadith* reported by *Āyeshā*.³³ Muslim jurists have been very lineant to the rules of establishment of legitimacy because in Islamic law an illegitimate child has no right to maintenance, inheritance and guardianship.

Although two years period of gestation is very rare but it is just to avoid a case where a legitimate child is declared illegitimate just because of longer period of gestation.

It is clear from these sections and decisions of different courts that Pakistani law which is

³²Tanzil-ur-Rehman, 1998, 858-860.

³³*Ibid.*

based on Islamic law leans in favour of legitimization rather than stigmatization.³⁴ In case of a lawful marriage the child follows status of the father without any acknowledgement of affirmation of parentage.³⁵

Even a child born of a marriage subsequently declared as void is legitimate provided that the parties believe in good faith that there is no impediment in their marriage, the marriage is, so far they are concerned, valid and legal for all purposes. If at later stage it is found that there was such an impediment, the marriage is no doubt null and void but the children born of such marriage are legitimate.³⁶

Legitimacy of a child may be presumed in the following cases; where there has been continuous cohabitation of the alleged parents, where the father acknowledges the child. This acknowledgement can be made by treatment of the father or by reputation and notoriety amongst members of the family, or the community.³⁷

This should be noted that establishment of legitimacy or paternity has no effect on establishment of maternity. For the child, whether legitimate or illegitimate, maternity is always established.

4.3.2 ADOPTION

In Pakistani law adoption is not recognized, it can be seen from report submitted on the CRC by Pakistan in which Pakistan took stand that legal adoption is un-Islamic and being an Islamic State provisions related to adoption will not be applied in case of Pakistan.³⁸

³⁴Manzoor Hussain v. Zahoor Ahmed, 1992 SCMR 1191;

Manzoor-ul-Haq v. Kaneez Begum, 1991 CLC 109.

³⁵Hamida Begam v. Murad Begam, PLD 1991 SC 275.

³⁶PLD 1963 Lahore 141 (FB).

³⁷Bashir v. Ilam Din, PLD 1988 SC 8.

³⁸Nyazee, A, ILR 2003, 98;

An Islamic State can not conclude a treaty which permits any prohibited act or which has immoral objectives, or these objectives are against principles and purposes of Islam. Same is the case where a treaty is prohibiting an act which is obligatory in Islam. Besides the stand took on

There are lots of decisions in which it is stated that adoption is un-Islamic. Justice Mehmood remarked in a case '*There is nothing in the Muhammadan law similar to adoption as recognized in Roman and Hindu system*'.³⁹

In personal law of Pakistan also legal adoption is not recognized except where a special family or tribal custom is proved, it will prevail provided that custom is given priority by legislation⁴⁰ over Muhammadan law. Generally rules of adoption in Pakistani law are based on Islamic law. Adopted son has no such rights as a real son has. He has no right on property of his adoptive father neither in his life nor after his death. But adoptive father if wants can give him one third of his property through will.

SUGESTIONS

In section 128 of *Qanun-e-Shahadat* Order 1984 no distinction has been made between regular and irregular marriages.⁴¹ In *Hanafi* law there is a distinction between these two and rules with respect to regular and irregular marriages are also different. For example in case of regular marriage husband may disown his child by *li'ān* but in case of irregular marriage he can not. In an irregular marriage husband and wife has no rights of inheritance, there is no right to maintenance for wife although she is entitled to dower,

the un-Islamic provisions of CRC a demonstration of this approach by Muslim States can also be seen at the 40th and 41st sessions of the General Assembly where draft declaration on 'Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally' was discussed. As a result of this difficulty of Muslim States that they can not sign or ratify any treaty which entails any act prohibited by Islam, Islamic principle of *kafālah* was introduced in preambular paragraphs 6 and 7 and articles 22. Jamshed A. Hamid, 2001, 130-131

³⁹19 All 283 mentioned in M. Farani, 1999, 709.

⁴⁰M. A. Mannan, Principles of Muhammadan Law, (Lahore: PLD Publishers, 1995), 519. [Hereinafter M. A. Mannan, 1995].

⁴¹Irregular marriage is a marriage that suffer from a temporary bar. It is defined as good in its foundation (*asli*) but unlawful in its attributes. It has no legal effects till consummation. Examples of an irregular marriages are : marriage with a woman in state of *iddah*, contracting more than four wives, marriage with out witnesses, marriage prohibited by reason of difference of religion, having two sisters in wedlock. Farani, 1999, 344; M. A. Mannan, 1995, 391-394.

etc. The words 'irregular marriage' should be included in the section because the children born of an irregular marriage are legitimate.⁴²

4.4 GUARDIANSHIP OF PERSON & PROPERTY

The rules regarding Guardianship of person and property depends partly on the Guardians & Wards Act, 1890 and partly on Muhammadan law.⁴³ A guardian is defined by section 4 of the Act as 'a person having the care of the person of a minor, or of both his person and property'. There are some other laws too related to both kinds of guardianships: The Majority Act, 1875, Punjab Court of Wards Act, 1903, High Court Rules and orders, Civil Procedure Code, 1908.

But the most important among these is the Guardians & Wards Act of 1890 so I will discuss this law in little detail.

4.4.1 GUARDIANSHIP OF PERSON

As said earlier in Pakistan custody matters are governed by the Guardians & Wards Act, 1890. Guardianship of a person generally rests with his mother when minor is in tender age, afterwards the custody goes to father. These are natural guardians but in case of their absence or dispute the court has powers to decide the guardian of a minor.

The courts while deciding custody matters consider welfare of a minor and while determining that the courts has regard to his age, sex, religion, the character, capacity of guardian and his nearness of kin to minor. Preference of minor is also considered.⁴⁴ The person who have custody of a minor is responsible to look after him in his health and

⁴²Muhammad Miskin v. Nasim Akhtar, 1979 CLC 558.

Allahdad v. Mukhtar, 1992 SCMR 1273.

⁴³Roland Knyvet Wilson, Muhammadan Law, (Delhi: Akashdeep Publishing House, 1988), 170. [Hereinafter Roland Knyvet Wilson, 1988].

⁴⁴Section 17.

education, and support him in all respects.⁴⁵

If the ward leaves or is removed from custody of a guardian of the person, the court if considers it in welfare of the minor, may return him to the custody of his guardian. The court may order for return and may arrest the ward to deliver it into the custody of the guardian.⁴⁶

In every matter related to minor the court will see what is in his interest. When, deciding about custody of the child, the court will not consider parent's right, it will see what is in minor's favour.

After seven years custody of a boy goes to father⁴⁷ and after attaining puberty the custody of a daughter goes to father but if the court thinks that to live with mother is in child's welfare the father will not be entitled to custody just because of his right given by Muslim law. Section 25 is constructed liberally to undertake this situation. The court will make each and every decision after considering what is in the interest of a minor.⁴⁸

There are certain conditions for the custodian of the child.⁴⁹

1. The custodian should be *mahram* to the child.
2. If custodian is mother she should not be married to a person who is stranger to the child.
3. *Irtidād* and slavery are disqualifications for a female to have custody of a minor but a *kitābiyah* mother can have custody of her child.
4. Being sane, adult and free from mental or bodily diseases and being of good moral

⁴⁵Section 24.

⁴⁶Section 25.

⁴⁷Ali Akhtar v. Mst. Kaniz Maryam, PLD 1956 Lahore 484.

⁴⁸Mst. Zebu v. Mize Gull, PLD 1952 Peshawar 77.

Also see PLD 1970 Kari. 619, PLD 1967 Lahore 382, PLD 1968 Karachi. 211.

⁴⁹Mst. Imtiaz Begum v. Tariq Mehmood, 1995 CLC 800.

character are essential requisites for a custodian.

A person not fulfilling any of these conditions would not be a custodian.

If custodian is not a mother the child whether male or female should remain with her till she becomes sufficiently mature to attend her daily needs independently.⁵⁰

Although the mother has right to custody of the son till seven years of age and of daughter till she attains puberty but her right is not absolute, it lapses if she remarried a person who is a *ghair mahram* i.e. who is not within prohibited degree of relationship with the minor.⁵¹ This can not be said that second husband comes within prohibited degrees as soon as marriage between him and the mother is consummated. The second husband must be within the prohibited degrees of the minor by consanguinity.⁵²

Although it is a settled rule that if mother remarries a stranger she loses her right but here also welfare of the child is taken into consideration. Pakistani courts sometimes show this approach that the child should not be taken away from the mother if it is in its welfare simply because the mother has remarried a person not related to the minor within prohibited degrees.⁵³

Father is a natural guardian and even where mother has custody he is the one to exercise control and to supervise the child. When mother took the minor to a place where it would be impossible for the father to exercise control over him she will lose her right.⁵⁴

The Lahore High Court decided in a case that as the rules of custody are not given by the

⁵⁰*Ibid.*

⁵¹Mst. Yasmin Bibi v. Mehmood Akhtar, PLJ 2004 Lahore 6.

⁵²Muhammad Bashir v. Ghulam Fatima, PLD 1953 Lahore 73.

⁵³Rashida Begum v. Shahabuddin, PLD 1960 Lahore 1142;
Mst. Nazeer Begum v. Abdul Sattar, PLD 1963 Karachi 465.

⁵⁴*Ibid.*

Qur'an or the *Sunnah* it is permissible for the courts to differ from text books on Muslim law. They can come to their own conclusions by the way of *ijtihad*. The rules given by the books are not uniform so the courts may depart from the rules stated therein if their application is against the welfare of a minor.⁵⁵

But it may prove to be a dangerous practice. The courts are not free to do *ijtihad*, they must remain within the limits prescribed by *shari'ah*. Although the courts leaned towards welfare of the child but the determination of the welfare of the child should not be left to the discretion of the judge. It should be understood that rules of Islamic law are in welfare of the child. Where there is very strong ground the court may substitute one rule of Islamic law by adopting another rule e.g. by substituting the rule '*the mother shall lose her right if she remarries with a stranger*' by the rule '*the paramount consideration is welfare of the child*'. Pakistani courts usually prefer second one.⁵⁶

Although the Guardian & Wards Act (VIII of 1890) is based on English law but Islamic principles and jurisprudence would be adopted by courts while interpreting statutory provisions. Opinions of jurists based on injunctions of the Holy *Qur'an* and the *Sunnah* should be respected.⁵⁷

4.4.2 GUARDIANSHIP OF PROPERTY

This guardianship lies with father but in case of his absence or disqualification the court has right to appoint a guardian for property of a minor⁵⁸ and can make orders for protection of his property.⁵⁹ A guardian of property may or may not have custody.⁶⁰

⁵⁵Zohra Begum v. Latif Ahmad Munawwar, PLD 1965 Lahore 695.

⁵⁶Tanzil-ur-Rehman, 1978, 744-745.

⁵⁷Mst. Imtiaz Begum v. Tariq Mehmood, 1995 CLC 800.

⁵⁸Section 7.

⁵⁹Section 12.

⁶⁰Fatimuddin Khokhar v. Zaibunisa, PLD1968 Kar. 774.

Guardianship of property lies with following persons in the given order; the father; the executor appointed by the father's will; the father's father; the executor appointed by the will of the father's father.⁶¹ Failing all of these it is for the *qāzī* i.e. now for the court, to appoint a guardian.⁶² Where there is a dispute between father and mother that who will be the guardian of the minor, the person who is proper and fit for the job should be appointed. In a case this was held that father is fit for the job so he was appointed as a guardian for property of a minor.⁶³

While appointing a guardian the court will consider his age, sex and religion along with his welfare. The character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes of deceased parents and intelligent preference of the minor if he is old enough to form such a preference will also be considered.⁶⁴

Sections 7 and 17 are distinguished in the manner that in case of section 17 the personal law of a minor plays an important role whereas in section 7 personal law does not play any part. Section 7 clearly says that the court shall make an order for appointment of a guardian when it is satisfied that such order is for welfare of the minor. If the court thinks that appointment of guardian is not necessary, it without proceeding further under section 17, shall dismiss the application for appointment of a guardian.⁶⁵

A guardian should not make any profit from his office.⁶⁶ He may do all acts which are reasonable and proper for the realization, protection and benefit of property and shall deal with minor's property as a man of ordinary prudence.⁶⁷ A guardian appointed by will or

⁶¹Asaf A. A. Fyze, 1955, 174; Md. Zafir v. Amiruddin, 1963 A.P. 108 quoted in M.A. Mannan, 1995, 537.

⁶²Roland Knyvet Wilson, 1988, 188.

⁶³Khanamji v. Farman Ali, PLD 1962 Lah. 166.

⁶⁴Section 17,

Juma Khan v. Gul Ferosha, PLD 1992 Peshawar 1.

⁶⁵Sardar Muhammad Iqbal Khan Mokal, The guardians & Wards Act (VIII of 1890) & The Majority Act (IX of 1875) with commentary, (Lahore: PLD Publishers, 1992), 146-147.

⁶⁶Section 20.

⁶⁷Section 27.

any other instrument or declared by the court shall not mortgage, change, gift, exchange or transfer by sale any part of the immovable property except with the prior permission of the court. He can not lease minor's property for more than five years, or more than one year beyond the date on which the ward will cease to be a minor. Such transaction without permission of the court would be voidable⁶⁸ i.e. such transaction would be valid and binding on the minor unless set aside by him within the period of limitation. The prescribed period of limitation is three years from the date of majority of minor, within which he may sue to set aside a transfer of his property made by his guardian.⁶⁹

The person who is not a legal guardian or guardian appointed by the court may have voluntarily placed himself incharge of the person and property of a minor, such a person is called a *defacto* guardian and he is merely a custodian of the person and property of a minor.⁷⁰ He can not transfer the immovable property of a minor even though such a transfer is for his benefit. Such a transaction is void and does not vest any title in the alienee.⁷¹ A legal guardian also has no power to sell or dispose of minor's property unless the property is in bad state and such a transaction is necessary to avoid loss.⁷² In case of permission by the court a minor can not avoid a sale of his property affected by his legal guardian except there is fraud or under hand dealing.⁷³ The legal guardian has power to sell or pledge movable property of a minor like goods and chattels.⁷⁴

SUGESTIONS

Guardianship of person and property both are governed by the Guardians & Wards Act of 1890. This Act is not based on Muslim Personal law although while deciding issues like

⁶⁸Sections 28-30.

⁶⁹Limitation Act, 1908, Article 44 of Schadule 1.

⁷⁰Muhammad Afzal Khan v. Khursheed Begam, PLD 1975 Peshawar 24;
Ahmad Khan v. Rasul Shaha, PLD 1975 SC 311.

⁷¹Muhammad Sulaiman v. Javed Iqbal, PLD 1981 Azad J & K 33.

⁷²Mrs. Eishu Chaugani v. Ranglal Agarwala, AIR 1973 Cal. 64.

⁷³Manzur Hussain v. Bishan Singh, PLD 1956 Lah. 718.

⁷⁴Zaitoon Begam v. Central Bank Ltd, PLD 1961 Lah. 888.

custody and guardianship of property Pakistani courts leaned towards Muslim Personal law but still there is need to formulate a clear legislation based on Islamic law on these issues.

CONCLUSION

In this chapter I have given suggestions and proposals at the end of discussion of every right. Now I want to re-emphasize the need of fresh legislation in this field. The provisions contradicting Islamic law should be brought in conformity with it. The legislation made by the British government was to fulfill their needs, we have to change the laws so that these may answer to our social needs.

CONCLUSIONS & PROPOSALS

In the preceding chapters the concept of rights and rights of minor in case of separation between parents have been presented to show that how Islamic law and Pakistani law tackle with these issues.

In Islamic law the word right denotes legal rights or claims and corresponding obligations. Islam gives so much importance to rights that protection of rights is made duty of the right holder as well as of the other people. Even State has no power to suspend these rights in any circumstance. As the source of right is *Shari'ah*, not the State, so it has no power to suspend these rights. In Islamic State every citizen can go to the court to enforce his rights whether it is guaranteed by the constitution or not. There are four kinds of rights; right of Allah, right of man, where right of Allah and right of man exists side by side and right of State. Some jurists do not consider right of State as a distinct right and mix it with right of Allah but the correct approach is that it is a distinct right. All basic rights can be derived from *maqāsid al-sharī'ah*. *Maqāsid al-shari'ah* also indicates priority among rights in case of a clash.

In Islamic law minor is a person who has not attained puberty. Rights of minor are directly related to his capacity. Minor possess capacity for acquisition so he possesses rights but as he lacks capacity for execution so he can not exercise these rights independently he needs a guardian through whom he exercises his rights. A child before birth also possesses some rights. Islam protects interest of a minor through different institutions.

In Common law right is an interest which is legally protected and recognized. Although there is no single agreed upon definition of right but this one is most acceptable. As to the source of right there is difference of opinion, according to Naturalists source of right is natural law and it is prior to the State so State can not suspend basic rights. Here any citizen can go to the court to enforce his rights whether recognized by the State or not. Whereas according to Positivists State is the source of right so a right will be enforced

only if it is a legal right and a legal right is a right, which is recognized by the State. Approach of Natural law is close to Islamic law. Right in its wider sense entails concepts of claim, privilege, power and immunity but in its strict sense it is a claim and this is the meaning which is followed by the courts.

As to rights of the child there is difference of opinion in Common law that child possesses rights or not. There are two theories of rights: interest theory and will theory. According to interest theory children possess rights but according to will theory they do not. In case of will theory there is one situation in which it gives concept of rights of minor i.e. if right is exercised by a representative. There are many arguments presented by the advocates of rights of minor in favour of the notion that minor is capable to possess rights. Our stand in this work is also the same as it is supported by Islamic law as well. But now almost all of the States accepted notion of rights of minor by ratifying international documents like Declaration of the Rights of the Child and Convention on the Rights of the Child.

There are five rights of minor in case of separation between parents. These are fosterage, custody, maintenance, parentage and guardianship. Fosterage is a religious duty of mother. A mother should suckle her child for first two years. Although it is a religious duty but according to majority of jurists mother cannot be compelled to suckle her child. Fosterage cause prohibition of marriage among persons having foster relations. Fosterage can be established in three ways: by acknowledgement, evidence and witnesses. In Pakistani law also this right is recognized but it is a moral right not a legal right.

Custody is a right of the child as well as of the mother. This is established by traditions of the prophet (Peace be upon him) that mother is preferred over other persons in having custody. Period of custody ends with respect to a boy at attaining seven years and with respect to a girl at attaining puberty. The person who wants to be a custodian must fulfill certain conditions like he or she must be wise, mature, free and not a debauchee, and must be *mahram* to the child. A mother after separation can ask for wages for custody according to *Hanafi* School. Mother cannot travel with the child to a place where it would

not be possible for the father to visit or look after the child. In Pakistan the Guardians & Wards Act, 1890, governs custody matters.

Maintenance of the child is upon the father with the condition that the child is poor or unable to work and the father is rich enough to spend on the child. Maintenance includes payment for fosterage, wages for custody, expenses for every day necessities, payment for premises in which the mother during period of custody resides, payment for servant if the child needs that.

Parentage is established for a legitimate child only. It is established by birth during valid and irregular marriages. Period of gestation is relevant here. The least period of gestation is six months and the most is two years. Legitimacy can be established by acknowledgement and by evidence also. In Islamic law there is no concept of legal adoption. To look after an orphan is a pious deed but you cannot change her parentage.

Guardianship of property rests with the father or in his default goes to male relatives. Legal capacity is a condition for a person to be a guardian. There are three conditions for attaining full legal capacity: puberty, sanity and freedom. Second condition is that he should belong to the religion of the minor. Natural guardian has more powers regarding property of a minor than testamentary guardian. He cannot sell or buy minor's property. Both kinds of guardians cannot make any transaction, which is purely harmful to the minor. Guardianship of property is dealt by the Guardians & Wards Act, 1890 in Pakistani law. This Act is based on British law but Pakistani courts are more inclined towards Islamic law while interpreting its provisions.

In Pakistan Personal law is based on Islamic law but still there are points of difference. In the light of above given analysis it is strongly recommended that the provisions conflicting with Islamic law should be abolished. There is a dire need to make new laws based on Islamic Family law which can answer today's social problems. The Acts formulated by the British to fulfill their needs can not resolve the problems of a Muslim society.

Although by process of Islamization endeavor is made to fill in the gap but still there is a lot to be done.

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