

## **Maintenance of the Child in Pakistan: A Much-Needed Legislation**

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### **Abstract**

The right to maintenance is a basic right of a child. Under Pakistani law, the father is responsible for paying maintenance for his children. Maintenance is incumbent upon the father according to his financial circumstances. Previously, sections 488-490 of the Criminal Procedure Code 1898 made it the obligation of the putative father to maintain his legitimate as well as illegitimate children. This position was considered against Islamic law, and hence, these sections were repealed in Pakistan in 1981. In 2002, an amendment was made in the Family Courts Act 1964, and some rules relating to a child's right to maintenance were formulated. However, the statute provides very few rules regarding maintenance. Cases related to the maintenance of children are decided in the light of precedents. The courts apply Muslim personal law while deciding issues regarding maintenance. This paper analyses the law and its interpretation by the courts. It argues that due to the importance of the right to maintenance of a child, there is a need to formulate detailed legislation to remove uncertainty and ambiguity in this area.

**Keywords:** Child maintenance, Pakistani law, Child rights, Muslim personal law, judicial discretion, codification

### **Introduction**

Under Islamic law, as well as Pakistani law, a father is obliged to pay maintenance for his child. This obligation continues until the child reaches the age of majority in the case of a son, and until marriage in case of a daughter. If a son is unable to earn after reaching the age of majority, the father will be obliged to maintain him until his son can maintain himself. Where Islamic law provides detailed rules regarding the maintenance of children, Pakistan, on the other hand, lacks detailed legislation on this issue. In Pakistan, maintenance is mainly governed by Muslim Personal law and precedents of the superior

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courts. The right to maintenance of a child in Islamic law has been discussed in another article,<sup>1</sup> hence, this paper discusses the same in a brief manner. While discussing Pakistani law, reference has been made to Islamic law at several points. This article will mainly explore the rules regarding the maintenance of children in Pakistani law. The relevant provisions of statutes, as well as case law, will be analysed to ascertain the approach taken by the courts regarding the maintenance of children.

This paper is divided into four parts. In part one, Islamic law related to the maintenance of a child will be discussed. Part two will analyse the relevant statutes in Pakistan by highlighting the deficiencies in various provisions of those statutes. In Part three, case law on the issue of the maintenance of children will be examined to analyse the approach adopted by the judiciary. The final part of this paper will summarise the findings and provide recommendations regarding the legislation of the right to maintenance of a child.

### **Maintenance of a Child in Islamic Law**

In Islamic law, *nafaqah* (maintenance) is a right of a child dependent on its father—to be maintained during the age of minority. The father's duty to maintain his children is distinct from his duty to maintain his wife. The father is obliged to pay his wife, as well as his children. Even if the children are staying with the mother, the father is obliged to maintain them separately. Rights like inheritance, maintenance, and guardianship depend on a child's *nasab* (lineage) and hence, upon the status of his/her legitimacy. *Nasab* gives rise to two rights: maternity and paternity. Paternity is established on the basis of legitimacy, and subsequently, all other rights, including maintenance, are established on the basis of paternity. Legitimacy is established for a child if it is born during a valid or irregular marriage (but not in a void marriage). In this regard, a father is obliged to maintain only his legitimate children, and not illegitimate children.<sup>2</sup> An illegitimate child only belongs to the mother and has

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<sup>1</sup> Mudasra Sabreen and Samia Maqbool Niazi, 'Nafaqa-e-Aulad kay Ahkam Shariah aur Qanoon kay tanazur main' (2017) 54 *Fikr-o-Nazar* 4, 5.

<sup>2</sup> Muhammad Al-Husainī Al-Shirāzī, *Al-Fiqh* (Vol. 68, Beirut: Dār-al-'Ulūm 1988) 312; David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet and Maxwell 1998) 430.

no rights over its father. Maintenance of an illegitimate child is also the responsibility of the mother, the maternal relatives, or the State.<sup>3</sup>

Maintenance is a duty that arises out of guardianship. In Islamic law, minors' guardianship vests in the father unless the interests of the child demand otherwise. The responsibility of maintenance is upon the father and varies according to his financial status.<sup>4</sup> In its literal sense, the word '*nafaqah*' means what a person spends on his family.<sup>5</sup> Maintenance includes food, clothing, lodging, a necessity of a nanny/nurse, and other necessary expenses of a child from birth until adulthood.<sup>6</sup> It is a religious as well as a legal duty of the father. Muslim jurists agree that the maintenance of direct descendants is incumbent upon the father, but they differ on the issue of the maintenance of indirect descendants. According to the majority of jurists (*Hanafīs*, *Shāf'īs*, and *Hanbalīs*), direct and indirect descendants are entitled to get maintenance; this includes children and grandchildren how low-so-ever. The *Mālikis* disagree with the majority and hold that only the immediate descendants are entitled to maintenance. According to them, grandchildren have no right to maintenance.<sup>7</sup> According to the *Shāf'īs* and the *Hanbalīs*, a financially capable person is obliged to maintain his parents how high-so-ever and children how low-so-ever. According to the *Hanbalīs*, both the person in need and the provider should belong to the same religion, as a difference in religion waives the right to inheritance and maintenance. The *Zāhirīs* are of the opinion that a well-off person is obliged to maintain his parents how high-so-ever, children

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<sup>3</sup> John L. Esposito, *Women in Muslim Family Law* (Syracuse University Press 1982) 38; Jamal J. Nasir, *Islamic Law of Personal Status* (Graham and Trotman 1990) 156; David Pearl, *A Text Book on Muslim Personal Law* (Croom Helm 1987) 85; Tanzil-ur-Rahmān, *A Code of Muslim Personal Law* (Vol 1, Islamic Publishers 1978) 690-692.

<sup>4</sup> Mansūr b. Yūnas b. Idrīs Al-Bahūtī, *Kashāf Al-Qanā' an Matan Al-Iqnā* (Abū Abdullah Muhammad Hasan Muhammad Hasan Ismā'īl Al-Shāf'ī, ed, Vol 5, Dār-al-Kutb lil-Ilmīyah 1997) 565; 'Alā-al-Dīn Abī Bakr b. Mas'ūd Al-Kāsānī, *Badā'i-al-Sanā'i fi Tartīb-al-Sharā'i* (Alī Muhammad Ma'wad and Ādil Ahmad 'Abd-al-Mawjūd ed, Vol 5, Dār-al-Kutb Al-Ilmīyah 1997) 172; Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (I. B. Taurus 2000) 146.

<sup>5</sup> Zain-al-Dīn b. Ibrāhīm b. Muhammad Ibn Nujaim, *Al-Bahr-al-Rā'iq Sharh Kanz-al-Daqā'iq* (Vol 4, Dār-al-kutb Al-Ilmīyah 1997) 293.

<sup>6</sup> Fazīl-ur-Rehmān Hilāl Usmānī, *Islāmī Qānūn: Nikāh, Talāq, Warāsat* (Dār-al-Ashā'at 1989) 106; Muhammad Yūsuf Mūsā, *Al-Nasab wa Āthāruhu* (Ma'had Al-Dirāsāt Al-'Arabīyah Al-'Ālīyah 1958) 132; Muhammad Mustafā Shalabī, *Ahkām-al-Usrah fil Islām* (Dār-al-Nahdah Al-'Arabīyah 1973) 835.

<sup>7</sup> (n 4) 172.

how low-so-ever, brothers, sisters, and wives. They all are equal in their right to maintenance. According to the *Hanafi* school, a person is obliged to maintain his children how low-so-ever, parents how high-so-ever, and close relatives if they are in need.<sup>8</sup>

There are a number of conditions to be satisfied before maintenance becomes obligatory upon the father.<sup>9</sup> The first condition is that the child is poor. If the child is individually well-off, then the father will not be responsible for the maintenance.<sup>10</sup> This is a general rule for maintenance that maintenance of a person should not be incumbent on another unless he/she is in need. The only exception to this rule is the wife, who is entitled to maintenance regardless of her financial condition.<sup>11</sup> ‘Need’ (*hājah*) is defined as without which a person will face hardship, although his religion, life, progeny, intellect, and property are not endangered.<sup>12</sup> The second condition is that the child is unable to earn for itself because of its tender age or physical incapability. This condition only applies to a male child. If a major son is incapable of earning, his maintenance is the responsibility of his father irrespective of his age. An adult who can earn for himself is responsible for his own maintenance.<sup>13</sup> The third condition is that the father is rich enough to provide for the child. All schools agree on this condition except the *Hanafis*.

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<sup>8</sup> Wahba Al-Zuhailī, *Al-Fiqh-al-Islāmī wa Adillatuh* (Vol 10, Dār-al-Fikr 2004) 7411-7412; Muhammad Jawād Mughniyah, *Al-Fiqh ‘ala Al-Madhāhib Al-Khamsah: Al-Ja‘farī, Al-Hanafi, Al-Mālikī, Al-Shāf‘ī, Al-Hanbalī* (5th edn, Dār-al-‘Ilm lil Malayīn 1977) 400.

<sup>9</sup> Shaikh Hasan Khālid and Adnān Najā, *Ahkām al-Ahwāl al-Shakhsiyyah fi Shar‘iah al-Islāmiyyah* (Dār-al-Fikr 1982) 276.

<sup>10</sup> Abī Al-Abbās Ahmad bin Hamzah Al-Ramlī, *Nihāyat-al-Muhtāj ilā Sharh-al-Minhāj* (Vol 7, Dār-al-Fikr 2004) 218, 220; Abī Zakariyā Yahyā b. Sharaf Al-Nawawī, *Rowdhah-al-Tālibīn* (Ādil Ahmad ‘Abd-al-Mawjūd and ‘Alī Muhammad Ma‘wadh ed, Vol. 6, Dār-al-Kutb Al-Ilmiyah 2000) 489-490; Shaikh ‘Alī Al-Khatīb, *Fiqh-al-Tifl* (Mu,assasah Al-‘Ārif lil Matbu‘āt 2002) 216; Abī Muhammad Abdullah b. Ahmad b. Muhammad ibn Qudāmah, *Al-Muqni* (Vol 3, Al-Matb‘ah Al-Salaḥiyah 1365AH) 319.

<sup>11</sup> Fakhrudīn Hasan b. Mansūr Al-Uzjandī Al-Farghānī and Moulvī Mahomed Yusoof Khān Bahādur and Moulvī Wilāyat Hussain (trs), *Fatāwā-i-Kazee Khān* (Vol 1, Kitāb Bhavan 1986) 328.

<sup>12</sup> (n 4) 340-341.

<sup>13</sup> (n 11) 322; Muhammad Amīn ibn ‘Ābidīn, *Hāshiyah Radd al-Mukhtār ‘alā Al-Durr al-Mukhtār* (Vol 10, Dār-al-Thaqāfah wa Al-Turāth 2000) 601; Abī Ishāque Burhān-al-Dīn Ibrāhīm b. Muhammad b. Muhammad ibn Muflih, *Al-Mubdi‘ Sharh Al-Muqni‘* (Muhammad Hasan Muhammad Hasan Ismā‘īl Al-Shāf‘ī ed, Vol 7, Dār-al-Kutb Al-Ilmiyah 1997) 169-170.

According to them, having a sound financial situation is a condition for the maintenance of other relatives but not for the maintenance of parents and children. For the maintenance of parents and children, having a sound financial condition is not a requirement if the father is capable of earning. Capability to earn is enough to impose a duty of maintenance on him.<sup>14</sup>

There is an agreement among jurists that the father is liable to maintain his male child until he attains puberty, but in the case of a female child, he is responsible for her maintenance until she attains puberty and gets married.<sup>15</sup> After marriage, her maintenance is upon her husband. But in the case of the break-down of marriage, the father again becomes responsible for the maintenance of his daughter. The father has no authority to force his daughter in such a case to earn money for herself. However, if she earns money within limits prescribed by *Sharī'ah*, then her father will not be responsible for her maintenance.<sup>16</sup> After puberty, a son is entitled to receive maintenance only if he is physically or mentally disabled, or he is a student.<sup>17</sup> According to the majority of jurists, except the *Mālikīs*, claiming past maintenance is not allowed because maintenance is based on present need. In such cases, it is presumed that the time has passed, hence there is no need for maintenance anymore. According to the *Mālikīs*; however, an order of the court for past maintenance can be awarded.<sup>18</sup>

### **The Law related to the Maintenance of Children in Pakistan**

Under Pakistani law, the maintenance of a child is an obligation primarily upon the father.<sup>19</sup> Although maintenance is not defined in statutes, it can be inferred from precedents that maintenance includes the provision of food, clothing, housing, and other necessary expenses to promote the mental and

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<sup>14</sup> (n 4) 187; (n 6) 134-135; (n 10) 489-490.

<sup>15</sup> Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (Oxford University Press 1955) 183.

<sup>16</sup> (n 7) 7413; (n 12) 601.

<sup>17</sup> Burhān-al-Dīn Abī Al-Hasan 'Alī Marghīnānī and Charles Hamilton (trs), *Hedaya: Commentary on the Islamic Law* (Kitāb Bhavan 1870) 146-147.

<sup>18</sup> (n 7) 7419.

<sup>19</sup> *Umara Khan v Sultana* PLD 1954 Peshawar 13; *Razak v Ijaz Mehmood* 1992 CLC 5.

physical wellbeing of the child.<sup>20</sup> This definition of maintenance is not conclusive and exhaustive, and may vary in specific circumstances.<sup>21</sup>

Previously, the law relating to maintenance of a child was contained in sections 488-490 of the Code of Criminal Procedure 1898 (Cr.P.C.). These sections were repealed in Pakistan in 1981,<sup>22</sup> and are now only enforced in Azad Jammu and Kashmir. As these sections are enforced in one part of the state, it would not be unnecessary to discuss them.

Section 488 of Cr.P.C. made it obligatory upon the father to maintain his wives, and children: both legitimate and illegitimate. Under this section, the monthly allowance for maintenance was not to exceed four hundred rupees. Non-fulfilment of the order of the court to pay maintenance resulted in imprisonment. Sections 489 and 490 dealt with enforcement of the right to maintenance and gave the power of judgment and decree to the Magistrate of First Class. According to section 5 of the West Pakistan Family Courts Act 1964, a Judge of a Family Court could also exercise his powers to pass the judgment and decree.<sup>23</sup> Orders of maintenance could be passed against defaulting husbands and fathers by using criminal as well as civil remedies. As civil litigation is more protracted, criminal proceedings provided for summary relief.<sup>24</sup> After the repealment of these sections in Pakistan, the Magistrate of First-Class no more has the authority to decide maintenance cases; only the Judge of a Family Court exercises this power. On these issues, in the absence of any statutory law, rules enunciated in case law by the superior courts will apply.

Currently, the Family Courts Act 1964 and the Muslim Family Laws Ordinance 1961 (“MFLO”) deal with the issue of maintenance of minors in Pakistan with the exception of Azad Jammu and Kashmir. The MFLO, in

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<sup>20</sup> *Humayun Hassan v Arsalan Humayun and another* PLD 2013 SC 557; *Maqsood Ahmed Sohail v Abida Hanif* 1992 MLD 219.

<sup>21</sup> *Ibid.*

<sup>22</sup> These sections were repealed by Federal Laws (Revision and Declaration) Ordinance 1981, s 41(8).

<sup>23</sup> The Family Courts Act 1964, s 5, and the schedule. Also, see *Muhammad Khalil-ur-Rehman v Shabana Rehman* PLD 1995 SC 633; *Adnan Afzal v Col. (Rtd.) Sher Afzal and two others* PLD 1982 Lahore 755.

<sup>24</sup> Lucy Carrol, ‘Maintenance Claims and the Family Courts: The Pakistan Experience’ (1991) 33 (3) *Journal of the Indian Law Institute* 332-333.

section 9, states that if a father fails to maintain his child, the mother or the grandmother may file an application to the Chairman Union Council. The Chairman shall constitute an Arbitration Council, which may issue a certificate specifying the amount payable by the father as maintenance. This remedy is available where the father agrees to pay maintenance. In other situations, the parties are entitled to go to court.

Section 17-A<sup>25</sup> of the Family Courts Act states that the suit for maintenance should be filed by the guardian of the minor. The suit shall contain all material facts relating to the maintenance. When litigation starts, the Family Court may fix interim monthly maintenance for a wife or a child on the date of the first appearance of the defendant. If the defendant fails to pay the maintenance by the fourteenth day of each month, his defence is considered struck off, and the family court shall decree the suit for maintenance on the basis of the contents of the plaint and other supporting documents on record of the case. In the decree of maintenance, the Family Court may fix an amount of maintenance higher than the amount prayed for in the plaint due to the afflux of time or any other relevant circumstances. The court may also prescribe an annual increase in maintenance. If any specific percentage of increase is not decreed by the court, maintenance fixed by the court shall automatically stand increased at the rate of 10% each year. For fixing the maintenance, the court may summon relevant documentary evidence from any organisation, body, or authority to determine the estate and resources of the defendant.

### **Analysis of the Case Law**

In Pakistani statutes, detailed rules regarding maintenance are not given. Resultantly, the courts enjoy huge discretion regarding the matters relating to the maintenance of children, which occasionally results in contradictory decisions. Following is the analysis of some of the cases decided by the courts.

Maintenance of a child is not a criminal matter, but it was included in the Criminal Procedure Code to ensure speedy justice. In *Adnan Afzal v Col. (Rtd.) Sher Afzal and two others*, the Lahore High Court observed that

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<sup>25</sup> Section 17-A was inserted in the statute by the Family Courts (Amendment) Ordinance 2002 (LV of 2002).

maintenance is a right of a quasi-civil nature but was included in the Cr.P.C to avoid the usual delays in civil proceedings.<sup>26</sup> As discussed earlier, before the repealing of sections 488-490 of the Cr.P.C. in 1981, litigants had civil as well as criminal remedies at their disposal. Civil suits are protracted whereas criminal procedure provided for summary relief, which was expeditious. Before the establishment of family courts, civil suits were even more complicated.<sup>27</sup>

According to section 488 of the Code, a father was liable to maintain his legitimate and illegitimate children. For a legitimate child, it is an established right, which cannot be disputed. However, the liability of the putative father to maintain his illegitimate child is greatly criticized by different sects. The Federal Shariat Court (“FSC”), which enjoys the authority to declare a law null and void if it is against the injunctions of the Quran and Sunnah,<sup>28</sup> has defended this provision as follows:

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 Shari‘ah proposition (the parentage is determined by the conjugal bed, and the person committing adultery has only disappointment in-store) applies to [the] right [of] being a parent. It does not concern itself with liability. The words ‘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 maintenance. The same liability is fixed in S.

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<sup>26</sup> PLD 1982 Lahore 755.

<sup>27</sup> (n 24) 332-333.

<sup>28</sup> According to Art. 227 and 203-D, the Federal Shariat Court has the authority to declare a law null and void if it is against the Quran and Sunnah.



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[ren] though he was at least an equal partner in sexual enjoyment and in the birth of the unwanted child. There is no prohibition in *Shari'ah* for this. I am of the opinion that this section is not repugnant to *Shari'ah*, 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.'<sup>29</sup>

The FSC seems to take the duty to maintain an illegitimate child as a punishment for the father. According to this interpretation, such a father does not have any rights on the child but should have responsibilities. Despite this defence, the law was abrogated by considering it to be against traditional Islamic law.

The father is obliged to pay maintenance to those children who were born during wedlock. In *Arshad Mehmood v Additional District Judge Jehlum and two others*, the wife filed a suit for her maintenance and the maintenance of her three children. One child was born during wedlock with the second husband, whereas two children were from her first husband. Both parties had a contract that the second husband will maintain those two children. The Lahore High Court decided that the wife could claim maintenance for herself and her child from the second husband, but not for the children from her first husband. Those two children should be maintained by their biological father. The Lahore High Court decided that enforcement of the contract was a subject of a civil suit, but according to the West Pakistan Family Courts Act 1964, maintenance cannot be granted on the basis of such a contract. The Appellate Court awarded maintenance for the two children, but the High Court set it

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<sup>29</sup> The case is unreported. SSM 14/S/1984 mentioned in Rashida Patel, *Islamisation of Laws in Pakistan?* (Faiza Publishers 1986) 186.

aside. The Lahore High Court decided that only that child who was born during wedlock, is entitled to maintenance.<sup>30</sup>

Under Pakistani law, the condition for entitlement to maintenance is that the child is in need and is unable to maintain itself. The courts look at the circumstances of each case and decide whether the child is able to maintain itself or not. The Family Court has the authority to fix interim maintenance at any stage of the suit.<sup>31</sup> The child should be maintained until the time he/she becomes able to earn an honest livelihood. To determine the capability of a child to earn a livelihood, the courts consider the status of the child's family, and the custom in the family about the age at which a person begins earning a livelihood. As far as the right to get an education is concerned, the father is not liable to pay for higher education.<sup>32</sup> In *Humayun Hassan v Arsalan Humayun and another*,<sup>33</sup> the court ruled that if an adult son is getting an education, he has to file a case for maintenance. Before deciding the case, the court will consider the age of the adult son; his resources of income if any; the nature and stage of his education; his academic results; his fervour and zeal; the extent to which this study will enable him to earn livelihood, but it did not include higher studies and an education abroad unless there was a promise by the father to the son regarding payment for his education abroad. The son's obedience towards the father, and father's financial position is also considered. In 1958, in *Ghulam Fatima v Muhammad Bashir*,<sup>34</sup> the Lahore High Court decided that it is not the duty of the father to maintain his child when the child has resources to maintain itself. If the child has a property, it should be maintained by its own means. In such a case, the father will be relieved of his duty of maintenance. If the child has no means to support itself, but some other person is voluntarily maintaining the child, the father will have no duty to reimburse that. To pay maintenance is the duty of the father of the child who is in need of it. This approach is in line with Islamic law, as the basic principle regarding maintenance in Islamic law is that a person is entitled to maintenance only when he or she is in need.

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<sup>30</sup> 1999 MLD Lahore 2975.

<sup>31</sup> *Ali Adnan Dar v Judge Family Court* PLD 2016 Lahore 73.

<sup>32</sup> *Alaf Din v Mst. Perveen Akhtar* PLD 1970 SC 75. Also, see *Mst. Ghulam Fatima v Sheikh Muhammad Bashir* PLD 1958 Lahore 596.

<sup>33</sup> PLD 2013 SC 557.

<sup>34</sup> PLD 1958 (W. P.) Lahore 596.

In Pakistani law, a father is obliged to maintain his minor children with the exception that if the major child is incapacitated, unable to earn a livelihood, or is getting an education, his/her maintenance becomes the responsibility of the father. It does not matter whether the child stays with the father or the mother.<sup>35</sup> In *Mukhtarul Hassan Siddiqui v Judge Family Court Rawalpindi and four others*, the Lahore High Court stated that the father is obliged to maintain a major child only if it is getting an education, but if the child is disobedient, it is not entitled to maintenance. The court defined ‘disobedience’ as a failure of a major child to perform its obligations towards its parents as imposed by the Qur’ān and Sunnah. The court opined that, in this case, the son who was twenty-two years old and getting a higher education, was disobedient as he did not allow his father to enter his house because his father had contracted a second marriage, thus, the court held that the father was not obliged to maintain him.<sup>36</sup> A disobedient child loses his/her right to maintenance. In 2011, in *Rashid Ahmed v Additional District Judge, Lahore and four others*, three major daughters who were in their twenties claimed maintenance from their father. The father alleged that the daughters were disobedient as they left his home and were living in ‘*dastak*’— a charitable organisation. The daughters refused to seek the father’s advice in their personal matters like marriage. The father said that he was ready to marry them off, but they refused. The daughters said that their father was not giving them a share in their dead mother's property, so they did not want to live with him. The Lahore High Court was of the opinion that the daughters were disobedient. They did not say that the father was not providing them with food and education. The court decided that the father was under no obligation to maintain a major child who was disobedient and had left his/her house.<sup>37</sup>

The right of the child to maintenance is distinct from the right of the mother to maintenance. In 1972, in *Mst. Razia Begum v Ghulam Rasul*,<sup>38</sup> the

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<sup>35</sup> (n 3); *Shabbir Ahmed v Mst. Ghulam Sakina* 1993 CLC 1880; *Muhammad Iqbal Lateef v Sheikh Muhammad Ikram, Additional District Judge Lahore* 2004 SCMR 1598; *Phakkar v Mst. Pathani and two others* 1985 CLC 487; *Syed Zia-ul-Hassan Gilani v Mian Khadim Hussain* PLD 2001 Lahore 188.

<sup>36</sup> 1994 CLC Lahore 1216.

<sup>37</sup> 2011 YLR Lahore 1632.

<sup>38</sup> 1972 P.Cr.L.J. Lahore 1286.

Lahore High Court held that the right of the child to claim maintenance from its father is distinct from the right of the mother to claim maintenance. Even if the father does not earn enough or does not work at all, he is obliged to pay maintenance to the child if he/she is not capable of working. The court stated that:

... if a man does not work or does not earn enough to support his children, that in itself is no ground to justify his omission to supply them with reasonable maintenance because having brought them forth in the world, (it) is his bounden duty to provide for their maintenance.<sup>39</sup>

In 2001, in *Syed Zia-ul-Hassan Gilani v Mian Khadim Hussain*, the Lahore High Court declared that the father could not escape from his responsibility on the basis of his poor financial situation.<sup>40</sup> The father, who is capable of earning, could not argue that he has no property to maintain his children.<sup>41</sup> This approach of the courts is in conformity with *Hanafi* opinion, which not only takes the father's financial situation into consideration but also considers whether he is capable of working or not.

The father is obliged to pay maintenance even if the children are in the mother's custody.<sup>42</sup> In *Khalid Mahmood v District Judge Jehlum and 6 others*, the Lahore High Court ruled that a child's right to maintenance is absolute and does not depend on the fact of him/her residing with the father.<sup>43</sup> This approach is in conformity with Islamic law, which obliged the father to maintain the child even when a child resides with the mother. In *Amar Ilahi v Rashida Akhtar*, the Lahore High Court took the stand that if the father failed to maintain the child when the child was with the mother, he would lose his right to custody. In this case, the father failed to maintain his daughter until the time of her marriage. The mother was given the right to custody and guardianship over the daughter despite the fact that the mother had

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<sup>39</sup> Ibid 1288.

<sup>40</sup> PLD 2001 Lahore 188.

<sup>41</sup> *Muhammad Yusuf v Shazia Bibi* 1992 MLD AJK 235.

<sup>42</sup> *S. M. Aslam v Rubi Akhtar* 1996 CLC Karachi 1; *Muhammad Ashraf v Nasreen Begum through legal heirs and three others* PLD 1989 Lahore 69; *Muhammad Shafi Alias Papan v the State* 2011 PCr.LJ Karachi 1424.

<sup>43</sup> PLD 1986 Lahore 272. Also, see *Farid Khan v Saeeda Bibi* 2014 MLD Peshawar 351.

remarried.<sup>44</sup> If the father is entitled to custody and the mother keeps the custody despite the father's efforts to take custody of the child, he is not obliged to pay maintenance.<sup>45</sup>

The extent of maintenance allowance is determined after considering the financial position of the father and his other liabilities. If the children are residing with their mother, the court, while determining maintenance of the mother, takes into consideration the fact that she has a burden to look after the child as well.<sup>46</sup> The father is bound to pay maintenance to a divorced daughter even if she is living with her mother.<sup>47</sup> In *Abdul Khaliq v Mst. Fozia Bibi*, the Peshawar High Court said that in determining the amount of maintenance for the child, the court would consider the father's financial situation, social status of the parties, necessary expenditures of the child, market prices, and educational expenses.<sup>48</sup> Maintenance of the son is a responsibility upon the father until he attains puberty, and of the daughter until she gets married.<sup>49</sup>

As discussed earlier, section 17-A of the West Pakistan Family Courts Act 1964 provides for at least a 10% annual increase in the amount of maintenance. Before the introduction of this law, the approach of the courts regarding the annual increase was not consistent. In 2012, in *Ibrar Hussain Bukhari v Additional District Judge Lahore*, the lower Courts fixed the quantum of maintenance at Rs. 100,000 along with an annual increase in the quantum of maintenance at 25%. The father argued that the quantum of maintenance and the annual increase was excessive. The Lahore High Court took into consideration the wealthy status of the father and decided that the quantum was appropriate, but a 25% annual increase was excessive and fixed it to be at 10%. The court also took into consideration the fact that the minor was a special child having a mental illness. The maintenance was awarded

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<sup>44</sup> PLD 1955 Lahore 412. Also, see *Mst. Rasheedan Bibi v Additional District Judge* 2012 CLC Lahore 784; *Masroor Hussain v Additional District Judge, Islamabad* 2011 CLC Islamabad 851.

<sup>45</sup> *Mst. Hamida Begum v Syed Mashaf Hussain Shah* PLD 1958 SC 284.

<sup>46</sup> (n 10); *Shahid Raza v Dr. Fauzia Shaheen* PLJ 2004 Peshawar 234 (DB); *Muhammad Aslam v Muhammad Usman* PLJ 2004 Lahore 1075; *Mukhtarul Hasan Siddiqui v Judge Family Court, Rawalpindi and four others* 1994 CLC 1216.

<sup>47</sup> *Farid Khan v Saeeda Bibi* 2014 MLD Peshawar 351.

<sup>48</sup> PLD 2012 Peshawar 97.

<sup>49</sup> *Abdul Latif v Surat Khatoon* 1989 SCMR 456; *Yaqoob Ahmed v Mst. Shaista* 2008 CLC Karachi 654.

until the majority and recovery of the child from the disease.<sup>50</sup> In 2011, in *Mst. Nusrat v Shahzad Riaz*, the Supreme Court of Pakistan, awarded an annual increase of 10% in the quantum of maintenance.<sup>51</sup> In 2012, in *M. Umar Fraz v Additional District Judge*, the Lahore High Court decided that an annual increase of 15% in the quantum of the maintenance of a child is illegal as the West Pakistan Family Courts Act 1964 does not allow any such increase, and is silent about this issue. The court held that it is the duty of the legislature to take the rate of inflation and prices of everyday necessities into consideration before making the law. The Lahore High Court recommended for the legislature to amend the law accordingly.<sup>52</sup>

According to Pakistani law, the grandfather is obliged to pay maintenance to his grandchildren if the father is unable to do so.<sup>53</sup> In 1991 in *Ghulam Nabi v Muhammad Asghar and 3 others*,<sup>54</sup> the Supreme Court of Pakistan decided that the grandparents are only obliged to pay maintenance if there is no closer relative alive. If the father is alive, it is his responsibility to maintain his children. In the presence of the father, the maternal or paternal grandparents have no responsibility to maintain the child irrespective of their sound financial status. This is in accordance with Islamic law, under which, maintenance is obligatory on the closest relative, and in the presence of closer relatives, maintenance cannot be made obligatory on distant relatives. In 1976, in *Haji Nizam Khan v Additional District Judge, Lyallpur and others*,<sup>55</sup> the Lahore High Court held that if the grandfather is financially sound, he is bound to maintain his grandchildren if they are in need. Those people who are financially sound are bound to maintain their needy relatives in prohibited degrees. The court based this decision on Islamic social justice, and declared that if a statute does not cover an issue, it should be covered by Muslim law. In this case, the Lahore High Court considered the doctrine of ‘justice, equity, and good conscience’ as meaning ‘Islamic law’. In *Sultan Ahmed v The Judge Family Court*,<sup>56</sup> the father was alive but was hiding from the court to avoid the

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<sup>50</sup> 2012 YLR Lahore 1703.

<sup>51</sup> 2011 SCMR 1325.

<sup>52</sup> PLD 2012 Lahore 170.

<sup>53</sup> *Abdullah v Jawaria Aslam* PLJ 2004 Lahore 9.

<sup>54</sup> PLD 1991 SC 543.

<sup>55</sup> PLD 1976 Lahore 930.

<sup>56</sup> PLD 2012 Lahore 148.

responsibility of paying maintenance. The Lahore High Court decided that when the father of the children is not available or is hiding, the grandfather is duty-bound to maintain the children. The courts considered the grandfather obliged to maintain his grandchildren only if they are in need, and the father is dead, absent, or incapable of maintaining the children.

The father is also obliged to maintain his daughter until her marriage, after which the obligation of her maintenance passes to her husband. If the marriage is dissolved, the duty to maintain the daughter devolves upon the father again, provided that she has no means to support herself. The father cannot deny the maintenance of a divorced daughter on the ground that she lives with her mother. The mother has custody of the daughter until her marriage, and if the daughter is divorced, the custody goes again to the mother.<sup>57</sup> In 1990, in *Ghulam Khan v The District Judge Gujrat*,<sup>58</sup> the father argued that his daughter refused to marry, so he was not responsible for her maintenance anymore. He argued that a father is obliged to maintain his daughter until her marriage, but in his case, he wanted to marry his daughter off, but she refused; hence, he should not be obliged to maintain her. The Supreme Court of Pakistan decided that this plea is not acceptable. The court noticed that the daughter did not want to marry as she was looking after her sick mother, and according to her, at that time, the circumstances were not suitable for her marriage, and later she might change her decision if the circumstances change. The court decided that the father had to maintain his daughter until the time she decided to marry. In this case, the Supreme Court considered looking after a sick mother as a justified cause for the daughter to not get married. In *Gakhar Hussain v Surayya Begum*, the Lahore High Court maintained that a father is bound to maintain his unmarried daughter even if she is earning. The daughter's right to maintenance is unconditional. The father contended that the daughter was disobedient as she refused to marry his nephew, but the court considering the father's behaviour towards the daughter, decided in her favour.<sup>59</sup> As far as a divorced daughter is concerned, in *Mian Muhammad Sabir v Uzma Parveen*, the court considered it a settled law that

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<sup>57</sup> *Mian Muhammad Sabir v Mst. Uzma Parveen* PLD 2012 Lahore 154. Also, see *Ch. Muhammad Bashir v Ansar-un-Nisa* MLD 2012 Lahore 1394.

<sup>58</sup> 1990 SCMR 136.

<sup>59</sup> PLD 2013 Lahore 464.

the father is obliged to pay maintenance to a divorced daughter. The court observed:

[the divorced daughter's] right to receive maintenance should not be defeated by her marriage any longer in existence. The rationale for providing maintenance to an unmarried lady is equally applicable to a divorced lady, as in either case, the single lady has no independent source of income. As such, there is no reason to treat a divorced lady differently and deny her the maintenance she is in need of.<sup>60</sup>

Maintenance is a duty of the father, but there is no consistency in the approach of the courts with reference to the relevance of the financial situation of the mother. In 1995, in *Imtiaz Begum v Tariq Mehmood*, the Lahore High Court gave custody to the father by taking into consideration the financial condition of the mother.<sup>61</sup> This judgment was against the 1968 judgment of the Supreme Court in *Muhammad Ramzan v Mst. Fazal Nishan*, in which the Supreme Court decided that the mother cannot be deprived of custody on the basis of her small income.<sup>62</sup> In 1978, in *Mst. Feroze Begum v Lt-Col. Muhammad Hussain*, the Supreme Court dealing with the same issue again, decided that as maintenance is a duty of the father, a mother cannot be deprived of custody just because she cannot maintain the child.<sup>63</sup> In *Mst. Saddam v Muhammad Nawaz and another*, the maternal grandmother was disqualified from custody by a lower court on the ground that she could not maintain the child. The Lahore High Court, while giving her custody, decided that it is a duty of the father to maintain the child.<sup>64</sup> Custody is an independent right and should not be affected by the financial condition of the mother. When children are in the mother's custody, the father is liable to maintain the children. It is illogical to deprive the mother of custody on the basis that she cannot maintain the children when it is not her duty to do so. In *Khalid Bashir v Shams-un-Nisa*, the court decided that it is a duty of the father to maintain

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<sup>60</sup> PLD 2012 Lahore 154.

<sup>61</sup> 1995 CLC Lahore 800.

<sup>62</sup> 1968 SCMR 1435. Also, see *Hafiz Saleem Akbar v Uzma Kanwal* 2015 YLR 2650.

<sup>63</sup> 1978 SCMR 299. Also, see *Yaqoob Ahmed v Mst. Shaista* 2008 CLC Karachi 654.

<sup>64</sup> 1991 CLC Lahore 1238.



the child, and he cannot be absolved of his responsibility on the basis that the mother is also earning.<sup>65</sup>

In 1997, in *Muhammad Riaz v Asia Perveen*, the Lahore High Court ruled that if there is an agreement between the parents that the husband would divorce the wife and the wife would not demand maintenance for the child, such an agreement is not enforceable. Maintenance of the children is an independent right that cannot be waived by an agreement.<sup>66</sup> In *Omar Ali Sheikh v Mst. Shamsunahar Begum*,<sup>67</sup> the parties agreed that the father would pay maintenance to the child until the age of majority. The ground taken by the petitioner was that the court could not award maintenance for more than the period agreed between the parties. The Dacca High Court observed that according to the law, a child is entitled to claim maintenance after attaining the age of majority, if due to any reason, the child is unable to maintain itself. The court held that such an agreement made on behalf of the child, which deprives a child of its right to maintenance, was not enforceable. The court also declared that the rule developed in case law regarding the maintenance of the wife—that if at the hearing, the husband states that he is willing to pay a specified sum, it may be considered to be an implied admission that he was not paying maintenance to his wife — also applied to cases of maintenance of children.

As far as the right to claim past maintenance is concerned, there are contradictory decisions of the courts. In 1958, in *Mst. Ghulam Fatima v Sheikh Muhammad Bashir*, the mother claimed past maintenance of the child from the father. The Lahore High Court said that past maintenance could only be claimed in two situations: if the maintenance is fixed by the court, or by the father himself. In this case, past maintenance was fixed neither by the court nor by the father, so it could not be awarded. The court also said that if the father was present, but the demand for past maintenance was delayed, then even the decreed maintenance could not be awarded. The principle in the case of past maintenance is that maintenance for the minor can only be claimed if the claimant is in need. In the case of delay, it is presumed that the claimant

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<sup>65</sup> 2015 MLD Lahore 11.

<sup>66</sup> 1997 MLD Lahore 142. Also, see *Shayan through Mst. Shamim v Nisar Ahmed* 2010 MLD Lahore 695.

<sup>67</sup> PLD 1967 Dacca 575.

was not in need and could afford to maintain the child. If the maintenance is fixed by the court, but the father refuses to pay it; on the instructions of the court, the father incurs a debt for the maintenance of the child, and past maintenance can be claimed.<sup>68</sup>

In 1991, in *Ghulam Nabi v Muhammad Asghar and 3 others*,<sup>69</sup> the Supreme Court held that past maintenance could only be awarded if the claimant is in need. In this case, the court was considering whether the mother of the child can claim past maintenance of a minor from a grandfather in case of a father's death. The court relied on the verse "... *An heir shall be chargeable in the same way...*,"<sup>70</sup> and found that the responsibility of maintenance is on the father and in case of his death, on his heirs, including the grandfather. The reasoning of the court was that as the mother could not even be compelled to breastfeed the child;<sup>71</sup> similarly, she cannot be forced to share the burden of maintenance with the grandfather, especially when she is poor. The Supreme Court noticed that the mother maintained the child and had not contracted a second marriage. The grandfather was in the place of the father, so he was obliged to pay past maintenance.

In 1971, in *Mst. Rehmat Bibi v Muhammad Ali*, the father was entitled to custody, but the mother refused to hand over the child. The mother was also claiming past maintenance for the minor. The Lahore High Court said that if the father is entitled to custody and demands it, but the mother refuses, the father has a right to refuse payment of past maintenance.<sup>72</sup> In 2004, in *Muhammad Iftikhar Zafar v Muhammad Ahmed*, the mother filed a suit for past and future maintenance of minors. The father argued that according to the divorce agreement, the mother should retain custody, and the grandfather shall provide maintenance. The Lahore High Court held that the father is obliged to pay maintenance from the date of the filing of the written statement by the mother, but not past maintenance. The court noticed that the father is not liable to maintain the child if a custodian, who is not entitled to custody, retains it against the wishes of the father. In this case, however, the father

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<sup>68</sup> PLD 1958 Lahore 596.

<sup>69</sup> PLD 1991 SC 543.

<sup>70</sup> Al-Quran 2: 233.

<sup>71</sup> For detailed rules regarding mother's duty to breastfeed the child see Mudasra Sabreen, "A Study of Islamic Law on Rada'ah" (2014) 35 (3) *Hamdard Islamicus* 85.

<sup>72</sup> PLD 1971 Lahore 151.

never claimed custody, so he could not argue that the children were in the custody of the mother against his wishes. If someone else already maintains a child voluntarily, it means that the child is not in need, so the father is not required to pay maintenance. Hence, in the case of refusal of the mother to hand over the children, the father is not obliged to pay maintenance.<sup>73</sup>

As far as an adopted child is concerned, it is entitled to maintenance from the adoptive father, although it has no right to inherit from him. In 2010, in *Muhammad Aslam v Shazia Bano*,<sup>74</sup> the mother of three minors applied for their maintenance, one of whom was an adopted child. The father argued that he is not obliged to maintain the adopted child, although he said that if the adopted child is given into his custody, he is ready to pay for his maintenance. The Lahore High Court held that an adopted child is not entitled to inherit from its adoptive parents, but it is entitled to maintenance. In *Maria Bibi through Abida Parveen v Naseer Ahmad*, the court considered the adoptive father as a constructive guardian and decided that he is duty-bound to pay maintenance to the adopted child. The father was held bound to pay maintenance to the minor girl through an agreement of adoption. The court also quoted the example of Zaid bin Harithah and emphasised the importance of taking care of orphans according to Islam.<sup>75</sup>

In *Muhammad Fayyaz and Another v the Islamic Republic of Pakistan through Secretary, Ministry of Religious Affairs, Islamabad*, section 3 of the Majority Act 1875, which fixed eighteen years as the age of majority, was challenged by the petitioner to be repugnant to the injunctions of Islam. The petitioner claimed that according to section 3, the father has to maintain his son until the age of 18 years, which is against Islam, as he might have attained puberty much earlier. The Federal Shariat Court held that it could only declare a law repugnant to the injunctions of the Qur'ān and Sunnah if it is against a verse of the Qur'ān or a *hadith* of the Prophet, and not on the basis that it contradicted a particular opinion in Muslim Jurisprudence. While discussing puberty as the age of majority and problems associated with this concept, the Federal Shariat Court said that the appearance of signs of puberty does not mean that the concerned person has attained the age of majority. The court

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<sup>73</sup> 2004 YLR Lahore 768.

<sup>74</sup> 2010 YLR Lahore 1327.

<sup>75</sup> PLD 2015 Lahore 336.

highlighted that the age of majority should be based on other mental, physical, and psychological aspects as well. As the age of puberty varies from place to place and person to person, it is hard to determine on which date a particular person has attained puberty. The court considered this difficulty in determination of the age of puberty a reason for the difference of opinion among jurists regarding this issue. While keeping in view the difficulty in determining the age of puberty, the court held that for the purpose of legislation, it is necessary to determine a specific age as the age of majority to avoid inconvenience and uncertainty.<sup>76</sup> Hence, the Federal Shariat Court did not declare section 3 of the Majority Act 1875 to be contradictory to the Qur'an and Sunnah.

It is clear from case law that Pakistani courts follow Islamic rules of maintenance. After the annulment of sections 488-490 of the Criminal Procedure Code 1898, there is no statutory law that deals with the maintenance of the child outside Azad Jammu and Kashmir. The West Pakistan Family Courts Act only deals with the issue of jurisdiction. Criminal Procedure Code provides for summary relief whereas civil litigation is protracted. Due to the repealment of sections of the Cr.P.C., litigants have been thrown in lengthy civil suits, which are often complicated. Cases regarding maintenance are decided in the light of the rules set by case precedents. This lack of legislation gives the courts huge discretion, which results in many contradictory decisions. It is argued that while discretion gives a judge the space to administer justice as it deems appropriate in the given circumstances, there are also chances of abuse of authority as well as contradictory decisions in such situations. There is a need to formulate a law to clarify issues related to maintenance. As said earlier, sections 488-490 of the Criminal Procedure Code 1989 make it incumbent upon the putative father to maintain his illegitimate child. This is totally un-Islamic as an illegitimate child, and his/her father have no mutual rights and duties. An illegitimate child only belongs to the mother. The father is duty-bound to maintain a child only if it is born during a valid or irregular marriage. The duty of maintenance is imposed on the father in Islamic law on the basis of paternity, and paternity is only established for a legitimate child. Here it is strongly recommended that these provisions should be abolished in Azad Jammu and Kashmir as well. In

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<sup>76</sup> PLD 2007 FSC 1.

Islamic law, one of the conditions to render the father responsible for the maintenance of the child is that the child should be legitimate. The mother, maternal relatives, or the state is obliged to maintain an illegitimate child.<sup>77</sup>

There is a need to draft a law to encompass all aspects of child maintenance. The following reforms are recommended to be incorporated into the law. Maintenance should be declared as a duty of the father, and the financial condition of the mother should be declared irrelevant. Those situations should be clearly specified in which a major son/daughter can claim maintenance, for instance, education and disability. Impediments to right of maintenance, like disobedience should be properly defined. The law should make a clear distinction between the right of the mother to claim maintenance and the right of the child to claim maintenance. Provisions should be included regarding the right to past maintenance, and the law should provide for situations in which past maintenance can be claimed. A time period can be fixed for which past maintenance can be claimed. In the case of adoption, the adoptive father should be made responsible for the maintenance of the adopted child. A time period can be fixed for the disposal of maintenance suits to ensure speedy justice. Moreover, a formula should be developed to determine the maintenance of the child. For instance, a percentage of the net income of the father can be fixed to decide the quantum of maintenance. Detailed legislation will remove uncertainty and inconsistency in the rules related to maintenance.

### **Conclusion**

Under Pakistani law, the father is responsible for paying maintenance to his children. Maintenance is incumbent upon the father in accordance with his financial circumstances. Sections 488-490 of the Criminal Procedure Code made it incumbent upon the putative father to maintain his legitimate and illegitimate children. This position was considered to be against Islamic law, and hence, these sections were repealed in Pakistan in 1981. In Islamic law, one of the conditions to render the father responsible for the maintenance of

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<sup>77</sup> David Pearl, *A Textbook on Muslim Personal Law* (Croom Helm 1987) 85; Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Islamic Publishers 1978) 690-692.

the child is that the child should be legitimate.<sup>78</sup> The father is liable to maintain his legitimate child only, because maintenance is established on parentage, and parentage is established on legitimacy.<sup>79</sup> This is contrary to the Convention on the Rights of the Child as it is discriminatory on the basis of the status of the legitimacy of the child. As said earlier, a system of *kafalah* should be established to take care of such children.

In Pakistan, after the annulment of the above-mentioned sections, the Muslim Family Laws Ordinance 1961 and the West Pakistan Family Courts Act 1964, deal with issues related to the maintenance of the child. However, these statutes give very few rules regarding maintenance. Cases related to the maintenance of children are decided in light of legal precedents. After analysis of the case law, we have come to the conclusion that Pakistani courts consider maintenance a basic right to the child, and the father is obliged to pay maintenance even if the children are staying with the mother. A child's right to maintenance is distinct from the wife/mother's right to maintenance. The courts apply Muslim personal law while deciding issues regarding maintenance. The courts fix the amount of maintenance after taking into consideration the father's financial condition. It is noticed that Pakistani courts have not developed any formulae to determine the maintenance of the child. For instance, they have not fixed a percentage of the net income of the father to decide the quantum of maintenance. Due to the importance of this right of the child, there is a need to formulate legislation to remove uncertainty and to clear issues related to maintenance. While it was a clever move to include maintenance in criminal procedure as it provided for summary relief, the lawmakers should reconsider this matter. A detailed legislation will provide for a clear formula to decide the quantum of maintenance. Furthermore, this procedure should be made easy and quick, so the litigants are not entangled in long proceedings.

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<sup>78</sup> Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law* (Kluwer Law International 2000) 139.

<sup>79</sup> David Pearl, *A Textbook on Muslim Personal Law* (Croom Helm 1987) 85; (n 56) 690-692.