

## Does Muslim Law Allow Husbands to Deny Paternity to Their Children?

*Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan*  
PLD 2015 SC 327

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### Introduction

In a country where matrimonial authority determines paternity, *Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan*<sup>1</sup> surfaced as a noteworthy case that interwove legitimacy, paternity, Islam, and law. The legal dispute traces the involvement of Muslim Personal Law, the Qanun-e-Shahadat Order and the influence of Islam on legislative intent. The issue at hand was whether the respondent, Mr. Ghulam Dastagir Khan, could shirk the responsibility of providing maintenance to his children born from his first marriage by simply denying that he was their father - an action that the Qanun-e-Shahadat seemingly allowed. It was clear to the court that the confusion regarding Article 128 of the Qanun-e-Shahadat Order 1984 ('QSO')<sup>2</sup> must be explained in light of Section 2 of the West Pakistan Muslim Personal Law (Shariat) Act 1962<sup>3</sup>. The decision of the court amplifies the concern surrounding 'societal cohesion and the values of the community',<sup>4</sup> while attempting to avoid the infliction of unjust harm on mothers and their children. This case urges the discussion and analysis of its judgment. Hence, this case note initially outlines the facts of the case, and sheds light on the ruling of the Supreme Court. It proceeds by examining the involvement and effect of relevant legislation, which is analysed with a socio-legal perspective. In conclusion, this case note distils the essence of the judgement and provides a recommendation to avoid differences of opinion amongst courts with respect to laws regarding paternity.

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<sup>1</sup> C.A No.90/2011 (SC) in W.P. No.4729 of 2010 (LHC); PLD 215 SC 327.

<sup>2</sup> Article 128 of the Qanun-e-Shahadat Order 1984 provides: 'Birth during marriage conclusive proof of legitimacy.---(1) The fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of marriage, or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless:- (a) the husband had refused, or refuses, to own the child;'

<sup>3</sup> Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (Act V of 1962) provides 'notwithstanding any custom or usage, in all questions regarding ... legitimacy or bastardy ... the rule of decision, subject to the provisions of any enactment for the time being in force shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims'.

<sup>4</sup> *Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan* PLD 2015 SC 327, para [10].

## **Facts and Holding**

In 1997, the appellant, Ms. Ghazala Tehsin Zohra, married the respondent, Mehr Ghulam Dastagir Khan and subsequently the couple had two children. The elder child, Hania Fatima, was born in 2000, and the younger, Hasan Mujtaba, in 2001. Khan then took a second wife, which prompted Zohra to file a suit for maintenance for herself and for their two children.<sup>5</sup> In response to the notice of the suit brought against him, Khan divorced his first wife and refused to provide for the children, alleging that they were not his biological offspring and sought a declaration to this effect. On 27 October 2007, just before the paternity trial was about to conclude, the husband sought permission from the local court to introduce DNA evidence. When the court turned down the request, he took the matter to the Lahore High Court (LHC) which granted his request on 9th February 2010. In light of Khan's allegation that Hania Fatima and Hassan Mujtaba were not his biological children, and that the Qanun-e-Shahadat did seemingly permit him to disown his children, the LHC allowed Khan to bring forth DNA evidence to strengthen his claim. Against this decision, Zohra moved the Supreme Court (SC), which accepted her appeal on 2nd February 2015.<sup>6</sup>

The SC granted Ghazala Tehsin Zohra her appeal with costs, setting aside both the allegedly impugned judgment of the LHC and the suit brought forth by Khan. Hania Fatima and Hasan Mujtaba were permitted to obtain, from the respondent, any remedy available to them under the law.<sup>7</sup> In the formulation of this judgment, the court bore in mind the sequence of events, the interpretation and reconciliation of the statutory provisions at hand, lack of assistance provided at the Bar with respect to the aforementioned statutes, and legislative intent of Islamic lawmakers.

## **Background and Prior Law**

The SC held that the judgment of the LHC was flawed for a number of reasons. A few aspects of this case have far-reaching consequences and hence must be probed into, 'so that the law can be clearly enunciated in the light of Article 189 of the

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<sup>5</sup> Ibid, para [1].

<sup>6</sup> 'Muslim law does not vest husbands with right to deny paternity of child, SC rules' *Dawn* (20 March 2015). <[http://epaper.dawn.com/DetailImage.php?StoryImage=20\\_03\\_2015\\_005\\_002](http://epaper.dawn.com/DetailImage.php?StoryImage=20_03_2015_005_002)> accessed on 13 June 2015.

<sup>7</sup> (n 4) para [16].

Constitution’,<sup>8</sup> which makes the decision of the SC binding on all other courts of Pakistan.<sup>9</sup> These aspects include the wording and interpretation of Article 128 of the QSO, presumption of paternity based on the sequence of marriage, birth and divorce, and the influence of classical Islamic law on legislation.

Although children born during marriage are presumed to be legitimate according to Muslim Personal Law, Justice Jawwad Khawaja understood that the provisions of the QSO had created confusion in this regard. Article 128 of the QSO states that the presumption of paternity does not exist where ‘the husband had refused, or refuses, to own the child’. The SC clarified the impugned judgment of the LHC by evaluating the aforementioned provision in light of principles of Muslim Personal Law (Shariat) as mandated by the Act V of 1962. This Act states that in cases involving issues of ‘legitimacy and bastardy’, if the parties involved were Muslims, the Court shall apply rules of Muslim Personal Law derived from *Sharia*.

Although the QSO lays down the blueprint for presumption of legitimacy, it is the Muslim Personal Law that provides details that are essential for understanding the former accurately. While the QSO conveys that a father may deny his child his paternity, Muslim Personal Law narrows the scope of focus by specifying that a father, if he wishes, must deny paternity within a stipulated time period of 40 days immediately after the birth of the child. The respondent, Khan, denied paternity of both his children long after the stipulated period of 40 days. Hence, Khan could not legally disown his children from his first marriage. The respondent's paternity was determined in the absence of DNA evidence,<sup>10</sup> because the chronological order of the dates of marriage, births of the two children and the divorce support the fact that the respondent had conjugal access to the appellant during marriage, hence upholding the presumption of legitimacy of Hania Fatima and Hasan Mujtaba.

The intention of laws regulating the presumption of paternity, the judgment says, is to prohibit individuals, particularly unscrupulous fathers, from making bald assertions that stigmatise children and their mothers.<sup>11</sup>

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<sup>8</sup> Article 189 of the Constitution provides: ‘Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan.’

<sup>9</sup> (n 4) para [5].

<sup>10</sup> If a child’s birth is not proven through the concept of the ‘conjugal bed’ (i.e. it cannot be proven whether the alleged father had conjugal access to the child’s mother or not), Courts resort to DNA evidence. Mudrasa Sabreen, ‘Parentage: A Comparative Study of Islamic and Pakistani Law’ (2013) 1(2) *Frontiers of Legal Research* 30.

<sup>11</sup> (n 4) para [13].

## **Analysis**

An action challenging the paternity of a child is a difficult question for courts to answer.<sup>12</sup> Questions surrounding the legitimacy of a child have emotionally as well as legally and socially detrimental impacts on the child and his/her parents, whether purported or biological.<sup>13</sup> What fundamental imperatives drive Islamic law regarding legitimacy and paternity? Under Islamic law, a child's legitimacy may be established through his/her birth during a marriage, through acknowledgement by the father, or by evidence.<sup>14</sup>

Notably, the grounds for ascertaining legitimacy through the principles of 'the conjugal bed' are quite lenient: a child born after six months of the consummation of marriage or two years after its dissolution is presumed to be legitimate. Muslim jurists were well aware of the normal period of gestation (nine months), then why did they allow a maximum period of two years, that too when the mother is no longer married to the father? Pakistani courts apply the principle of the conjugal bed even when conditions of its applicability are not fulfilled. In *Hamida Begum v Murad Begum*,<sup>15</sup> the SC applied this principle to a child born within six months of the marriage and held the child to be legitimate. Through such clemency, the law attempts to preserve societal values and order by shielding the child and mother from possible censure. However, effects of the presumption of legitimacy on the husband of the mother must also be elucidated.

A man may deny paternity by proving lack of conjugal access to his spouse, or in case of adultery, successfully alleging that his spouse indeed conceived a child with another man. However, there is a time limit for such an accusation: the husband of the mother must deny paternity within 40 days of the birth of the child. Failure to do so upholds the presumption of legitimacy, and the man must provide for the child.

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<sup>12</sup> See Heather Faust, 'Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity' (1996) 100 Dickison Law Review, 963.

<sup>13</sup> Jacquelyn A. West, 'Maintaining the Legal Fiction: Application of Presumption of Paternity and Paternity by Estoppel in Pennsylvania' (2004) 42 Duquesne Law Review, 577.

<sup>14</sup> This includes DNA evidence. Mudrasa Sabreen, 'Parentage: A Comparative Study of Islamic and Pakistani Law' (2013) 1(2) Frontiers of Legal Research 21, 36.

<sup>15</sup> PLD 1975 SC 624.

Establishment of paternity by evidence is stronger than establishment of paternity by acknowledgment.<sup>16</sup> DNA tests have made it easier to prove or disprove paternity. However, Muslim scholars are wary of resorting to scientific methods for testing legitimacy. It is preferable to prioritise the *Sharia* and principles of the conjugal bed and treat scientific proof as circumstantial evidence. In Pakistan especially, there is wariness attached to using DNA testing as conclusive proof, because it may be prone to error due to lack of technical facilities. Such an ‘error’ could possibly stigmatise a child forever.<sup>17</sup>

Muslim jurists, when laying down the principles of paternity, were not indifferent to the laws of nature; rather, they were motivated by a desire to prevent the misuse of laws regarding divorce and disavowal of children. A child does not control the circumstances he/she is born into, and hence must not be subject to undue and unwelcome societal glare due to alleged illegitimacy. As a result, the acknowledgement of paternity and the fatherly behaviour of a man towards his children often supersedes DNA evidence in a courtroom.

### **Conclusion**

The case at hand illuminates not only how protective Islam is of mothers and children, but also how wary the religion is of the stigma associated with illegitimacy, bastardy, and the societal upheaval it is capable of causing. The discrepancy between the decisions of the LHC and the SC hints at a lack of comprehensive legislation regarding issues of paternity in Pakistan. This ultimately results in contradictory decisions regarding these issues, which impede the quick dispensation of justice. There exists a need to formulate a detailed legislative plan that encompasses all points of the Islamic Law regarding paternity, so that courts may find their jobs a little easier.

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.