

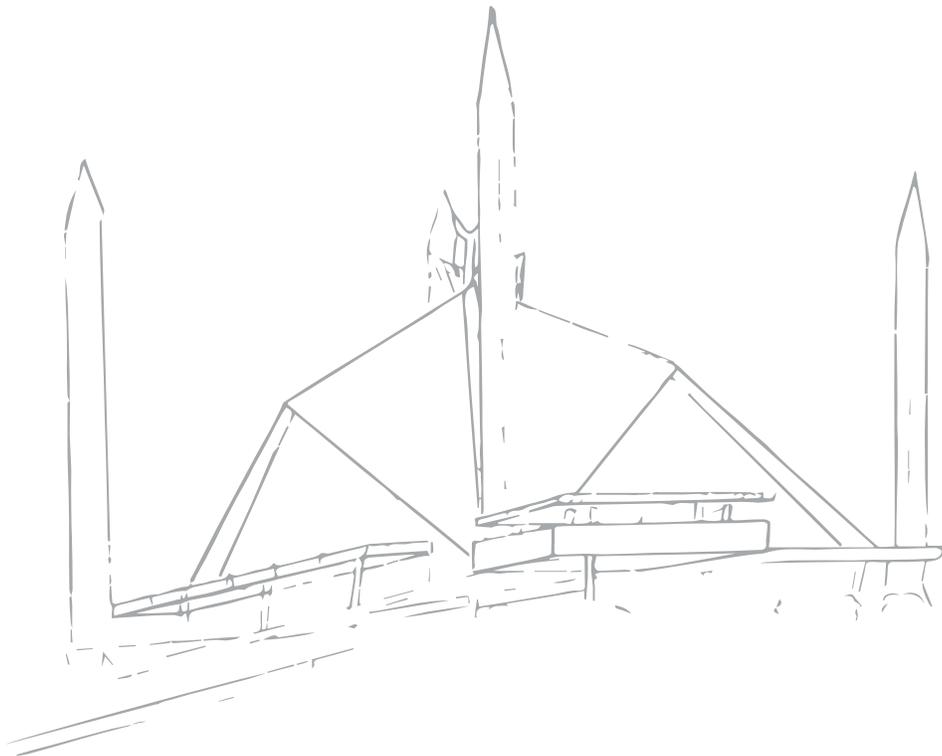


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Rights of Parents to Maintenance under Shari'ah Law: A Call for Legislation in Pakistan

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Abstract

Islam demands children to provide the maintenance and sustenance to the parents in their old age as insisted by the Qur'an and Sunnah. It is a legal and filial duty of their children under family laws in Islam. There are certain enactments passed by the Federal and Provincial Assemblies in favor of senior citizens of the State. However, there is no specific legislation to protect rights of maintenance and care to Muslim parents by the children. Therefore, Pakistan still needs to address specific legislation to fill the lacuna between the social security and welfare clauses under state welfare institutions as well as the legal obligation of the children under Islamic law for the betterment of elderly people. The work presents the rights of parents to maintenance under Shariah law and the proposal for legislation in Pakistan through analysis of parents' maintenance laws made by certain Islamic states. Further, the law will allow the aggrieved parent to file a case against their children if they decline to support him/her. Research aims to include the extent of the legal duty of children and a right of parents as prescribed by different schools of thoughts under Islamic Law and, analysis of legislations of certain Islamic States in this perspective. This will assist in the advancement of a future prospect to Islamize the law in the field of Muslim Family Law. In this regard, qualitative research method will be applied, as is a best-suited method for making analysis of Islamic rulings and legislations of Islamic states.

Keywords: Rights of parents, maintenance under shariah law, Islamization.

1. Introduction

Generally, the word maintenance means the act of supporting. In Pakistan, this term is used in Muslim Personal Law in relation to family structure in distinct relations. Initially, it was used for maintenance given by husband to his wife.¹ Apart from this, the maintenance of children by the father is also mentioned

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¹ S.9, The Muslim Family Laws Ordinance 1961.

under Muslim Personal Law.² However, no law precisely recognizes the maintenance of parents by adult children.

In Islamic jurisprudence, the legal term *nafaqah* is used for financial support or maintenance. Any person becomes liable to pay *nafaqah* due to certain causes. These are marital relation, proprietary rights³ and blood relations.⁴ It includes food, clothing and housing.⁵ Further, the obligation of maintenance also varies due the factor of economic condition of the person who is liable to pay maintenance and the one to whom it is to be paid.

2. Obligation of Maintenance

Generally, a wealthy son has an obligation to pay maintenance to his needy and poor parents.⁶ If the parents become poor or too old and remain no longer able to work, their sustenance and care have to be provided by their children because Allah Almighty has ordered to be kind to parents whether they are Muslims or not. Almighty states in the Holy Qur'ān, "And be kind to parents."⁷ In another verse, He says, "And treat parents with benevolence."⁸ In another verse, it is ordered by Almighty Allah to respect parents with high moral standards as stated, "If either or both of them attain old age in your presence, then do not say even 'Ugh!' to them, nor reproach them, and always speak to both of them submissively, observing polite manners." Further in subsequent Ayah stated, "and always lower your wings of submissiveness and humility out of soft heartedness for both of them, and keep supplicating (Allah), "O my Lord, have mercy on both of them as they brought me up in (my) childhood (with mercy and clemency)."⁹ While interpreting the verse, "do not say even 'Ugh!' to them", Sarakhsī states that 'ugh' (*al-ta'fif*) is used in

² S.17-A, The Family Courts Act, 1964.

³ *Nafaqah* of slaves and animals. See: Muḥammad Amīn b. Ābidīn, *Radd al-Muḥtār `alā al-Durr al-Mukhtār* (Beirut: Dār al-fikar, 1992), 2:572.

⁴ Abū Bakr Muḥammad b. Aḥmad b. Abī Sahl Al-Sarakhsī, *Al-Mabsūt*, (Beirut: Dār al-Ma'rifah, 1993), 5:180.

⁵ Ibn Ābidīn, *Radd al-Muḥtār*, 2:572...

⁶ Sarakhsī, *Al-Mabsūt*, 5:222

⁷ Al-Qur'ān, 2: 83. Al-Qur'ān, 4: 36. Al-Qur'ān, 6:151.

⁸ Al-Qur'ān, 46: 15. Verse with same meanings.

⁹ Al-Qur'ān, 17:23 & 24.

the meaning of annoyance (*al-adhā*). The meaning of annoyance further elaborates the prevention of *nafaqah*/maintenance during their frequent need. Therefore, maintenance is obligatory even if they are able to earn, because meaning of annoyance is more in tiredness and fatigue.¹⁰ A wealthy child will be forced to provide maintenance to his parents even if they are sound to prevent the harm that causes tiredness and fatigue.¹¹ Though, a Muslim and a *dhimmī* are not obliged to provide maintenance to their parents who are 'the people of war (*ahl al-ḥarb*)' even if they are *musta'min* in an Islamic state.¹²

Another verse of the Holy Qur'ān, which was revealed to encourage Muslims for spending on their parents, states that "They ask you what they should spend (in the way of Allah). Say: Whatever wealth you spend (is right), but the deserving ones are your parents and close relatives and orphans and the needy and the wayfarers."¹³ Ibn Kasīr mentioned that Maymūn b. Mehrān read this verse and said, "These are the places of alimony".¹⁴ In his exegetic work, Khāzin states that spending on parents is due as their right upon the child. Māwardī indicates one of the two positions of this verse that this verse, which afterwards was repealed by verse of *zakāt*, was revealed before it to obligate the maintenance of family.¹⁵

Almighty Allah has also granted the right to non-Muslim parents as the Holy Qur'ān states, "And if both of them contend with you that you should associate (others) with me, of which you have no knowledge, then do not obey them. And cooperate with them in worldly affairs in decent manner."¹⁶

There are many tractions of the Prophet (peace be upon him) elaborating the rights of parents in the property of their children. 'Ā'isha, may God be pleased with her, narrated, the aunt of

¹⁰ Sarakhsī, *Al-Mabsūt*, 5:222.

¹¹ *Ibid.*, 5:228.

¹² *Ibid.*, 5:228-229.

¹³ Al-Qur'ān, 2:215.

¹⁴ 'Imād al-Dīn Ibn Kathīr, *Tafsīr al-Qur'ān al-Azīm*, (Dār Ṭayyiba li al-Nashr wa al-Tawzī', 1999), 1:572.

¹⁵ Abū al-Ḥasan al-Māwardī, *al-Tafsīr al-Māwardī*, (Beirut: Dār al-Kutab al-'Ilmiyya), 1:272.

¹⁶ Al-Qur'ān, 31:15.

Umārah b. Umayr, May God be pleased with her, asked her that she has an orphan in her guardianship. May she enjoy from his property? Aisha told her that The Messenger of Allah said, “The pleasantest things a man enjoys come from what he earns, and his child comes from what he earns.”¹⁷ Sarakhsī states, according to one of the two narratives, *nafaqah* of parents will be taken equally from wealthy sons and daughters. The position of Imam Abū Ḥanīfah in this perspective is that *nafaqah* between sons and daughters is divided while upholding analogy (*Qiyās*) on the distinct shares of male and female in the inheritance.

The other narrative elaborates that parents are entitled to have *nafaqah* due to their (actual) proprietary right in the property of the child.¹⁸ If actual proprietary right does not exist, then the parents have the right of ownership (*tamlīk*) during a need.¹⁹ However taking anything from the property of son is legal whether he permits his parents or not. It is legal for parents to use that property while remaining within the conditions of non-extravagancy and knowledge or skillfulness.²⁰ Second narrative presented by Sarakhsī takes its’ authority from the Hadith narrated by Abdullah ibn Amr ibn al-As that a man came to the Prophet (peace be upon him) and said: I have property and children, and my father finishes my property. Prophet Muhammad replied, “You and your property belong to your father; your children come from the pleasantest of what you earn; so enjoy from the earning of your children”.²¹ Interpreting ‘You and your property belong to your father’ estates, Sarakhsī says that both male and female children are equal in this regard, and so this right is saved and be granted to parents even if they have

¹⁷ Abū Dāwūd Sulaymān b. al-Ash’ath, *al-Sunan* (Beirut: Dār al-kitāb al-Arabī), 3:312, Ḥadīth No. 3530 and Muḥammad b. Ḥibbān, *al-Ṣaḥīḥ* (Beirut: Mu’assasat al-Risālah, 1993), 10:73, Ḥadīth No. 4260.

¹⁸ Sarakhsī, *al-Mabsūt*, 5:222.

¹⁹ ‘Alā’ al-Dīn Abū Bakr b. Mas’ūd al-Kāsānī, *Badā’i’ al-Ṣānā’i’ fi Tartīb al-Sharā’i’* (Beirut: Dar al-Kutub al-Ilmiyyah, 1986), 4: 30

²⁰ Sayyid Sābiq, *Fiqh al-Sunnah*, (Cairo: al-fataḥ li al-Ālam al-Arabī), 3:276.

²¹ Abū Bakr Aḥmad b. Ḥusayn b. Alī al-Bayhaqī, *al-Sunan al-Kubrā* (Karachi: Jāmi’a al-Dirāsāt al-Islamiyya, 1989), 3: 191, Ḥadīth No. 2896.

distinct religion although, the prohibition of transfer of inheritance is due to the difference of religion between them.²²

2. Right to Receive Maintenance

It is obligatory duty of children to provide maintenance to parents but there are certain conditions inflicted for obtaining maintenance according to Islamic Jurisprudence, which are following. *Sarakhsī* includes in parents, the grandfather (father of father), grandmother (the mother of father) and the mother of mother. In this perspective, he proclaims that they are from parents and get maintenance as grandfather gets residuary portion of inheritance in the case of non-existence of father.²³

The right of the parents on the property of the children is restricted with the condition that they should be poor and needy.²⁴ *Sarakhsī* elaborates the entitlement with a condition that both the parents and child must not be needy and poor, otherwise they both have equal position and none of them will be entitled to take maintenance from other on priority basis.²⁵ Further, if the parent is unsound mind, his son is liable to give him maintenance according to the ruling of proprietary right of father upon the property of son irrespective of his own father (father of father). The wealthy son is liable to pay maintenance to his father in the same way as if he is sound mind but needy and poor; his maintenance is upon his son and not upon his father.²⁶

Children are liable to provide maintenance even if parents are non-Muslims. As quoted above the verse of *Surah Luqmān* "And cooperate with them in worldly affairs in decent manner". While interpreting the verse, *Sarakhsī* states, they should not be left to die with hunger. A non-Muslim parent is entitled to take

²² *Sarakhsī, al-Mabsūt*, 5:222.

²³ *Ibid.*,

²⁴ *Sayyid Sābiq, Fiqh al-Sunnah*, 3: 276.

²⁵ *Sarakhsī, al-Mabsūt*, 5:222. *Imām Abū Yūsuf* said, "If the father is unsound (physically or mentally) and the earning of the son does not increase from the expense of himself, he must include the father to himself. As the father will die due to exclusion (if he do not include with himself in expenses) and if he do so (include expenses of father in the expenses of himself), there is no fear of the loss of child because a man does not perish on half of his belly". *Ibid.*,

²⁶ *Ibid.*, 5:229.

maintenance from his Muslim child in the same way as dhimmi parent (a non-Muslim parent living under the protection of Muslim state) is entitled to take maintenance.²⁷

Imām Abū Ḥanīfa, Imām Mālik and Imām Shāfi'ī took the position that father can take from the property of his son while being proportional to his need.²⁸ They have also described that needy child can also take from his wealthy father. For this assertion, they quote the narration of Prophet (peace be upon him) for the wife of Abu Sufyān. As he said, "there is nothing wrong on your behalf, if you take from the property of your husband whatever is sufficient for you and your child."²⁹ While, Imam Ahmad stated that father can take from the property of son according to his desire during need.³⁰ It is plain from the statement that he has not made any condition of proportionality to level of need. However taking anything from the property of son is legal whether he permit his parents or not. Moreover, it is legal for parents to use that property while remaining within the conditions of non-extravagancy and knowledge or skillfulness.³¹

3. Statutory Law of Pakistan

Basic framework of Pakistani law is British common law as inherited after independence. With the passage of time, certain Islamic principles have been inserted in the law to make it in consonance with Islamic injunctions. As Article 227 of the Constitution of Islamic Republic of Pakistan 1973 declares that, no law shall be made against the injunctions of Islam. In a case, *Haji Rana Muhammad Shabbir Ahmad Khan vs. Federation of Pakistan* through Attorney-General for Pakistan,³² it has been held that:

"After addition of Article 2-A in the Constitution, the Holy Qur'an and the *Sunnah* became the Supreme Law of Pakistan and the courts are obliged to enforce the existing laws with such

²⁷ Sarakhsi, *al-Mabsūt*, 5:226.

²⁸ Sayyid Sābiq, *Fiqh al-Sunnah*, 3:276.

²⁹ Ibn Ḥibbān, *al-Ṣaḥīḥ*, 10:71, Ḥadīth No. 4258.

³⁰ Sayyid Sābiq, *Fiqh al-Sunnah*, 3:276.

³¹ *Ibid.*,

³² PLD 2001 SC 18.

adaptations as are necessary in the light of Holy Qur'an and Sunnah to uphold the holy provisions thereof."

Further, section 226 of *Principles of Mahomedan Law* by D.F Mulla describes as: "Children in easy circumstances are bound to maintain their own parents, although they may be able to earn something for themselves."³³

The Government of Pakistan has made certain welfare reforms to empower senior citizens in a society such as Employees Old Age Benefit Act 1976, Social Security Act 1965, Employees Benevolent Fund and Pension for Government Employees and Government. At provincial level, laws are also enacted such as The Balochistan Senior Citizens Welfare Act 2017, The Sindh Senior Citizens Welfare Act 2014 and The Khyber Pakhtunkhwa Senior Citizens Act 2014. While Punjab Senior Citizens Welfare and Rehabilitation bill 2017 as well as The Islamabad Capital Territory Senior Citizens Board Bill, 2017 are yet to be passed after final discussions in the relevant institutions.

Subsequently, specific enactments for the maintenance of different persons in one family are acknowledged in relation to the maintenance of wife and children under The Muslim Family Laws Ordinance 1961 and The Family Courts Act 1964 respectively. While, no specific law recognizes the maintenance of needy and poor parents by their children. Still there is a dire need to enact a separate law for the maintenance of needy and poor parents to empower them in a society.

According to this writer, no petition for maintenance or assistance of parents has been preceded in the courts of Pakistan.

Council of Islamic Ideology. – Council of Islamic Ideology has passed a resolution in relation to the Islamic concept of family and stated that parents, dependent brothers and sisters must also be included in the definition of family under Islamic society.³⁴

³³ D.F. Mulla, *Principles of Mahomedan Law* (Bombay: The Caxton Works Fort, 1905), 184.

³⁴ Council of Islamic Ideology, *Annual Report*, (Islamabad: Council of Islamic Ideology, 1980-1981), 122.

In 1993, the Council presented a draft to promulgate an Act for the maintenance of relatives. According to it, a financially stable Muslim is liable to maintain his close relatives who are poor and needy. This draft proposes to enact a law to protect the legal right of the relatives. This draft also contains certain provisions in relation to maintenance of parents.³⁵ These are the following provisions.

Clause 4 of the proposed draft states that stable children are liable to pay maintenance to their poor parents and grandparents in spite of their ability to earn livelihood. In the case if parents or grandparents are physically or mentally disable, their maintenance upon children is obligatory with the condition of children being employed even not financially stable.³⁶

All the children (without any distinction of being male or female) of a needy person are equally liable to pay maintenance to their father. In this situation, rules of inheritance shall not to be applied.

Section 5 states that the children of a disable person are liable to maintain him, in the case if his father and children both are alive and financially stable. While, if children are not financially stable then his father will be liable to pay maintenance to him.

Section 6 defines that maintenance of wife, children, parents and grandparents is obligatory upon the person in the case of having distinct religions.

Section 7 prescribes food (facility of health care), clothing (according to the summer and winter), and residence includes in maintenance. Court will take following things in to consideration while determining the maintenance.

- Capability of the person who has to provide maintenance.
- Capability of the person who will take maintenance.

³⁵ Council of Islamic Ideology, *Social Reforms Report*, (Islamabad: Council of Islamic Ideology, 1993), 143-145.

³⁶ *Ibid.*, 144. See the explanation on the same page: "Financially stable means a person who is liable to pay zakat or his monthly income is more than the necessary expenditures of his family".

- Expenditures of life, social and economic situations of the society.

Section 9 elaborates that a person who is liable to have maintenance according to the proposed draft, he may file a petition in relation to The Family Courts Act, 1964 (Act XXXV of 1964) and the provisions of this act will be entirely applicable to the petition.

In its 2006-2007 Report, the Council also recommended the Parliament to legislate in order to discourage the trend of evicting elderly parents from their homes. To this effect, legislation for prevention against eviction of elderly Parents from home is to be enacted.³⁷ Council has also recommended inflicting punishment in case of violation to this law. In addition, it recommends that State should ensure the maintenance and assistance to such people while considering the status of their family.³⁸

4. Maintenance of Parents and Legislation in Bangladesh

Many Islamic countries have enacted maintenance laws for the welfare of parents in their countries. As we have recent example of Bangladesh, which has enacted welfare law named as 'The Parents Maintenance Act 2013' due to the challenge and security of the proper maintenance of elderly in Bangladesh. Therefore, the country enforced these responsibilities through the enactment.

Under the Act, parents may get remedy by complaint if a child does not provide maintenance without any logical cause or force them to live in old home or at any other place without their consent³⁹. According to Muslim Family Law Ordinance 1961, maintenance means a legal remedy of payment to the wife that leads an amount for the purpose of food, clothing and residence.⁴⁰ In Parents Maintenance Act 2013, word maintenance includes

³⁷ Council of Islamic Ideology, *Annual Report*, (Islamabad: Council of Islamic Ideology, 2006-2007), 288.

³⁸ *Ibid.*, 151 & 259.

³⁹ S. 3(4), *Parents Maintenance Act, 2013*.

⁴⁰ S. 9 (1), Muslim Family Law Ordinance 1961. The same law is enforced in Pakistan and Bangladesh.

food, clothing, medical facilities⁴¹, residence and company given by the child.⁴² It is also made obligatory upon children to maintain communication with the parents within their capability if they live separately from them.⁴³

The male and female children are equally responsible to maintain their parents according to this act.⁴⁴ It does not distinguish between children in the case of being more than one and states that they may provide maintenance by consultation among themselves.⁴⁵ The Act does not confine duty towards father and mother but extend it in the absence of father and mother of child towards the maintenance of grandparents (both from father and from mother).⁴⁶ While, the act does not explicitly elaborate the word parent and the question arises in relation to inclusion or exclusion of the parents of foster, adoptive and illegitimate children. In relation to amount, it is stated that the child has to provide a reasonable amount for maintenance from their earnings if the parents do not live with them.⁴⁷

The Act also enumerates provision on the crime and punishment. If the child violates section 3 and 4, he/she shall be entitled to the highest punishment of one lakh taka and, in default of money, he/she will be liable to the highest imprisonment of three months.⁴⁸ Besides, the wife or husband of any child, if provokes and does not cooperate in providing maintenance, he/she shall also be liable to the same punishment.⁴⁹ The offence is described as cognizable, bail-able and compoundable and the accused person may get bail as well as the offence may be resolve out of the formal court system.⁵⁰ The Act has not specified any provision specifying the amount of maintenance and time.

⁴¹ Every child must take care of his/her parents regularly and provide medical facilities. S. 3(5) of Parents Maintenance Act, 2013.

⁴² S. 2, Parents Maintenance Act, 2013.

⁴³ Ibid., S. 3 (6).

⁴⁴ Ibid., S. 3 (1).

⁴⁵ S. 3 (2), Parents Maintenance Act, 2013.

⁴⁶ S. 4, Parent Maintenance Act 2013.

⁴⁷ Ibid., S. 3 (7).

⁴⁸ Ibid., S. 5 (1).

⁴⁹ Ibid., S. 5 (2).

⁵⁰ Ibid., S. 6.

Further, the parents (no other than parent) must file the written complaint, otherwise the court will not accept.⁵¹ This point may be criticized in relation to illiterate parents.

5. Conclusions and Recommendations

Life is a precious gift of Almighty Allah. Allah Almighty has made a man best among all creatures and imposed certain duties to be fulfilled by him. These impositions include legal and moral obligations. Certain legal obligations are acknowledged for the persons living in one family. For elderly person as parents and grandparents right to maintenance as a legal obligation of children is provided under Islamic Jurisprudence. This paper has elaborated the collective position of Jurists in relation to the construction of legal right of needy parents. Council of Islamic Ideology has also prescribed and acknowledged this obligation of children as a right of parents under Islamic Injunctions and recommended to enact law in this perspective. These laws shall also be enacted in Pakistan for the benefit, welfare and empowerment of the elderly in the country while looking towards the rulings of Islamic jurisprudence and Muslim states.

It may be pertinent here to give some recommendations to the Government and policymakers for enacting a law for the maintenance of parents.

An Act should be promulgated to establish a legal right of parents to maintenance under Pakistani Law.

A law should be made for prevention against eviction of elderly Parents from home and heavy penalty should be enforced to implement law.

Free legal council should be introduced for the senior citizens/ parents for filing a petition in the court of law.

A precise procedure should be elaborated for speedy trial and interim maintenance.

⁵¹ Ibid., S. 7 (2).

Amount of maintenance should be described according to the status and expenditure of children.

In case, if children are poor and financially unstable, maintenance should be provided by the state on average basis.

Public awareness should be made to support the reform through government, social parties, NGOs and the public.

Islamic education in relation to the maintenance and assistance of parents should be introduced in schools, college and university level throughout the country.

Free medical service should be provided by the Government to the needy elderly.

NGOs and Social Welfare Organizations should be encouraged to enhance their role towards elderly care services.
