ILLEGITIMACY AND THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD AND ITS APPLICATION IN KADHIS’ COURTS

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ABSTRACT

The aim of this paper is to examine the concept of illegitimacy vis a vis the principle of the best interest of the children in a number of arena, including paternity, maintenance, custody, inheritance and guardianship.

According to some Jurists the legal disability existing between a non-marital children and their biological father aims not only discouraging non-marital child bearing but also the act of adultery and fornication. Others are aware of societal biases against the non-marital children, as a result, they are protecting the interest of those children vide the realization of the principles of “no vicarious liability” which absorbs the guiltless child from unfair treatments in consequence of the acts done by their biological parents.

The study takes into account the important shift that ‘the principle of the best interest’ has recently brought about in jurisprudential landscape of filiation in Kadhis’ Courts. In this study, the question that needs anxious response is the combination of the two leading opinions of jurists and the interest of the child born as a result of illegitimate act.
PREJUDICE AGAINST NON-MARITAL CHILDREN

No one disputes the facts that non-marital children since the dawn of civilization suffered discrimination informed either by law and/or society. At Common Law, a child born out of wedlock was filius nullius (the child of no one). It was considered object, non-persons, incapable of inheriting from a parent, siblings or any other relatives, and had no legal right to parental support and left in parish where he was born.  

At Islamic legal system, a child born out of wedlock is regarded as ‘Mother’s child’. He’s precluded from holding of religious visibility and responsibility; - He lacks competency to make a call for prayers or lead congregational prayer. He has no right to wrongful death caused by his biological father. The probative value attached to his evidence is nil.

The discrimination against the non-marital children on societal perspective is justified on the ground that it would deter illicit relationship, preserve and strengthen the family and precludes a biological father from enjoying the fruits of his crime.

Against this background, the assumption is that the dominant classical paradigm is not protective of both the genre of non-marital children and their mother. It has monstrous hardship on the female party, which includes ‘stigma’ and child support. To escape such burden, such mother normally aborts the child or dumps it once delivered.

Despite acknowledging the two leading schools of legal thoughts, Courts of law continue treating children begotten out of wedlock different from marital children when determining issues affecting their life including paternity (recognition), maintenance (support), custody, and guardianship and inheritance rights.


Paternity

Paternity means fatherhood or status of being father. Establishing paternity is the legal process of determining the biological father of a child. When parents are married, in most cases, paternity is established without legal action. If parents are unmarried, the presumption of maternity is established without a court order.

The establishment of the paternity of children born out of wedlock is difficult by all standard, however, becomes more complex in case where a mother cannot identify ‘a putative father’ on account that she had been intimate with more than one man at the assumed period of conception. The importance of the paternity is exemplified in the fact that it defines and determines several legal rights and obligations created by Islamic law.

The grand principle that establishes paternity in Islamic law is drawn from a Prophetic report that “ the paternity of the child is for the owner of the conjugal bed or the rightful owner of the bed (al-walad lil-firash).” The Jurist disagreed over the exact meaning of the term ‘firash. Ibn Qayyim al-Jawziyya recorded three leading opinion on the meaning of the term ‘firash’: the marriage contract itself, according to Abu Hanifa; the marriage contract with feasibility of consummation of marriage, according to al-Shaf’i and Ibn Hambal; and the marriage contract with verified consummation of marriage, according to Ibn Taymiya.

According to the first school of legal thought the principle of al-walad li-l firash is construed as a valid marriage (nikah) or the legal ownership (istilad), which is no longer practiced, on the following accounts: the Prophetic rule ‘al walad li-1 firash’ overrules any attribution of the paternity of a non-marital child, Secondly, the Prophet disapproved the pre-Islamic custom of istilhaq. Thirdly, approving istilhaq ‘ascribing the paternity of a non-marital child’.

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The second school of legal thought argued that in addition to an established marital relationship, the other methods of establishing paternity includes, Istihaq vide acknowledgment and Evidence, on the following account: not attaching the paternity of the non-marital child to the biological father will result in the deprivation of the blameless child from the right of paternity, a natural right of every human being, which subjects him to continued stigmatization and unfair treatment in consequence of acts done by another. This course of action will be contrary to the principle of “no vicarious liability”. Secondly, the averment made by the Prophet, after administering the oath of condemnation (lian) between Hilal and his wife, that: “watch out if the child resembles sharik, is his, “a cogent proof of recognizing biological father. Similarly in the case of Ibn Zam’ah, he ordered Sawdah to veil herself from the boy after finding resemblance between him and Utbah/biological father. Thirdly, Umar (R.A) used to attach the paternity of illegitimate child on the basis of biological ground to the father the same way when such a child is attached to his mother (by qiyas).

In concurring with the qiyas, Ibn Qayyim vehemently argued that a valid analogical deduction dictates that if the illegitimate child’s paternity can be assigned to the mother because of her share of seminal fluid, the same rational should hold true in the case the male party as he is also the other contributor of sexual material.

1. This view is supported by the four leading schools of Jurisprudence; i.e. Maliki, Shafi, and Hambali among others. The proponents of this school express their condemnation of irresponsible liaisons beyond the bonds of marriage by denying the non-marital child a right to paternity on moral & general welfare because it discourages bring child into the world out of wedlock. See also RWK v A MA (2016) eKLR
3. Supported by Ibn Qayyim, Ibn Taymiyah among others, the proponents of this view express their condemnation of imposing disabilities on the non-marital child as fiction of the law. The Muslim jurists who laid down the principles of paternity were not indifferent to the laws of nature. They were motivated by a desire to prevent illicit relationship. See also RWK v A MA (2015)eKLR
4. “Every soul draws the deed of its acts on none but itself; No bearer of burdens can bear the burden of another”. Qur’an, 6: 164)
6. Abu Daud:vol. 3.p 63
7. Al-Muwatta p. 75
8. Ibn Qayyim, Zad al-Ma’ad Vol. 5 p. 307 & 582
This creature is the product of sexual fluid of both the male and female parties in such a sexual encounter. Both of them are guilty of the same sin, hence if one is biologically related to him/her, the other should be as well. Accordingly, the biological father must bear the burden by virtue of the legal maxim, “liability accrues from benefit”.

Lastly, the grand principle of Islam on preservation of paternity and child care and protection against social ills demand that istilhaq should be upheld so as to provide these children with social placement and protection to save them from social deviation, moral corruption and criminality. ¹

Further, the proponent (the second school) of this school refuted argument by the opponent (the first school) by stating that: The opponent understanding of the Prophetic rule on firash is inaccurate. According to them the Prophetic rule on firash establishes a presumption of paternity on a child born within wedlock and that it doesn’t extend to a child born out of wedlock as the case of Ibn Zam’ah². Secondly, they further submitted that the report disapproving the ascribing non-marital child to his biological father as attributed to Prophet is a weak report³ and even if accepted it’s limited to slave women’s child born as a result of illicit relationship⁴. Thirdly, the opponent rationale argument, namely the deterrence effect of non-attachment rule is not only problematic but if view against the background of Islamic deterrent principle against adultery/fornication is untenable as the reverse is true, i.e. linking non-marital child to his biological father and obligating him to bear the burden of maintaining the child will deter him and other potential sex predators⁵.

Notably, the grounds for ascertaining the paternity through the principle of ‘conjugal bed’ by and large are quite lenient. A child born within six months of marriage and/or beyond two years after the dissolution of marriage, when a mother is not married, is presumed to be legitimate.

It is within the knowledge of Muslim Jurists the normal period of gestation then why did they allow a maximum period of two years? Through such clemency the law attempts to preserve social values and order by shielding the mother and the child from possible censure. However, the effect of the presumption of legitimacy created by law must not stand if rebutted by conclusive proof.⁶
INTESTATE SUCCESSION

Classical Islamic law paradigm maintains a distinction between a non-marital and marital child for the purpose of intestate succession. According to the first school of legal thought, non-marital child is entitled to inherit his mother by virtue of his status as ‘a child of a mother’; the paternity is strongly presumed and need not to be proven but, he is barred from inheriting his biological father intestate, by virtue of his status as ‘illegitimate child’ notwithstanding judicial finding of paternity or paternal acknowledgment by the father.¹

In contrast, the second school of legal thought allows a non-marital child to inherit intestate from and through his biological father if there is a judicial finding affirming his paternity to the child or presumably, if the father openly and notoriously recognizes the child to be his child devoid of any rebuttal or through evidence.²

According to the former school of legal thought the evidence of genetic relationship alone is not clear and convincing proof for establishing paternity as a result of illicit engagement as ground of intestate inheritance and a non-marital child must establish paternity before claiming a share from his father’s estate, according to the latter school of thought.

Undoubting, the legal status of the child born out of wedlock in relation to holding of jurist among the second school of thought is key towards realization of the principle of the best interest and none vicarious liability keeping with the higher objectives of law (maqasid-u-shari’ah).³

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¹ ibid
² Ibn Taymiyyah, Majm al-Fatawa, Vol.32 p. 113
³ Al-Shawkani, Nayl Al-Awtar, Vol. 6 p. 184
⁴ Ibn Qayiim, Zad al-Ma’ad Vol. 5 p. 383
⁶ The intention of law regulating the presumption of paternity is meant to prohibit unscrupulous father from: making bald accusation against the child & mother & failing to undertake his parental duties. See also in Re Estate of Ramadhan Hassan(2014)eKLR.
TESTAMENTARY SUCCESSION

The law still maintains distinctions between non-marital and marital child for the purpose of testamentary succession. Although the first school of legal thought may no longer bar non-marital children from inheriting their biological father but they require them to satisfy the confirmation of the instrument creating will to the limitation on quantum as laid down by Islamic Law of Succession. ⁴

In contrast, non-marital children are not entitled to inherit testamentary from their biological father, according to the second school of legal thought by virtue of their status as equal to marital children. For marital children they are equally barred from inheriting from their father testamentary by virtue of law of limitation on beneficiaries to inherit.¹

¹ al- Mawsua al-fiqhiyya, vol. 45 p. 223 ; A non-marital child is the legitimate child of his mother so that him & his brother born legitimately from his biological father &mother, inherit from her mother &her maternal kindred. In Re Estate of CCBH (2018) eKLR

² ibid ; within the ambit of the second school of legal thought, among Hassan & Ibn Siyrin, a child born out of wedlock is not foreclosed from inheriting, intestate from his biological father upon prescription of penalty of fornication or adultery.

³ The maqasid al sharia revolve around the question of how to understand the eternal message in light of the challenges posed by changing social, economic and political environment of modern world. The usefulness of the principle of philosophic-legal cum hermeneutical tool is meant to protect life, wealth, intellect, wealth and lineage.

⁴ The Book of Bukhar 51:7: The power of testator is limited in two ways, firstly he can’t bequest more than a third(1/3) of his net estate. Secondly, he cannot make a Will in favor of a legal heir.

MAINTENANCE

The responsibility of the father to provide maintenance for his children is unconditional and absolute². The responsibility of father to provide support to his children is created by
consanguinity. A non-marital child is less likely to receive financial support from his biological fathers.

The first school of legal thought argued that a biological father, according to his means, is responsible for the maintenance of his children with regard to the ‘birth status’ of his children, thus children born as a result of illicit relationship even if the paternity is established by either evidence or acknowledgment, are barred from receiving any financial support from their biological father and, that it is their mother who only bears the responsibility of supporting the children born out of wedlock.

In contrast, if paternity is established legally by either judicial evidence or acknowledgment, according to the second school of thought, it will create a duty upon a biological father to provide financial support for a non-marital child. Thus, non-marital parent (father) owes the same duty towards the children irrespective of their ‘birth status’ as marital parents do.

Difference in child support is generally as a result of juristic failure to appreciate the distinction between the parental rights and duties. The former school of legal thought concentrated on rights instead of obligation, in consonance with the principle of *ex turpi causa non oritur actio*, that it is wrong to allow a biological father to profit from his wrong. Whereas the latter school concentrated on the welfare of the child as the first and paramount consideration and shall not take into consideration whether the child is born within/without marital ties.

1.Narrated Abu Hurayrah (RA): Allah’s Prophet (SAWS) said, ”Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir. The book of Abu Dawud 17: 2864. However the two limitations (on quantum and beneficiaries) can be rendered valid by the consent of all heirs.


3. ..And on the child’s father is their food and clothing…..Al Baqarah V. 233

4. al- Mawsua al-fiqhiyya, vol. 41 p. 80: ….An heir shall be chargeable in the same way..”Chap. 2 v 233 according to Hambali lawyers.

5. ibid
CUSTODY

When a mother of a non-marital child is incapacitated, does a biological father have a right to the custody of his child? Or in a situation where two persons not married to each other lived together for seven years with their two children. After some years a dispute arises between two of them as to the upbringing of the children and the biological father applies for custody of them, suppose the interest of the children demand the children be placed under the custody of their father. Can the unmarried mother defeat the father’s claim on the basis of the ‘birth status’ of the children?

When discussing about the question of entitlement, in relation to custody, seems to be considered as a right to be vested upon a certain properly qualified relative of the child such as the mother, father or other relatives. In fact, it’s a shared right between the ward and the entitled custodian(s). The ward share stems from the fact that it’s weak and unable to take care of itself and therefore it may suffer irreparable damage if no support and care is given to it. Whereas, the custodian share of his right stems from the particular reason that can be used as a basis for providing him/her entitlement to the office of custody. Jurists seem to discuss custody in the context of a marital child as a non-marital child exclusively belongs to the mother. Accordingly to the first school of thought, since paternity of a child born out of wedlock cannot be attributed to his father. The ‘birth status’ of the child renders the biological father incompetent to seek for orders regarding custody.

Conversely, if paternity of a non-marital child is established by either judicial evidence or acknowledgment by a biological father, this will create a shared right between the ward and the father, according to the second school of legal thought. However, it’s a well-established principle in various jurisdictions that the relevant laws on custody of the child must focus on the best interest of the child as paramount determinant factor.

GUARDIANSHIP

The fiduciary relationship created by law between a guardian and a ward, born out of wedlock, whereby the guardian assumes the power to make decision on behalf of the ward’s person or property is primarily vested on mother alone. Natural father of a child born out of wedlock doesn’t have any rights of guardianship in respect of his child born out of wedlock merely by virtue of his
‘birth status’. The first school of legal thought is in consonance with the aforementioned holding, on the ground that the birth status of the child negates the paternity of a biological father and the child.

In contrast, since the second school of legal thought argues that if the biological father establishes paternity of the ward vide a judicial evidence and/or acknowledgment; the putative father shall be recognized as a guardian by nature.

CONCLUSION

The central thought emerging from this brief study is that within the discursive Islamic legal tradition, legitimacy is defined by linkage to the traditional sources, authoritative figures, and important precedents. The integration of the principle of the best interest of the children within the garb of the higher objective of law (Maqasid of Shariah) is an important example on how the Islamic legal thought responds to social challenges that threaten its long-standing authority in one of the remaining legal fields that have survived the powerful onslaughts of modernity.

1. Al-Zuhayli W, Al-fiqh Al Islami Wa Adillatahu ,V. 7 p. 719

2. The paternity regulation has always been connected with other family law rules pertaining to issues such as custody and guardianship etc. For right to custody to exist the paternity must be established by marriage alone.

3. Al-Zuhayli W, Al-fiqh Al Islami Wa Adillatahu ,V. 4 p. 139