

Illegitimate Child (*Walad Al-Zina*) And His Position In Islamic Succession

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I. Introduction

Before a person can claim his right to inherit his deceased relative, he must show that he is related to him through one of the grounds of inheritance. Nevertheless, a situation may arise where by a relative is barred to claim his right to inherit even though, he might be duly falling under one of the grounds of inheritance.

This is a situation whereby he is falling within one of the impediments to inheritance. These impediments are those factors that are recognized by the Shari'ah as those acts if committed by a heir or he found himself in without his own act, would bar him from inheriting his deceased relative. They are as follows:

- Difference of Religion
- Intentional killing
- Slavery
- Illegitimacy
- Mutual Imprecation
- Still-born
- In ability to determine who die first.¹

This paper as the titled shows it is going to pay attention only to one of the above mentioned factors.

II. Illegitimacy

Is a product of an illegal intercourse between a man and woman which is under the law regarded as an illegitimate child.² such a child cannot therefore inherit his father, for he is a by-product of zina.

Like wise the father cannot inherit that walad-zina. The prophet (May the peace and blessings of Allah be upon him) said:

The child belongs to one on whose lawful bed it is born.³

In another tradition the prophet (S.A.W) was reported to have said:

If a woman commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may any one inherit from him.⁴

Based on the two traditions stated above it is clear that, this child is considered illegitimate as a result of extra-marital sexual relationship (zina) and as such a child can not be legitimized. And illegitimate child (waladul-zina) does not inherit from the father and the father does not inherit from the illegitimate child.

III. Inheritance Share Of An Illegitimate Child

Under Sunni Muslim law, the illegitimate child is entitled to inherit from the mother and her relations whether legitimate or illegitimate and they can inherit from him according to the Hanafi, Maliki, and shafi'i's fiqh, the mother and her relatives inherit from an illegitimate person according to normal rules of succession.

An illegitimate person who does not leave a surviving son or son's son h-l-s will have no agnatic residuary heirs.⁵

While according to the Hanbali fiqh, the male agnatic relatives of the mother inherit from an illegitimate person as if they were the male agnate relatives of the illegitimate person when there are no true male agnates.⁶ All heirs inheriting as they are given their shares first before this rule comes into operation.

Therefore, according to the Hanbali fiqh, the mother's son (Uterine brother), mother's father (Maternal grandfather) and mother's full brother (maternal uncle) will inherit as residuaries and exclude other surviving heirs in the capacity of 'son' 'father' and 'full brother'. However such maternal male agnate relatives will not agnatisate their female counterparts into residuaries.⁷

The uterine brother of the propositus can inherit in dual capacity as a Qur'anic heir and as a residuary. He will also be able to inherit as a residuary in the presence of a daughter (or agnatic granddaughter) of the propositus. The rule of tanzil is applied as under normal principles.

IV. Confession By Adulterer

In a situation where by an adulterer (zani) voluntarily made a confession that he has committed an extra marital sexual relationship with a particular woman and her baby is his own biological son.⁸

In this regard, there are different opinions of scholars. Majority of the Muslim scholars unanimously agreed that such confession will not legitimize the baby. This is because (Nasab) blood relation is a blessing and it can not be built on something that is unlawful.

While scholars like Ibn Taymiyyah Ishaq bn Rahawiyyah viewed that, the confession of an adulterer legitimized the baby and as such his (Nasab) blood relation is valid.⁹

They said since his (Nasab) blood relation in the side of his mother is confirmed and established despite the evil she committed. The same thing will apply to the father's side. His (Nasab) blood relation became valid upon his confession, they further added that this is to protect the dignity and Nasab of the child in the society, and he should not be blamed for an evil that he has not committed. Al-Qur'an says:

If you disbelieve indeed, Allah is free from need of you. And He does not approve for His servants disbelief. And if you are grateful, He approves (i.e. likes) it for you; and no bearer of burdens will bear the burden of another then to your Lord is your return He will inform you about what you used to do indeed He is knowing of that within the breasts.¹⁰

This is the understanding of the above scholars

Gestation Period

Muslim jurists have placed limits on the minimum and maximum period of gestation allowed under Islamic law to determine the legitimacy of a child.

Minimum gestation period

The minimum gestation period is six lunar months deduced from the Qur'anic verses. Almighty Allah says in the Qur'an:

And we have enjoined upon man (care) for his parents. His mother carried him (increasing her) in weakness upon weakens and his weaning is in two years. Be grateful to Me and your parents to Me is the (final) destination.¹¹

In another verse:

And we have enjoined upon man, to his parents, good treatment. His mother carried him with hardship and gave birth to him with hardship, and gestation and weaning (period) is thirty months (he grows) until, when he reaches maturity and reaches the age of forty years he says, "my Lord, enable me to be grateful for your favor which you have bestowed upon me and upon my parents and to work righteousness of which you will approve and make righteous for me my offspring. Indeed I have repented to you and indeed I am of the Muslim."¹²

According to the Hanafi fiqh, the presumption of legitimacy starts from the time of marriage contract. If a woman gives birth to a child within six lunar months of her marriage, the child is not considered to be of the husband. However, if the husband accepts the child then the child is legitimate and entitled to same rights as any other legitimate child.¹³ Note that the husband in this situation acknowledges legitimacy which already exists; he is not making an illegitimate child legitimate.

According to the other three schools of Law the minimum gestation period for presumption of legitimacy starts after consummation of the marriage whether acknowledged by the parties or presumed by Law when there is no hindrance to sexual intercourse.

If a divorced woman after her waiting period (Iddah) re-marries and a child is born within six lunar months of the second marriage and within the maximum gestation period allowed under Islamic law, the child is of the first husband. However, if a divorced woman after her waiting period (Iddah) re-marries and a child is born within six months of the second marriage, but after the maximum gestation period from the termination of the first marriage allowed under Islamic Law, the child cannot be attributed to either the present or the previous husband.¹⁴

Maximum Gestation Period

The maximum gestation period is two lunar years from conception to delivery according to the Hanafi fiqh and four lunar years according to the other Sunni fiqh, although more than one view has been attributed to Imam Malik (R.A) one of which puts the limits at five years, and another for seven years.¹⁵

However based on the sources available to us, it is clear that the most acknowledged view is four years. Clear evidence shows that, we can give here the case of a woman whom her husband is lost. Umar (R.A)

directed the woman to wait for good four years before she could marry again in order to ascertain her status i.e. to know whether she is pregnant or not.

V. Conclusion

It should be noted that, anyone who is impeded from the inheritance can not affect or disturb the share of the heirs. He is considered not existing in Law. It is also clear that, majority of the Muslim scholars considered walad al-zina as illegitimate child and as such he can not inherit his father and the father can not inherit him. He can only inherit from his mother's side.

End Notes

- [1]. S.O. Muhammad, The distribution of estate in Islam, N.p, Ilorin, 2001, Pp.7-10
- [2]. Ibid, P.9
- [3]. A. Hussain, The Islamic law of succession, Darussalam, Riyadh, 2005, P.251
- [4]. Ibid, P.250
- [5]. Ibid, P.252
- [6]. S. Fauzan, Al-tahaqiqat al-Mardiyah fi al-Mabahis al-Fardiyah, Islamic University, Madinah, 1415 A.H. P.218
- [7]. Ibid, P.219
- [8]. M. M. Ambu, Fiqh al-Muwarith fi dau' al-Kitab wa Sunnah, Maktab al-Iman, Egypt, N.d, P.226
- [9]. Ibid, P.227
- [10]. Al-Qur'an 39:8
- [11]. Al-Qur'an 31:14
- [12]. Al-Qur'an 46:15
- [13]. A. Hussain opcit, P. 251
- [14]. Ibid, P.252
- [15]. Ibid, P.252.