

Implications And Consequences Of Illegitimate Child (Walad Al-Zina) In Islamic Law: A Classical View

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Abstrak

Artikel ini menghuraikan konsep anak zina (walad al-zina) menurut pandangan Islam. Juga dibincangkan dengan terperinci perkara-perkara yang berhubung dengan perzinaan dan kesannya serta akibat kepada anak hasil dari perzinaan. Perkara utama yang ditekankan ialah kedudukan anak zina dari aspek moral dan agama, di samping kepada siapakah mereka dinasabkan

Introduction

Muslim scholars have characterised the child's illegitimacy based on certain features. Illegitimate child has certain rights and provisions relating to moral, religious, legal position and other aspects. This article seeks to examine those rights and provisions as revealed by the Muslim jurists in the classical book of Islam.

How Illegitimacy is Established

Legitimacy of the child in Islam is based on the establishment of legal paternity (*nasab shar'i*). The status of a child begotten through a legitimate relationship would be regarded as legitimate, hence, he or she would be entitled to receive maintenance, guardianship and inheritance.

An illegitimate genealogical relationship (*nasab ghayr shar'i*) in Muslim family law denotes any child whose status is not legitimised on the basis *al-walad li al-firash*.¹ According to all the jurists, there are three categories which bring about the illegitimacy of a child.

i. The first category, *zina* - is regarded as the strongest reason for the illegitimacy of a child born as a result. Strictly speaking, *zina* in Islam occurs through illicit sexual relations - fornication in which both parties are unmarried, or adultery when one or both parties are married. While both parties if the act is properly witnessed, i.e. four witnesses seeing the act will be punished by the *hadd* penalty, only the unmarried woman will be punished if she becomes pregnant without the act having been witnessed. The resultant offspring will be illegitimate (*walad zina*).

ii. The second category concerns the offspring arising within a legitimate union where certain features occur which render certain offspring illegitimate. In this category, Muslim jurists have determined four features where if one of them is fulfilled, the child's illegitimacy is confirmed.

1. Imprecation (*li'an*) - *Li'an* can be defined as an oath which brings about divorce. A husband may without legal proof (i.e. four witnesses seeing the act) allege adultery by his wife without becoming liable to punishment for *qadhf* (the legally unsubstantiated allegation of adultery) and deny the paternity of a child born to his wife.² The process of *li'an* is an oath sworn by the husband that his wife has committed adultery. This might involve adultery where no pregnancy ensues or the husband might wish to disown the conception of the wife. In her turn, the wife takes an oath to deny it. As already stated, in order to validate the charge made by a husband against his wife, the allegation would normally have to be supported by four witnesses and would involve the *hadd* punishment. By the process of *li'an* the solitary evidence of the husband can be accepted for the purpose of divorce if he bears witness four times followed by an oath before Allah that he is solemnly telling the truth. And the oath should solemnly invoke the curse of Allah on himself if he is telling a lie. The wife, in her turn, follows the same practice in her denial. As the Qur'an clearly states:

"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evil-doers. Save those who afterward repent and make amends. (For such) lo! Allah is Forgiving, Merciful. As for those who accuse their wives but have no witnesses except themselves, let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth. And yet a fifth, invoking the curse of Allah on him if he is of those who lie".³

The conjunction of these two rules in the Qur'an, i.e. the punishment for *qadhf* and the rule for *li'an*, indicate that *li'an* was intended to be a means for a husband to divorce his wife when he was sure that she had committed adultery but could not legally prove it. It must be stressed that although a divorce through *li'an* involves the accusation of adultery, no *hadd* penalty is involved. Thus, the reason for the husband using this form of divorce, when other forms are readily available to him, must be that he wants to publicly stress his wife's adultery. This might come about as a result of bitter-

ness of being cuckolded. However, he would also be drawing the attention of society in general to his spurned position and with the easy availability of the ordinary form of divorce there would be no reason for him to undergo such humiliation. On the other hand, if his wife is pregnant as a result of the adultery, then the true nature of this *li'an* form of divorce becomes more apparent because according to the doctrine of *al-walad li al-firash*, the child of the wife's adultery would be legally entitled to claim paternity from her husband. As a result of *li'an*, this is no longer possible because, according to all the jurists, there would be no blood-relationship between the husband and the child. The disjunction of the child's *nasab* from a paternal relationship with the husband would be regarded as absolute and this was the reason that the Prophet Muhammad has adjudicated that the son of the fornicating woman could not be acknowledged by the husband, if the husband claimed that the conception of the child was a result of adultery.⁴

According to al-Shafi'i, if the husband feels the child who was born by his wife is not his, it is his duty to disown the child immediately.⁵ The child of *li'an* is publicly shown to be illegitimate, the cuckolded husband has no involvement in its maintenance and care and all the other legal provisions which normally exist between father and child. Thus, when there is a legal union between the husband and the wife but the child has become an issue of dispute between the husband and the wife, as in the case of *li'an*, the child would be regarded as illegitimate unless the child is acknowledged by the husband, when it would be considered as legitimate. The descent of a child born in a legal union is established from the claimants, i.e. the father, master or the acknowledger, so long as the claimant has sufficient proof. Thus, any child born to any woman where there is a legal union with the husband or master and the husband does not disown the child, the child should be regarded as his even if the wife has been disowned on the basis of *li'an*.⁶

It is reported that the first *li'an* occurred when Hilal b. Umayyah accused his wife of committing adultery with Sharik bin Samha'. The allegation made by Hilal is reported to have been true because dissolution of the marriage between Hilal and his wife was confirmed by the Prophet Muhammad.⁷ This is because it is reported that Hilal's wife refused to invoke the curse, thus, confirming Hilal's allegation. The Prophet Muhammad predicted that Hilal's wife would deliver a curly-haired black child.⁸

It should be noted here that if the husband knew that his wife had been unfaithful and that the child born to her was not his, he was not required to use the process of *li'an*. In terms of strict observance of the letter of the law as interrelated by the jurists, if he did not use the process of *li'an*, the child would be regarded as his according to the doctrine of *al-walad li-al-firash*. The wife's adultery would, then, only have effect if it had been witnessed by four witnesses or if she, for some reason, made a fourfold confession of it to the authorities. Thus, although contrary to the religious spirit of Islam, *nikah al-istibda'* could still continue. The matter was, then, one involving the consciences of the participants and their relationship with Allah.

2. The Period of Gestation after the divorce by or the death of a husband or master. Most Muslim scholars agree that in order to determine a child to be considered as legitimate, the child must have been born at least six months after the marriage took place.⁹ According to the Shafi'is, the Malikis and Ahmad Ibn Hanbal, the wife must give birth at least six months after the marriage contract takes place, the husband and the wife must have been able to be together at the beginning of the period, because 'six months' is the minimum period of pregnancy.¹⁰ Thus, the child of a divorced woman who had observed 'iddah should be regarded as legitimate so long as the conception was not more than two years or four years for the Shafi'is and the Hanbalis respectively and five years for the Malikis.¹¹ Thus, if conception takes place after more than the maximum period of gestation, the *nasab* of the child would be regarded as illegitimate as it must have arisen out of *zina*.¹²

3. Inability to beget ('*adam al-qudrah 'ala al-injab*). According to most of the Shafi'is, when a husband has no ability to beget the child like a eunuch (*majbub*), a child born to the wife could be regarded as illegitimate because a eunuch, according to them, would not be able impregnate a woman.¹³ However, the Shafi'i Abu 'Ubaydah b. Harbawayh regards the child as legitimate. *Al-Iqna'* reports:

'Abu 'Ubaydah b. Harbawayh who held the post of a judge in Egypt adjudicated that the child born to a wife of a eunuch (majbub), should be affiliated to his father. The report says that a eunuch (mamsuh), carried his son on his shoulder and wandered about in the Egyptian market and said, "Look at the judge i.e., Abu 'Ubaydah b. Harbawayh who has agreed to affiliating illegitimate children or bastards to slaves. He also agreed to affiliate the child to its father even though the father is a eunuch (majbub) or a castrate (al-khasi). Thus, the waiting period of the woman whose marriage has been dissolved by talaq or the death of a husband who is a eunuch or a castrate, is by delivery of the child since despite the lack of both testicles, the instrument of the semen remains. The availability of both testicles merely enhanced the proceeding of blood circulation. If a dead castrate, at the time of his death leaves a pregnant wife, the child who is born to the woman thereafter, may be affiliated to that man. The waiting period of such a woman therefore, is until delivery because his male sexual organ (alat al-jima') still remained. Moreover, if the husband extensively penetrates his male sexual organ into his partner, the emission may occur even if with little sperm".¹⁴

The Malikis maintain that his status as a father will depend on the view of the medical experts (*ahl al-ma'rifah*); if the expert's view is that the eunuch is able to impregnate a woman, the child should be attributed to him, but if the expert's view was the opposite, the child could not be affiliated to him.¹⁵ The rest of the jurists, following

the doctrine *al-walad li al-firash*, maintain that the child is legitimate.¹⁶

4. According to the Hanafis, when a master refuses to acknowledge paternity of a child born by his slave girl, the child would be regarded as illegitimate.¹⁷ However, as he owns the slave-girl, the child would also be his slave.

iii. The third category, is the child born of a marriage from a union which the parties know to be unlawful. This includes deliberate marriage to women prohibited from marriage by their close relationship, also deliberate marriage with an idolator, polyandry and taking a fifth wife.

The Moral/Religious and Legal Position of the *Walad Zina*

i. The Moral/Religious Status of the *walad zina*. There appears to have been a degree of dispute about the moral/religious status of the *walad zina* among the early traditionists and jurists. They report of Traditions from the Prophet with regard to the moral/religious status of the *walad zina*, which are particularly unclear. In the *Musannaf* of al-San'ani, a range of conflicting Traditions seem to reflect a societal attitude against the *walad zina*, on the one hand, and an attempt to introduce a more balanced moral view of his position, on the other. This is reflected in Traditions attributed to the Prophet and to the Caliph 'Umar.

On the one hand, 'Abd Allah b. 'Amr reports from the Prophet that the *walad zina* will not enter Heaven.¹⁸ Tawus is also reported as having spoken harshly about the destiny of the *walad zina* in the Hereafter.¹⁹ Another Tradition from Wahb claims that he had read in some books that *walad al-zina* would not enter Heaven up to the seventh generation and that Allah lightened that for this ummah and made it up to the fifth generation.²⁰ Abu Hurayrah is said to have believed that the *walad zina* was the most evil of the three involved in his birth; i.e. he was more evil than his mother and father.²¹ In another extraordinary Tradition attributed to the Prophet on the authority of 'Ikrimah, it is claimed that when the people called out to the father of a *walad zina* that he was the worst of the three, the Prophet contradicted them and said that he was the best of the three. The people changed that to the *walad zina* being the worst of the three.²²

On the other hand, we see 'A'ishah denying that the *walad zina* is the worst of the three and arguing that the blame for his parents' action should not be put on him, using the Qur'anic text, '*no bearer of a burden can bear the burden of another...*' [al-An'am: 164].²³ In addition, Ibn 'Umar also denies Abu Hurayrah's claim that the *walad zina* was the worst of the three and claims he was the best of the three.²⁴

There is little or nothing in the literature on this subject after al-San'ani's (d.211) *Musannaf* until al-Bayhaqi (d.458). This might suggest that because of the nature of this dispute and the hostile attitude among the more 'upright' in society, it was deemed better to ignore it. However, al-Bayhaqi returns to the discussion quoting the Traditions on both sides of the dispute which al-San'ani has reported.²⁵ In addition to the Traditions of al-San'ani on the *walad zina* not entering heaven, he quotes other *hadith* which

explains that this means that if the *walad zina* behaves in the same way as his parents, he will not enter paradise.²⁶ Al-Bayhaqi also provides a commentary on the statement that the Prophet said that the *walad zina* was the worst of the three. He maintains:

“That the words do not have a general meaning but refer to a hypocrite who was causing trouble for the Prophet. The Prophet asked who would give him relief from such a person. He was told that the man, in addition to his attitude, was a walad zina. At this, the Prophet commented that this man (i.e. the troublesome hypocrite) was the worst of the three”.

Thus, al-Bayhaqi by this description suggests that it was only this particular *walad zina* who was the worst of the three, and he was that by virtue of his attitude towards the Prophet. In support of this he quotes the Prophet repeating the Qur’anic phrase that ‘A’ishah had quoted ‘no bearer of a burden can bear the burden of another... [al-An’am :164].²⁷ This seems to indicate that any idea of the *walad zina* being condemned for the sins of his parents is not acceptable - at least morally. However, the existence of the traditions suggests that there was a natural disposition to condemn the *walad zina* which was not based on morality/religion.

ii. The Legal Status of the *walad zina* - The arguments among Traditionists and jurists about the legal status of *walad zina* reflect the argument about the *walad zina*’s religious and moral status. The main statements highlighted by the Traditionists and jurists have focused on the followings: (i) *nasab* of the *walad zina*, (ii) maintenance and care, (iii) bloodwit (*diyah*), (iv) inheritance (v) marriage, (vi) leading the prayer (*imamat al-salah*), (vii) giving testimony, (viii) slavery and manumission, and (ix) *salat al-janazah*. As will be seen, the first five of these are directly connected with the *nasab* of the *walad zina* while the others are outside that legal aspect.

1. The *Nasab* of the *Walad Zina*

All Muslim jurists hold that the *nasab* of the child of *zina* or *li’an* would be attributed to his/her mother’s kinsfolk (*qawm*).²⁸ This is because, as already stated, the illegitimate child has no relationship of *nasab* from the father and there would be no *wala’* from the father’s side (*janib al-’ab*).²⁹ Therefore, according to all the jurists, the illegitimate child would be associated (*mansub*) to his/her mother’s kinsfolk;³⁰ the mother’s *wali*, before her marriage, if she had been married, would be the child’s *wali*. The child would also be associated to her *wala’*, if she was a client (*mawla*).³¹ Therefore, when a man has committed *zina* with a woman and she delivers a son, even if he claims that he is the father, this would not be accepted because the descent of the illegitimate child is established from the woman by birth. Accordingly, when a man claims the paternity of such a child, whose mother is a slave and in the possession of another, the child’s *nasab* is not established from him because such a child is considered to be illegitimate (*walad zina*).³² However, if the man should subsequently, by any means, be

proved to be the proprietor of its mother, the child is emancipated although the mother of the child would not become *umm al-walad*. However, if he said, "This is my son by wickedness", or, "I did wickedly with her and she gave birth to this child", or, "This is my son by what is not right",³³ the child would not have his *nasab*. But if the claimant should say, "He is my son", without adding, "by *zina*"- the child having no other father - and should he afterwards become his proprietor, the child's descent from the claimant would be established, and the child would be free. In like manner, if the man should say, "He is my son by an invalid (*fasid*) marriage or invalid (*fasid*) sale" or he should claim him under problematic intercourse (*wat' shubhah*), his descent would not be established so long as he continues in the possession of another; but if the man himself should afterwards become the proprietor of the child, the child's descent from him would be established, and the child would be free; and his mother also, if she should come into the man's possession, would become his *umm al-walad*".³⁴

In the words of Subhi Mahmassani, the status of the child of *zina* must be ascribed to its mother and the *nasab* of the mother.³⁵

Some may consider that it is somewhat strange that it is the mother's *nasab* that the child takes and not the actual father, i.e. the other party to the adultery. However, in legal terms, the only way that such a situation might have been able to occur was by the actual father admitting his adulterous act and the child of that act being confirmed as his by the process of physiognomy (*qiyafah*).³⁶ Proper admission of adultery, i.e. four separate confession of it by the actual father, would result in him receiving the *hadd* penalty. Therefore, there was no encouragement for any but a 'pious' adulterer to confess. The woman's accusation that he was the father would have no effect in law without four witnesses to their adultery. Therefore, the same would have to be the case in a matter of adultery outside the doctrine of *al-walad li al-firash*. Thus, the preponderance of the legal circumstances necessitate that the *nasab* of the illegitimate child should be attributed to the mother whose birth of the illegitimate child is the only certain fact in the case.

2. Maintenance and Care (*Hadanah*) of the *Walad Zina*

It is clear from the previous discussion of the *nasab* of the *walad zina* and *walad li'an*, that the responsibility for care and maintenance must reside with those to whom the child's *nasab* is attributed. Thus just as the *nasab* of the *walad zina* and *walad li'an* belongs with the mother and her family, so does the responsibility for care and maintenance.³⁷

In the case of *li'an*, the Malikis are quoted as saying that a woman who was divorced by her husband through *li'an* has no right to claim maintenance from her husband, even if she is pregnant, because the inviolability (*'ismah*) of the woman has been regarded as having been terminated as a result of the alleged activities which led to *li'an*. This is because, a woman would be entitled to claim maintenance from her husband as long as her pregnancy is associated with him as the owner of the waiting

period (*sahib al-'iddah*). Therefore, according to the Malikis, a husband, who accused his wife of committing adultery (*mula'in*) which had resulted in pregnancy but then he acknowledged paternity of the child, would be liable for *hadd* punishment for slander (*qadhf*) but the child could be affiliated to him (*al-mula'in*). The mother would be liable for providing maintenance of the child before the acknowledgment of paternity was made even though the father was rich (*musir*) at that time.³⁸

On the other hand, the Shafi'is, are reported to have said that if a father disowned the child born to his wife but later acknowledged the child's paternity, the mother for the child would still be responsible for providing maintenance and care for the child, not the father.³⁹ Thus, they make the first statement of the husband invalidate his second statement, i.e. his change of mind. This would be similar to the case of the mother having to provide maintenance for the child of *li'an* who was not acknowledged by her former husband. In the event of the mother providing maintenance for the child without a judge's sanction and she needed to borrow money from her former husband, the amount paid by her husband would be regarded as the woman's debt owed to that husband. Thus, if her loan was witnessed, the judge has to adjudicate that the husband has the right to recover the sum from his former wife.⁴⁰ Strictly speaking, according to the Malikis, a pregnant woman who has been divorced by *li'an* cannot be entitled to maintenance because her pregnancy does not affiliate the child to her husband.⁴¹ Therefore, as far as the maintenance of the child is concerned, *li'an* is based on the situation of a witnessed adultery - as if four witnesses had been present. However, if the wife was already six months pregnant when the *li'an* or the actual witnessing of her adultery took place, the child is entitled to maintenance from the husband. Presumably, this is on the grounds that the belatedness of the *li'an* of the witnessed adultery after conception has taken place means that there is a strong possibility that the child is his, despite the mother's later adultery. The reverse situation arises in terms of the husband who had caused the *walad zina* to be illegitimate by *li'an*. The *walad zina* would not be responsible for providing maintenance for the husband (since he was not his father, according to the law). The responsibility of providing maintenance on the basis of parentage (*nasab*) could not be applied (*irtifa'*) as the child has been disowned by its father and was regarded as a child of *li'an*. There is no legal relationship between the father (!) and the son (!).⁴²

According to Abu Hanifah, if a pregnant woman is proved guilty of *zina*, the *hadd* punishment cannot be inflicted on her until she has delivered her child. In addition, *hadd* penalties cannot be carried out on her immediately after delivery unless the new born baby would have someone else able to give suckling.⁴³

In all of these cases, there is a strong probability that the woman who has to provide maintenance for the illegitimate child would not have the means to do so. As the illegitimate child's *nasab* has been associated with the mother, as already mentioned, the mother's *wali* and immediate agnates, e.g. father, brother, uncle, cousin would take over the responsibility, because, as we will see later, they are involved in mutual inheritance with the illegitimate child. Thus, the transference of *nasab* to the

mother would mean that the mother's *wali* would become the illegitimate child's *wali*. This would seem to be the theoretical legal background to the maintenance of the illegitimate child. However, this may not have always actually taken place as the result of the shame that the adultery or fornication of the woman brought to her family. Thus, it seems that the plight of both mother and child might be a life of poverty and perhaps corruption.

The care of the child, which will include suckling it, feeding it and providing it with as comfortable an atmosphere as possible is always the responsibility of the mother in marriage, although her husband is required to provide the means for this to take place. In the case of an illegitimate child, this duty of care (*hadanah*) is still required of the mother. In the case of the mother divorced by *li'an* or those whose illegitimate children have been born as a result of fornication by consent (i.e. they were unmarried virgins previously), this duty still rest upon the mothers who should be supported by her family and her *wali*. However, in the case of a woman who has been married being convicted of *zina*, they are given a remission of two years to suckle the child before they are stoned to death. The responsibility for care (*hadanah*) will then fall on the woman's family, particularly her close female relatives, like mother, grandmother and sisters.⁴⁴ The Islamic jurists do not seem to have discussed what would happen if the woman's family rejected her and her child. It seems that, in this case, it should be the duty of *bayt al-mal* or the state to intervene but this is not explicitly stated.

In cases of a child being born as a result of rape, the jurists appear to be silent on whether the child would be regarded as legitimate or illegitimate. However, it would seem impossible that the child should be regarded as legitimate. There are two reports in the *Muwatta'* explicitly stating what would happen to the woman committing *zina* by force, i.e. rape (*mustakrahah bi al-zina* or *mughtasbah*), the *hadd* punishment would be inflicted on her if she could not provide proof that she had really been forced to commit *zina* but the raped woman is entitled to receive dower (*mahr*) from the rapist. *Al-Muwatta'* reports:

"Malik related to me from Ibn Shihab that 'Abd al-Malik Ibn Marwan gave a judgement that the rapist had to pay the raped woman her bride-price. Yahya said that he heard Malik say, "What is done in our community about the man who rapes a woman, virgin or non-virgin, if she is free, is that he must pay the bride-price of the like of her. If she is a slave, he must pay what he has diminished of her worth. The hadd punishment in such cases is applied to the rapist, and there is no punishment applied to the raped woman. If the rapist is a slave, that is against his master unless he wishes to surrender him".⁴⁵

The second report concerns a woman who is pregnant and claims that she has been raped. *Al-Muwatta'* reports:

"Malik said, "The position with us about a woman who is found to be

pregnant and has no husband and she says, 'I was forced', or she says, 'I was married', is that it is not accepted from her and the hadd is inflicted on her unless she has a clear proof of what she claims about the marriage or that she was forced or she comes bleeding if she was a virgin or she she calls out for help so that someone comes to her and she is in that state or what resembles it of the situation in which the violation occurred". He said, "If she does not produce any of those, the the hadd is inflicted on her and what she claims of that is not accepted from her". Malik said, " A raped woman can not marry until she has restored herself by three menstrual periods". He said, "If she doubts her periods, she does not marry until she has freed herself of that doubt".⁴⁶

As for the Hanafis, Shafi'is and Hanbalis, Ibn Qudamah says:

"The hadd punishment cannot be inflicted on woman who having no husband or is [not under the ownership of a] sayyid gets pregnant. If she claims that she has been forced to commit zina, or has had problematic sexual intercourse (wat' shubhah) or she does not admit committing zina. This is the view of Abu Hanifah and al-Shafi'i. In contrast, Malik holds that such a woman should be punished if she is resident and not a stranger. However, if there are signs (that the woman has been forced for zina) like she comes screaming for help or shrieking, (the hadd cannot be inflicted on her)".⁴⁷

Thus, it would appear that Malik seems to be more demanding of evidence for rape than the Hanafis and Shafi'is. It would appear that when the rape is established, the raped woman receives the appropriate dower. This would help towards the maintenance of the child but it would appear that the rapist is escaping much of his responsibility, whether or not the *hadd* of stoning is administered on him because the child he brought into existence by his violent sexual act is not being paid for out of his wealth.

It is useful to describe the children who are regarded as illegitimate in Islamic law and who will be responsible for their maintenance. The first category are those born to married mothers who conceived them in a properly witnessed act of adultery. Their mothers will be liable to the *hadd* punishment of stoning after the children have been suckled. Their maintenance and legal status will then belong to the families of the mothers. The second category is those born to the *thayyib*, that is a divorcee or a widow, who has not remarried. In her case, she would be condemned to the *hadd* punishment of stoning, if she was properly witnessed in the act of adultery or if she gave birth to a child outside the possible limits of her *'iddah*. Any child that she gave birth to would become the responsibility of her *wali* and her family. The third category are children whose illegitimacy has been made known by *li'an*. The mothers are not liable to the *hadd* punishment for witnessed adultery and will be responsible together with their

families for the child's maintenance and care. The fourth category are those who are born to unmarried mothers who give birth to them whether their fornication was witnessed or not. These women will be liable for the *hadd* punishment of flogging but they will have to continue their duty of care and maintenance for the children and they ought to be supported by their families.

3. Bloodwit (*Diyah*) for the *Walad Zina*

In the case of the child committing any crime involving *diyah*, his/her mother's kinsfolk will be liable for the payment of bloodwit (*diyah*), that is the responsibility of that particular *diyah* must be referred to the '*aqilah*' of the child's mother.⁴⁸ This arises directly out of the fact that the *walad zina*'s *nasab* has been attributed to the mother and her family.

4. Inheritance of the *Walad Zina*

The majority of the schools of law are in agreement to declare that the child of *zina* cannot inherit from the former husband of the mother because there is no *nasab* relationship between him and the child, which is the basis of the designated heirs.⁴⁹ Furthermore, all the jurists maintain that due to fact that the *nasab* of the *walad zina* has been attributed to the mother and her family, the *walad zina* not only is allowed to inherit from his/her mother,⁵⁰ but also from any other designated heirs of the mother, including her sisters and her agnates ('*asabah*').⁵¹ They also enjoy reciprocal rights of inheritance from the child.⁵² Thus, the father of the child would not allowed to inherit from the illegitimate child as clearly stated in the *hadith* of the Prophet Mu)ammad which says:

*"Any man who commits zina ('ahar) with a free woman or a slave, the child [of such 'ahar] is considered as a child of zina, the child cannot inherit from its father and the father also cannot inherit from him/her".*⁵³

This is clearly because the father is not associated with the *walad zina* in any legal aspect of the *walad zina* concerned with *nasab*.

5. The Marriage of the *Walad Zina*

Muslim scholars do not have a consensus on matters relating to the girl child of *zina* as to whether her actual biological father of such a child could be allowed to marry her. For instance, the Shafi'is and some of the Malikis are reported to have declared that such a man is allowed to marry the illegitimate daughter, sister's daughter, daughter's daughter, daughter's brother and daughter's sister.⁵⁴ This is because, according to them, those women are legally considered unrelated (*ajnabiyyah*),⁵⁵ and this nullifies the Qur'anic prohibition of marriage with those who are biologically related (*maharim*). Thus, the biological father is not allowed to inherit from her nor has the daughter the

right to claim maintenance from the physical father. However, Malik is reported to have withdrawn his previous view and stressed that the father is prohibited to marry his child of *zina* and the sexual intercourse which takes between him and his illegitimate daughter would be regarded as unlawful. This view is reported to have been agreed by the Malikis.⁵⁶ The Hanafis and the Hanbalis are of the view that the biological father would be strictly prohibited from marrying his illegitimate daughter. This is because, even though from the viewpoint of the canonical law of Islam the girl was not regarded as related to him, i.e. she did not derive her *nasab* from him, in fact, she was the production of the father's illicit sexual intercourse with her mother.⁵⁷ According to the Hanbalis, it is reported that Ahmad Ibn Hanbal was told of a man who had committed *zina* with a woman. As a result, the woman gave birth to a child. That man, i.e. the father, later married his illegitimate child. When the matter was referred to Ahmad Ibn Hanbal, he was reported to have adjudicated that the man should be killed because the man's position (*manzilah*) was regarded as like a Muslim who turned from the Islamic religion (*murtad*). However, Qadi Abu Ya'la, while commenting on this view, says:

*"It would be sufficient to categorise the sexual intercourse which takes place between the father and the illegitimate daughter as unlawful, as he knows that the child is his daughter outwardly (fi al-zahir) although the nasab of the child is from another person".*⁵⁸

Other Legal Aspects of the Walad Zina

1. Leading the Prayer

There was disagreement among the early jurists about whether it was possible for the *walad zina* to lead the prayer. Some of early scholars hold that the *walad zina* should be allowed to lead the prayer as long as he is an upright person.⁵⁹ This view is held by Ibrahim al-Nakha'i,⁶⁰ Hasan al-Basri,⁶¹ al-Sha'bi,⁶² 'Ata' b. Abi Rabah,⁶³ Sulayman b Musa,⁶⁴ al-Zuhri,⁶⁵ Ishaq b. Rahawayh,⁶⁶ and 'Amr b. Dinar.⁶⁷ A clear example which we have of the *walad zina* leading the prayer is that of Ziyad b. Abihi whose mother was a prostitute from al-Ta'if who had a relationship with Abu Sufyan before he became a Muslim.⁶⁸ The result of that relationship is said to have been Ziyad. Later, Mu'awiyah tried to make his position more regular by declaring that he was his brother.⁶⁹ As far as the the status of the child's illegitimacy is concerned, the history of Islam does not underate the child as 'Ali's governor in Fars, one of Ziyad's duties would have been to lead the prayer. This seems to reinforce the view that, at least, in the early days of the Islamic empire, the attitude to the *walad zina* leading the prayer was not hostile.

However, Malik put forwards a Tradition that 'Umar b. 'Abd al-'Aziz is said to have summoned a person of an unknown father who had been leading the prayers in al-'Aqiq (near Madinah) and to have prohibited him from serving again as *imam*.⁷⁰ This attitude, the *walad zina* leading the prayers was ascribed to Malik and al-Shafi'i who all

regarded it as reprehensible (*makruh*) and later it was adopted by the Hanafis, the Malikis and the Shafi'is generally.⁷¹ According to Malik and al-Shafi'i, the reason why they hold that the *walad zina* being an *imam* was reprehensible (*makruh*) is because the *walad zina* is of an unknown father (*la yu'raf abuh*).⁷² As far as this prohibition of the *walad zina* leading the prayer is concerned, al-Zurqani, the later Maliki commentator on the *Muwatta'*, maintains:

*"Malik regarded it as reprehensible (makruh) for the walad zina to serve as an imam ratib, i.e. imam who officiates the five daily prayers, but not the one who serves as imam of superogatory (nawafil) prayers, (i.e. it is not reprehensible)."*⁷³

Further he says:

*"This is because, according to Malik, if the walad zina is allowed to lead the prayers it would bring about gossip among the people (ma'rad li kalam al-nas) which, in effect, is sinful."*⁷⁴

In other words, Malik appears to be suggesting that the *walad zina* leading the prayer would cause the people to commit a sin by talking maliciously about him. The Malikis further argue that generally the *walad zina* is not knowledgeable in religion.⁷⁵ Al-Baji (d.494), another Maliki commentator on the *Muwatta'*, justifies this by maintaining:

*"The position of the imam is respected, and therefore it should be given priority and should be regarded as one of the most important matters in religion. Thus, the imam of the prayers is similar to leaders of the Islamic community ('umara' and khulafa') which require that such a person must not have a deficiency in qualities (naqs)".*⁷⁶

Thus, according to the Malikis:

*"It is reprehensible (makruh) to appoint the walad zina as an imam because he was created from wicked sperm (nutfah khabithah)."*⁷⁷

The Hanafis also maintain:

*The walad zina serving as an imam is reprehensible (makruh) and that the ma'mum who follows him will not get a reward from Allah".*⁷⁸

According to al-Shafi'i:

*"The prohibition is only reprehensible (makruh) because the imam is regarded as in a respected position (mawdi' fadl) and rewards are not only for the imam himself but also for those who pray behind him. However, the makruh nature of the walad zina leading the prayer does not require those who have performed the prayer behind him to repeat it".*⁷⁹

In contrast to the view held by those three schools of law, the Hanbalis maintain that the *hukm* of the *walad zina* serving as an *imam* of prayer (whether *rawatib* or *nawafil*) is not reprehensible so long he is sound in religion (*salima dinahu*). The status of the *walad zina* according to the Hanbalis is similar to a slave. It is not reprehensible for a slave to become an *imam* of the prayers even though the *hurr* has a priority to be an *imam* over the slave.⁸⁰ The Hanbalis justify their position through a *hadith* of the Prophet Muhammad:

*“A person is allowed to lead (ya’umm) the people in prayer so long as he is (one of) the best in recitation of the Holy Qur’an (aqra’uhum). In the case of two men whose qualities are similar, the one who is knowledgeable in the traditions should be given priority. However, if the knowledge of the traditions is similar, then choose the one who had first participated in the migration to Medina (hijrah). If they still have similar qualities, priority should be given to the one who preceded in embracing the Islamic religion. A man would not be allowed to lead the prayers who was under another’s authority (sultan)...”*⁸¹

This is because the *walad zina* has nothing to do with a crime committed by its parents as al-Qur’an says that, ‘...’no bearer of a burden can bear the burden of another...[al-An’am (6):164] and ‘... the noblest of you, in the sight of Allah, is the best in conduct...’[al-Hujurat : 13].⁸²

2. Giving Testimony

‘Umar b. ‘Abd al-‘Aziz and Nafi’ are reported to have rejected the testimony of the *walad zina*.⁸³ However, Sa’id al-Ansari, Layth b. Sa’d and Malik only rejected testimony in the case of those who had committed *zina*.⁸⁴ Al-Sha’bi,⁸⁵ and ‘Ata’ b. Abi Rabah,⁸⁶ the Hanafis and the Hanbalis admitted it without qualification.⁸⁷ Al-Shafi’i emphasizes specifically that such testimony is valid in cases involving *zina*.⁸⁸ In other words, provided the *walad zina* was a just man, the circumstances of his birth had nothing to do with the acceptability of his evidence. Thus, despite early objections to the testimony of the *walad zina*, the jurists have taken a more positive attitude to this than they did toward the *walad zina* leading the prayer.

3. Slavery and Manumission

This involves the problem of whether the owner of a slave woman may manumit her illegitimate child. The early legal scholars and Traditionists including ‘Umar b. al-Khattab and his son ‘Abd Allah, ‘A’ishah, Ibn ‘Abbas, Hasan al-Basri, al-Sha’bi, Ibn Jurayj and ‘Ata’ b. Abi Rabah have not only allowed someone to manumit and maintain the *walad zina* but also to manumit its mother.⁸⁹ The Hanafi, al-Sarakhsi quoted the *hadith* reported by ‘Abd Allah b. ‘Umar that a slave woman is reported to have committed *zina* and given birth to a child. Ibn ‘Umar manumitted the mother and her

(illegitimate) child. According to al-Sarakhsi, this is the proof that one of the ways to get closer to Allah (*taqarrub*) is by manumitting the *walad zina*. It is reported also that Ibn 'Umar told the people to treat the *walad zina* well and encourage them to manumit the *walad zina* because the *walad zina* should also be dignified like any other person who has dignity because he/she is innocent, the sinful act was committed by his/her parents.⁹⁰ In *Sunan al-Kubra*,⁹¹ it is reported that Abu Hurayrah had been asked about whether *walad zina* would be allowed to be manumitted. Abu Hurayrah reported in the affirmative. When Ibn 'Abbas was asked by someone about whether to manumit of a slave who was a *walad zina* or a legitimate slave (*walad rushdah*), presumably as an act of atonement (*kaffarah*), he advised that person to see which one of the two would bring the higher price. The person found the price of the *walad zina* was higher by one dirham than the other slave. Then Ibn 'Abbas told him to manumit the illegitimate slave. It is narrated by Sufyan from Yunus from al-Hasan that the manumission of *walad zina* was the same as the manumission of any other slave.

Abu Hasan, the *mawla* of 'Abd Allah b. al-Harith who has been regarded as one of the old (generation) of the *mawla* of Quraysh tribe and most knowledgeable (*ahl al-'ilm minhum wa al-salah*) is reported to have heard that a slave woman who has been manumitted by her patron requested a legal opinion from 'Abd Allah b. Nawfal about whether her illegitimate child would also be manumitted because of her manumission. 'Abd Allah b. Nawfal is reported to have said:

*"I heard 'Umar b. al-Khattab say that he would prefer to go to the holy war (jihad) wearing a pair of sandals ('ala na'layn) rather than manumit a walad zina".*⁹²

'A'ishah, Abu Hurayrah and Mujahid disallow buying and selling an illegitimate slaves and also their manumission. A similar view is reported on the authority of Suhayl b. Abi Salih. He also mentioned that Abu Hurayrah said:

*"To participate in the path of Allah (li 'an umti 'a fi sabil li Allah) is dearer to me than manumitting a walad zina."*⁹⁴

4. Salat al-Janazah of the Walad Zina.

All Muslim jurists hold that in the case of the *walad zina* dies, the funeral prayers should be led by the mother's *wali*, who is, in effect, the *wali* of the child. In general, most Muslim jurists agree that the dead *walad zina* should not be treated differently from any other Muslims.⁹⁵ This is because illegitimate child is innocent as it has been enforced clearly by the *hadith* of the Prophet which says: "*The child of zina is innocent for the sinful acts committed by its parent*".⁹⁶ As far as the moral position relating to *walad zina* is concerned, it is reported that 'Ata' b. Abi Rabah has no objection to visit the *walad zina* if he/she is sick.⁹⁷ 'Umar, Ibn Jurayj and 'Amr b. Dinar maintained that the illegitimate child should be commended to be well behaved and treated well.⁹⁸

Conclusion

In this article, we have seen the regulations regarding illegitimacy has been demonstrated. The evidence shows that the Prophet Muhammad laid the basic foundations for this. However, the details of these rules were developed by later jurists. When the illegitimacy of the child is established beyond contradiction, whether as a result of *zina* or *li'an*, the child derives its *nasab* from the mother. It is her family, who are theoretically required by law to provide for the child and her *wali* will be the child's *wali* in terms of *diyah* and marriage if the child is a girl. There will be reciprocity between the child and the mother's family in terms of inheritance. In other words, Islamic law is attempting to lay down a legal and moral basis for provision for the *walad zina*.

Notes:

1. This is because the majority of Muslim and non-Muslim scholars of Muslim family law have identified the mode of affirming a legitimate *nasab* under the doctrine the child belongs to the bed (*al-walad li-al-firash*). This normally comes about through either a valid marriage (*nikah sahiih*) or concubinage (*milk al-yamin*). However, there are other means accepted by Islamic law as coming within the terms of the doctrine.
2. Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 89; al-Dimashqi, *Kifayat al-Akhyar*, pp. 42-421; Charles Hamilton, *The Hedaya*, p. 123; Ibn al-Najjar, *Muntaha al-Iradat*, section 2, p. 334; Subhi Mahmassani, *Turath al-Khulafa'*, p. 367; Joseph Schacht, see v. '*li'an*' in EI¹, vol. V, pp. 24-26, EI, 1961, p. 569, cf; John L. Esposito, *Muslim Family Law in Egypt and Pakistan*, pp. 78-79; Hammudah 'Abd al-'Ati, *The Family Structure in Islam*, p. 239.
3. Q. 24 (al-Nur) 4-7.
4. See al-Tabari, *Tafsir al-Tabari*, vol. XVIII, p. 85, cf; Ibn al-Qayyim, *Zad al-Ma'ad*, vol. IV, p.109.
5. Al-Nawawi, *Minhaj al-Talibin wa 'Umdat al-Muftin*, p. 103.
6. Al-Khatib, *al-Iqna'*, vol. II, p. 122.
7. See for the detail of the subject in Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. XXII, pp. 351-371, cf; al-Tabari, *Tafsir al-Tabari*, vol. XVIII, p. 85.
8. *Sahiih Muslim*, (translated by 'Abdul Hamid Siddiqi), vol. II, pp. 780-781; See also al-Tabari, *Tafsir al-Tabari*, vol. XVIII, P. 84; cf; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 39; al-Burhanpuri, *Kanz al-'Ummal*, vol. XV, p. 205.
9. Ahmad Ahmad, *Mawdu' al-Nasab fi al-Shari'ah wa al-Qanun*, p. 270.
10. Ahmad Ahmad, *Mawdu' al-Nasab fi al-Shari'ah wa al-Qanun*, p. 270; Ibn al-Humam, *Sharh Fath al-Qadir*, vol. IV, p. 171, cf; Sahnun, *al-Mudawwanat al-Kubra*, vol. V, p. 125; al-Shafi'i, *al-Umm*, vol. V, p. 222, cf; Ibn Qudamah, *al-Mughni*, vol. IX, p. 115, cf; M. Shalabi, *Ahkam al-Ussrah*, p. 686.

11. Ibn 'Abdin, *Hashiyat Radd al-Muhtar*, vol. III, p. 541; Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 268; Abu Zahrah, *al-Ahwal al-Shakhsiyyah*, pp. 411-412.
12. Ibn 'Abdin, *Hashiyat Radd al-Muhtar*, vol. III, p. 541.
13. Al-Ramli, *Mughni al-Muhtaj*, vol. VII, p. 127, cf; Ibn Qudamah, *al-Mughni*, vol. VII, p.429-30.
14. Al-Khatib, *al-Iqna'*, p. 466.
15. Sahnun, *al-Mudawwanat al-Kubra*, *op.cit.*, vol. II, p. 445, cf; Ahmad Ahmad, *Mawdu' al-Nasab fi al-Shari'ah wa al-Qanun*, p. 273.
16. Ibn al-Humam, *Sharh Fath al-Qadir*, vol. IV, p. 299, cf; K.N. Ahmed, *The Muslim Law of Divorce*, p. 878; al-Sarakhsi, *al-Mabsut*, vol. VI, p. 53; Mahomed Yusoof Khan Bahadur, *Mahomedan Law*, vol. I, p. 133; Ibn Qudamah, *al-Mughni*, vol. VII, pp. 429-30; Ahmad Ahmad, *Mawdu' al-Nasab fi al-Shari'ah wa al-Qanun*, p. 272.
17. Al-Marghinani, *al-Hidayah*, vol. II, p. 68. However, according to the majority of jurists hold that the child of *umm al-walad* would be regarded as legitimate even if the master does not acknowledge (*di'wah*) the child. [see for example Sahnun, *al-Mudawwanat al-Kubra*, vol. VIII, p. 23, cf; al-Shafi'i, *al-Umm*, vol. VIII, p. 322, cf; Ibn Qudamah, *al-Mughni*, vol. XII, p. 502; Ahmad Ahmad, *Mawdu' al-Nasab fi al-Shari'ah wa al-Qanun*, p. 276.
18. Al-San'ani, *al-Musannaf*, vol. VII, p. 454; al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, p. 58.
19. Al-San'ani, *al-Musannaf*, vol. VII, p. 454.
20. Al-San'ani, *al-Musannaf*, vol. VII, p. 455.
21. Al-San'ani, *al-Musannaf*, vol. VII, p. 454.
22. Al-San'ani, *al-Musannaf*, vol. VII, p. 455.
23. Al-San'ani, *al-Musannaf*, vol. VII, p. 454.
24. Al-San'ani, *al-Musannaf*, vol. VII, p. 455.
25. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, pp. 58-59, cf; al-San'ani, *al-Musannaf*, vol. VII, pp. 453-455. .
26. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, pp. 58-59, cf; al-San'ani, *al-Musannaf*, vol. VII, pp. 453-455.
27. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, pp. 58-59.
28. Fatwa 'Alamghiri, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baille, *A Digest of Moohummudan Law*, p. 415; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123; S. Ameer Ali, *Student's Handbook of Mahomedan Law*, p.76; Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 266; M. Zayd al-Abyani, *Sharh al-Ahkam al-Shar'iyyah*, vol. II, p. 10.
29. See footnote 30.
30. Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 266; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123; *Fatawa 'Alamghiri*, vol. IV, p. 174; Neil B.E. Baille, *A Digest of Moohummudan Law*, p. 415.

31. Al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123, *Fatwa 'Alamghiri*, vol. IV, p. 174; Neil B.E. Baille, *A Digest of Moohummudan Law*, p. 415; al-Shafi'i, *al-Umm*, vol. IV, p. 86.
32. See *Fatwa 'Alamghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.
33. *Fatwa 'Alamghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.
34. See *Fatwa 'Alamghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.
35. See Subhi Mahmassani, *Turath al-Khulafa'*, p. 182.
36. Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 269; Ibn Qayyim, *Zad al-Ma'ad*, vol. IV, pp. 116-119, cf; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp.300-301; cf; Reuben Levy, *The Social Structure of Islam*, p. 137; Haji Khalifah, *Kashf al-Zunun*, vol. I, pp. 1366-1367, cf; T. Fahd, see v. '*Qiyafah*' in EP, p. 235. As far as physiognomy is concerned in this context, there are two branches; (i) *qiyafat al-bashar* which has the object of disclosing the lines of parentage between the child of an unknown father and his presumed father with a view of legitimation. (ii) *qiyafat al-athar* i.e. the faculty of minutes observation which the Arab displays, most notably in the course of everyday life. The examination of footprints permits him to find stray animal, a fugitive chief, also path etc; he distinguishes the footprints of a man from those of a woman, those of a young man from those of an old man, those of a white from those of a negro and those of a stranger from those of a local resident. He can tell even the woman is a virgin or not. Shurayh, the famous Qadi was a physiognomist (*qa'if*).
37. Seymour, Vesey Fitzgerald, *Muhammadan Law - An Abridgement*, p. 98.
38. Al-Nafrawi, *al-Fawakih al-Dawani*, vol. II, p. 98.
39. Al-Khatib, *al-Iqna'*, p. 481, cf; al-Ramli, *Nihayat al-Muhtaj*, vol. VII, p. 220.
40. Al-Khatib, *al-Iqna'*, p. 481.
41. Ahmad al-Sawi, *Bulghat al-Salik*, vol. I, p. 523.
42. 'Abd al-'Aziz 'Amir, *al-Ahwal al-Shakhsiyyah*, p. 141.
43. Al-Mawardi, *al-Ahkam al-Sultaniyyah*, p. 225.
44. See for example, al-Khatib, *al-Iqna'*, pp. 489-493, see also Shaykh 'Iwad's commentary printed in the margin of al-Khatib, *al-Iqna'*, pp. 489-493; Muwaffaq al-Din Ibn Qudamah, *'Umdat al-Fiqh*, pp. 108-109; al-Ramli, *Nihayat al-Muhtaj*, vol. VII, p. 220; Ibn Qayyim, *Zad al-Ma'ad*, vol. IV, pp. 432-437; 'Abd al-'Aziz 'Amir, *al-Ahwal al-Shakhsiyyah*, p. 141. Thus, a father, who denied (*al-nafi*) that the child was his, would not be responsible for providing maintenance for that child.
45. *Al-Muwatta'*, p. 630, cf; Malik b. Anas, *al-Muwatta'*, (translated by Aisha Abdurrahman Bewley), p. 343.
46. *Al-Muwatta'*, p. 716, cf; Malik b. Anas, *al-Muwatta'*, (translated by Aisha Abdurrahman Bewley), p. 392.
47. Ibn Qudamah, *al-Mughni wa al-Sharh al-Kabir*, vol. X, p. 192.

48. Ibn Rushd, *Bidayat al-Mujtahid*, vol. II, p. 266; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123, *Fatawa Alamghiri*, vol. IV, p. 174; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415, cf; Subhi Mahmassani, *Turath al-Khulafa'*, p.182.
49. Reuben Levy, *The Social Structure of Islam*, p. 147, cf; Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 68-69.
50. Al-Burhanpuri, *Kanz al-'Ummal*, vol. XV, p. 204; al-Shafi'i, *al-Umm*, vol. II, p. 82; al-Zurqani, *Sharh al-Zurqani*, vol. III, pp.123-4; 193; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123; Reuben Levy, *The Social Structure of Islam*, p. 147, cf; N.J.Coulson, *Succession in the Muslim Family*, p.173, cf; Ibn Qudamah, *al-Mughni*, vol. VII, p. 121; Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 76-69; William H. Macnagten, *Principles of Muhammadan Law*, ch.II, p. vi; Abu al-Walid Sulayman al-Baji, *Kitab al-Muntaqi - Sharh Muwatta'*, vol. IV, pp. 82-83; Knyvet Wilson, *A Digest of Anglo-Muhammadian Law*, p. 220; Qadi Abu Yusuf, *Kitab al-Athar*, p. 168; al-Shaybani, *Kitab al-Athar*, pp. 154-155.
51. Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 76-69; William H. Macnaghten, *Principles of Muhammadan Law*, ch.II, p. vi; Abu al-Walid Sulayman al-Baji, *Kitab al-Muntaqi - Sharh Muwatta'*, vol. IV, pp. 82-83; Knyvet Wilson, *A Digest of Anglo-Muhammadian Law*, p. 220; al-Shaybani, *Kitab al-Athar*, pp. 154-155; al-Burhapuri, *Kanz al-'Ummal*, vol. XV, p. 204; al-Shafi'i, *al-Umm*, vol. II, p. 82; al-Zurqani, *Sharh al-Zurqani*, vol. III, pp.123-4; al-Sarakhsi, *al-Mabsut*, vol. VII, p. 123; Reuben Levy, *The Social Structure of Islam*, p. 147, cf; N.J.Coulson, *Succession in the Muslim Family*, p.173, cf; Ibn Qudamah, *al-Mughni*, vol. VII, p. 121; al-Zurqani, *Sharh al-Zurqani*, vol. III, p. 193.
52. Ibn Qudamah, *al-Mughni*, vol. VII, p. 121.
53. Al-Tirmidhi, *al-Jami' al-Sahih*, vol. IV, p. 428; Ibn Majah, *Sunan Ibn Majah*, vol. II, p.917, cf; al-Jassas, *Ahkam al-Qur'an*, vol. III, p. 246.
54. Al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. IV, pp. 63-67, cf; Reuben Levy, *The Social Structure of Islam*, p.139.
55. Reuben Levy, *The Social Structure of Islam*, p. 139, cf; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. IV, pp. 63-67.
56. Ahmad al-Sawi, *Bulghat al-Salik*, vol. I, p. 516.
57. Cf; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. IV, pp. 63-67; M. Jawad Maghniyah, *al-Ahwal al-Shakhsiyyah*, p. 26,cf; Reuben Levy, *The Social Structure of Islam*, p. 139.
58. Al-Dimashqi, *al-Ikhtiyarat al-Fiqhiyyah*, p. 210.
59. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276; al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91.
60. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-San'ani, *al-Musannaf*, vol. II, p. 396. According to Ibrahim al-Nakha'i, the illegitimate person should be allowed to lead the prayers so long as he regularly performs five daily prayers.

61. Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 59.
62. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91.
63. Qadi Abu Yusuf, *Kitab al-Athar*, p. 56; al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91; al-San'ani, *al-Musannaf*, vol. II, p. 396.
64. Al-San'ani, *al-Musannaf*, vol. II, p. 396; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 59.
65. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58.
66. Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58.
67. Al-San'ani, *al-Musannaf*, vol. II, p. 396; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58.
68. W. Robertson Smith, *Kinship and Marriage*, p. 287; W. Montgomery Watt, *The Majesty That was Islam*, p. 19.
69. W. Montgomery Watt, *The Majesty That was Islam*, p. 19.
70. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276; Sahnun, *al-Mudawwanat al-Kubra*, vol. I, p. 86; al-Shafi'i, *al-Umm*, vol. I, p. 193; al-Shirazi, *al-Muhadhdhab*, vol. I, p. 99; al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 90.
71. Al-Shafi'i, *al-Umm*, vol. I, p. 193; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. I, pp. 43-431; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; al-Ramli, *Nihayat al-Muhtaj*, vol. II, p. 182; al-Shubramlisi, *Hashiyah*, printed in the margin of al-Ramli, *Nihayat al-Muhtaj*, vol. II, p. 182; al-Sarakhsi, *al-Mabsut*, vol. I, p. 41; Ahmad al-Sawi, *Bulghat al-Salik*, vol. I, p. 158; Ahmad al-Dardir, *Aqrab al-Masalik* printed in the margin of Ahmad al-Sawi, *Bulghat al-Salik*, vol. I, p. 158; Ahmad al-Dardir, *Aqrab al-Masalik*, p. 26.
72. Al-Shafi'i, *al-Umm*, vol. I, p. 193; al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 90; al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276, cf; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. I, p. 431.
73. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276, cf; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. I, p. 431, Ahmad al-Dardir, *Aqrab al-Masalik* printed in the margin of Ahmad al-Sawi, *Bulghat al-Salik*, vol. I, p. 158; see also Ahmad al-Sawi, *Bulghat al-Salik* printed together with Ahmad al-Dardir, *Aqrab al-Masalik*, vol. I, p. 158.
74. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276.
75. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276
76. Al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276
77. Al-Zurqani, *Sharh Muwatta'*, vol. I, p. 276

78. Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; Al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. I, p. 430; al-Sarakhsi, *al-Mabsut*, vol. I, p. 41.
79. Al-Shafi'i, *al-Umm*, vol. I, p. 193; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; al-Jaziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. I, p. 430.
80. Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58. Thus, according to the Hanbalis, a slave is not qualified to give testimony (*shahadah*) in marriage and property but not the *walad zina*.
81. Ibn Rushd, *Bidayat al-Mujtahid*, vol. I, p. 104, cf; Ibn Rushd, *Bidayat al-Mujtahid*, translated by Imran Ahsan, vol. I, p. 159; al-Sarakhsi, *al-Mabsut*, vol. I, p. 41; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; al-San'ani, *al-Musannaf*, vol VII, p. 455; al-Sarakhsi, *al-Mabsut*, vol. I, p. 41; al-Zurqani, *Sharh al-Zurqani*, vol. I, p. 276, cf; al-Shaybani, *Kitab al-Athar*, p. 56.
82. Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; al-San'ani, *al-Musannaf*, vol VII, p. 455.
83. Al-San'ani, *al-Musannaf*, vol. VII, p. 457.
84. Al-Sarakhsi, *al-Mabsut*, vol. X, p. 211; Ahmad al-Dardir, *Aqrab al-Masalik*, p. 174.
85. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, pp. 91; al-San'ani, *al-Musannaf*, vol. II, p. 397.
86. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, p. 91.
87. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, pp. 91; al-San'ani, *al-Musannaf*, vol. II, p. 396; Ibn Qudamah, *al-Mughni*, vol. II, p. 59; al-Maqdisi, *al-Sharh al-Kabir*, printed in the margin of Ibn Qudamah, *al-Mughni*, vol. II, p. 58; Charles Hamilton, *The Hedaya*, vol. II, p. 363.
88. Al-Shafi'i, *al-Umm*, vol. VI, p. 226.
89. Al-San'ani, *al-Musannaf*, vol VII, p. 456. See also *hadith* nos. 13869, 13870, 13872, 13873, 13874, cf; al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, p.59, cf; al-Zurqani, *Sharh al-Zurqani*, vol. p. 86 and 89; al-Burhanpuri, *Kanz al-'Ummal*, vol. V, p. 259. According to al-Sarakhsi, the *hadith* which allows manumission of the illegitimate child is because the child's mother was a slave. This is what made Ibn 'Umar manumit that woman and her child. This is a proof that manumission is allowed for the way of *taqarrub* to Allah. [al-Sarakhsi, *al-Mabsut*), vol. VII, p. 77.]
90. Al-Sarakhsi, *al-Mabsut*, vol. VII, p. 77.
91. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, p. 59.
92. Al-San'ani, *al-Musannaf*, vol VII, p. 455; al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, p.59.
93. Al-San'ani, *al-Musannaf*, vol. VII, p. 456.

94. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. X, p. 59.
95. Al-Burhanpuri, *Kanz al-'Ummal*, vol. V, p. 259; al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, pp. 91; Qadi Abu Yusuf, *Kitab al-Athar*, p. 56, In this connection, it is reported that when 'Ata' b. Abi Rabah was asked whether the illegitimate child be allowed to be an *imam* of the prayers, he is reported to have replied in the affirmative so long as he regularly performs prayers and fasting. Abu Hurayrah holds a different view particularly if the illegitimate child dies, he is reported not to have participated the funeral prayers of the illegitimate child (*lam yusalli 'alayh*).[al-San'ani, *al-Musannaf*, vol VII, p. 455; al-Burhanpuri, *Kanz al-'Ummal*, vol. V, p. 259.]
96. The *hadith* was reported by 'A'ishah in *Mustadrak al-Hakim*, the text says '*laysa 'ala walad al-zina min wizri abawayhi shay'* [See al-Suyuti, *al-Jami' al-Saghir*, vol. II, p. 458.]
97. Al-Bayhaqi, *al-Sunan al-Kubra*, vol. III, pp. 90-91.
98. Al-San'ani, *al-Musannaf*, vol. VII, p. 456. See also *hadith* nos. 13871, 13875, 13881, and 13882; al-Burhanpuri, *Kanz al-'Ummal*, vol. V, p. 259.