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Status of guardianship, alimony and inheritance of illegitimate children in Islam

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ABSTRACT

From the standpoint of Holy Sharia of Islam and the Laws, illegitimate children are children who have been born as a result of prohibited sexual intercourse between non-intimate men and women. Legally speaking, lineage refers to blood, natural, credit based and conventional relationship between two people where such a relationship, in the view of scholars is established between the illegitimate child and his own father. From a custom based point of view, substantiating lineage occurs variedly where in the system representing the substantiation of claims; one can refer to convincing the judge's conscience. It is noteworthy, regarding civil and criminal laws of these people enjoy all laws related with legal and Sharia based rights established except for some limited cases and these instances could be examined in inheritance and guardianship where guardianship and alimony of such a child is vested upon the adulterer and concerning inheritance, there is no heredity exists between the child of adultery and his/her parents.

Keywords: Illegitimate child; Alimony; Guardianship Inheritance

1. INTRODUCTION

Illegitimate children's guardianship

Definition of guardianship

Guardianship means rearing and raising the child (Jafari, Langaroodi, 1993). Idiomatically speaking, guardianship denotes raising a child by an individual who is entrusted with raising the child (Hashye Ibn Abedin 1995). According to the material, we can infer that guardianship is referred to material and spiritual keeping of a child by people legally stipulated (Jafari, Langaroodi, 1993).

View of Imamy scholars regarding guardianship of illegitimate child

As stated previously, most Imamy scholars maintain the child of adultery does not belong to the adulterer or adulteress and they regard no relationship between the child and his convention parents except for prohibition of marriage; thus, the adulterer and adulteress have no right in this connection as some jurists have stated that keeping the child of adultery so-called sufficiently obligatory act and the costs incurred have to be secured through the Treasury (Golpayaegani, 1995). In addition to this, most early scholars too believe in upon-guardianship of the illegitimate child by his or her parent, however keeping these children. In their view is sufficiently obligatory. In this regard, it has to be said that in sufficiently obligatory act, if someone attempts to do something, the others will forfeit the duty and obligation. In this case, if conventional parents of the illegitimate child act to guard the child, others will forfeit this task and on the other hand, since in accordance with the Sharia everyone is responsible for his own conducts and parents of this child have had the main role in creating him/her and are thought of main people in guarding him/her, it is for the same reason that today, this role is entrusted with the conventional parents of the child. It is maintained that they have to look after the child such that Fatwa by Ayatolla Fazel Lankarani in this regard quotes as saying: Are conventional parents are responsible for taking guardianship of the child of adultery or not? He said: in case guardianship and custody of the child of adultery is vested on the conventional father and the adulteress, if the child is male and the time period is for two years while the child being a female is assumed by mother (Lankarani, 1995). Also, concerning the alimony of child born of adultery as well as keeping him by the adulterer, Imam Khomeini said the child born out of adultery as well as the alimony are like other children (Karimi, 1989).

2. TYPES OF PARENTAGE

In the Iranian law, articles 1021, 1161 have mentioned discussions related to relationship and descendants. Hence, parentage can be divided into various forms such as special and general parentage or parentage out of marriage and parentage without marriage.

A) Special and general parentage

- 1) Special parentage:** The concept of this type of parentage could b sought in articles 1158 to 1167. On the basis of these articles, parentage is defined as: the true blood relationship and interest existing between two peoples where one is born as a result of birth from loin and the other is born directly (Safae & Emami, 1995).
- 2) General parentage:** According to article. 1031, onwards, and 1158 of civil law, general parentage is defined as the true blood relationship and interest existing between two

peoples where one is born as a result of birth from loin or the latter's womb or as a result of the birth of two people from the third party (Safaei & Emami, 1995).

In fact the general parentage is the same as relative relationship which is of types predicted that exists in articles 1031, onwards civil law. Although the Iranian civil law has introduced relative relationship, parentage and descendants in different topics, i.e. the Iranian civil law has brought relative relationship in the sixth book and parentage and descendants in the eighth book after marriage and divorce while speaking of it as under the title of family only through the Obligation to express unanimously, the interdependence relationship contents on the general concept with the issues of the family and marriage in such a way that is imperative relationship an parentage be discussed following family, marriage and divorce.

B) Parentage out of marriage and without marriage

In another grouping, parentage could be examined with respect to the quality of the infant's birth. In other words, the infant is born as a result of marriage and matrimony of his parents and sometimes without the matrimonial relationship being ever established, the infant is born, put it simply, the semen of the newborn is conceived without marriage.

1) Parentage out of marriage

This type of parentage is the common type of parentage which is the fruit of legal and valuable institution of marriage. It is established by the way of matrimonial bond between the husband and the wife. This type of parentage is usually examined under the title of legitimate parentage while articles 1158, 1159 of civil law provide for such conditions.

2) Parentage without marriage

It is obvious that contrary to the previous items, the infant is born out of the marriage context and there's been no matrimonial bond between the couples' semen. Of course, person without marriage is sometimes legitimate like parentage caused by uncertainty and is sometimes illegitimate and thus, has been considered in the holy Islamic teachings as well as the civil law. Parentage without marriage is once legitimate when the infant is an adulterate and is discussed in the law books whose decree is brought in article 1167 of civil law. Due to the fact we deal with the parentage of illegitimate children and as we said in defining parentage that it is a natural and blood relationship between the child and the parents, it is imperative that the natural and blood relationship be established between the parents and the child of the adultery, so that one can recognize a definite parentage, though illegitimate for these children. Most importantly, these children will come out of the bewilderment and confusion surrounding their identity recognition and their attribution to their own parents.

Thus, in the second section, we address the illegitimate children parentage and we also, have a discussion on the waif to understand whether they're legitimate and to whom they could be attributed (Rashidi, 2014).

3) Paternal and maternal parentage of illegitimate children

1.2. Paternal parentage of illegitimate child

There's no doubt with regards to the fact that an illegitimate infant is created out of his natural father and this infant is customarily and in language his own child.

However, what matters, is that the lawmaker has not recognized this sort of parentage due to social interests and maintaining family interests, because he has stipulated in article 1167 civil law that the child born of adultery is not returned to the adulterer.

Here, in this discussion, we are not supposed to prove the legal and Sharia parentage of the illegitimate child, rather the fact that it is established that a child is created out of a man's semen, his attribution to the father will be easier. Thus, here, we deal first with the paternal parentage of the illegitimate child from the perspective of the Islamic jurisprudence and then we will discuss the civil law views on this point.

The conclusion is that the child resulting from adultery, in case it is a boy, his guardianships are vested on the mother for two years and if it is a girl, his guardianship is instructed with mother up to 7 years and after that it is the father who assumes the guardianship. The tight to custody is also deemed to be vested by the father or the paternal grandfather (there is no difference between the child born of proper marriage and adultery) (Ghalayee, 1999). Of course under amendment, article 1162 of the civil laws, guardianship of the girl or boy is entrusted on mother for seven years. In accordance with the issues, today Shiite scholars believe that obligation of alimony and guardianship are vested on the adulterer and this is in the interests of the child and that of the society.

Views of Sunnis scholars regarding illegitimate child

In jurisprudence, guardianship is the right of mother (Moghnye, 1964) and it is raising, keeping the child in a period of time he is needs of women and on the other hand as stated, in jurisprudence, some sort of lineage will be established between the child of adultery and his mother; therefore when lineage is established between a party, he is like a legal child and the duties of this child are entrusted on the legal custodian and in addition to this in jurisprudence the guardianship of the child will be vested upon the maternal grandmother in case parents are absent and in case she is absent too, this duty lies with the hand of paternal grandfather and jurisprudence scholars refer to a Hadith by the Prophet. Thus the best person for the guardianship of such a child is his mother, in accordance with a prophet hadith: Mother is more deserved to keep of her child as long as she is not married (Almostadrak, 1995). If no mother exists and there are things like disinherit of the child, blasphemy or heresy exist about the mother, this will hinder her from taking the guardianship and that guardianship is vested in maternal relatives or not is a matter of controversy (Alasghlani, 1989).

If this illegitimate child is minor, since he is barren from the father's side, thus paternal relatives cannot be perceived for him because there is no lineage for them and only mother and maternal relatives are perceived for such a child. Maleki state span of guardianship for boys is from birth to puberty but this period for girls is up to the time she marries. Hanabele state period of guardianship for boys or girls is seven years and after that the child chooses to select one of them (Moghnye, 1964).

Legal right of illegitimate child guardianship

Article 1168 of the Iran's Civil Law has considered guardianship as the right and duty of parents, i.e. they cannot forfeit it or transfer it, because they fulfill their own duty and cannot ask for fees in return. Concerning other impacts of lineage, specifically coercive custody, guardianship and alimony of a special soul nothing is mentioned in the civil law regarding

illegitimate children. The requisites for this non-attachment are that illegitimate lineages do not have such impacts. In other words, understanding these impacts for the said lineage along with the concept of non-impingement and according to article 1167 of the Civil Law on illegitimate lineage cannot be the origin of legal impacts of lineage and it is only exception regarding marriage. In regard to Civil Law, Dr. Emami states: the right of custodianship by after or paternal grandfather and also the right of guardianship by mother and father as inferred from relevant instances are among lineage impacts of the laws and there is no natural legal relationship between natural parents of the child born of them and the child born out of adultery does not belong to the adulterer; therefore, natural parents do not have natural right to take guardianship of their own natural child but since the child needs care and this is among sufficiently obligatory acts, the parents caused the creation of such a child will precede in his keeping (Imami, 1995).

People assuming guardianship in Iran's laws are father and mother who have born children but regarding the fact parents are equal together or not, there is disagreement between Imamiye scholars which are primary sources of Iran's civil laws and the civil laws, following famous words of Imamiye scholars (Najafi, 1981), gets mother to take guardianship of the boy and girl for seven years; In this regard mother is precedent over father. According to amended article 1169 of the Civil Law by the Islamic Council Parliament and final approval by the Expediency Council, guardianship of children, either boys or girls is vested upon mothers for seven years and after that guardianship will be entrusted with fathers. The court's discretion regarding the interest of the child is necessary and the court may cede the child to father. However, guardianship in another view has been stated to be vested on parents and believes the parents share that responsibility (Tabatabai, 1980). Article 6, Civil Law states Court cannot oblige parents to give expenses of the child from a civil responsibility and lineage rather the court can determine damage as the fee and oblige the inflictor of damage to pay that amount (Safaei and Emami, 1995).

Researcher's view: In accordance with jurisprudence studies and social conditions, the guardianship of the illegitimate child is assumed by the conventional father or the adulterer, because lexically and conventionally, it is called the child of the adulterer and his ID card is vested in the adulterer because he has caused this child to bear and there is a natural link between the two and he has to shoulder the custodianship.

Alimony of illegitimate children

Definition of alimony

In encyclopedia, it has been stated that alimony is donating property and donated alimonies (Alfirrozabadi, 2000). Scholars have defined alimony as giving clothes, edibles, housing and shelter to the latter or donating something while one is himself in need of it (Hashye Ibn Abedin, 1995). Varied definitions have been provided generally and specifically. Alimony, legally speaking is things to which the person needs for continuing life like edibles, clothes, shelter, house clothes and that which a person needs conventionally in life (Najafi, 1981). Article 1204 of the civil law states "alimony for relatives is clothes, shelter and food and house appliances in as much as their needs are met via considering degree of alimony giver's ability. Legally speaking, the one assuming alimony is alimony giver and the one given alimony is called alimony receiver. Principally, alimony of each person is up to himself unless someone else has committed to have donated to him or the law has obliged someone to give him alimony (Imami, 1993). Article 1199 of the civil law states: alimony of

children is up to the father. However, it is discussed whether conventional father is obliged to give alimony to his own illegitimate child or not? In this case, Islamic Scholars' views are first discussed and then than view of Law are going to be expressed.

View of Imamy scholars reading alimony of the illegitimate child

Who assumed the alimony of the child born of adultery? Does the father of the illegitimate child have to pay him the alimony? In Legal book, it has been stipulated that: child born of adultery forfeits the right of alimony over his own relatives and also the relatives forfeit such a right because the right to alimony as inferred from relevant articles is along legal impacts and under article 1167 of the civil law, the child born of adultery won't be attributed to the adulteress (Imami, 1993), and hence, on another basis, child of adultery is attached to the adulterer and adulteress. It is no problem to substantiate alimony for the adulterer, therefore, the child born of adultery has the right of alimony over his relatives and this right is obligatory over father and paternal grandfather and they have to pay the alimony and also the father and paternal grandfather of the child born of adultery will have the right to pay the alimony in three states:

1. Pregnancy period; during pregnancy, the adulterer man considered to be the father of the carriage is obliged to pay the alimony of the woman because it has been stipulated in Jurisprudence and Islamic Law that a woman whose divorce is revocable, during the period of Udda forfeit the right to alimony from her own husband unless she is pregnant and the book and Tradition explicitly state this
2. The book and Tradition is inferred that alimony hinges on carriage or it is because of carriage and proper married, divorce, revocation, cannot intervene.

Views of the Sunnis regarding alimony of illegitimate children

First theory: the heir who inherits from such a child is obliged to pay the alimony of such a child for as much as the amount they inherit where this is the idea of Hanabele (Alasghalani, 1989).

Second theory: It is obligatory for each relative who is an intimate person and other these people., alimony is not obligatory and for a group of scholars who consider heirs as precedent over no –heirs (Alkasani, 1989), and for another group of scholars, the heirs will be obliged to pay the alimony for as much as they inherit where this their Abu Hanafi theory (Almardavi, 1985).

Third theory: Alimony by parents and their children is obligatory; thus the illegitimate child won't have any alimony unless by his mother or her children where this theory is one of Maleki and Shafeie (Almardavi, 1985).

Legal ruling on alimony of the illegitimate child

Iranian law, under article 1199 of the civil law considers alimony of children as vested on father and after the father dies or in case the father lacks the power to pay te alimony, this tsk is entrusted with the paternal grandfather and in case no paternal grandfather exists, this task is vested on mother; that which cannot be denied is that this article concerns legal and legitimate child; but this article cannot be exercised about illegitimate children because the law does not recognize this sort of relation being a means of alimony. Concerning alimony, due to the fact that it is considered to be impacts of lineage, hence based on the general rule of

non-attachmmt of the child of adultery to the adulterer (article 1167 civil law), it appears that obliging parents to giving something as alimony to the illegitimate child is difficult based on the laws (Ghahfarkhi, 2004; Imami, 1965; Katouzian, 1989; Ebadi, 1998).

Child born out of adultery has no right of alimony over his own relatives and also relatives are deprived of such a right over this child because the right of alimony as infer from article 1167 is of a legal impacts. Therefore, we have no choice but to prove father's responsibility in payment of alimony in various ways:

1. Conviction to alimony due to lineage;
2. Conviction to payment of alimony due to general rules of commitment: each off which is going to be summarily expressed.

Lineage: Regarding obliging father to paying alimony to the illegitimate ate child, some scholars attach importance to father's lineage in creating the child and finally obliging him to paying alimony of the illegitimate child. Dr. Emami writes in this regard: it appears that in case if the child is born of father and born of mother of doubts, the father due to lineage will be obliged to pay costs of pregnancy and days of recovery; for example, when a man asks for the hand of a women whose husband is dead and the woman states she is in Udda and the man is aware of the Udda and states that the time of Udda is three months and it is already finished and if the two marry the man will bear all the costs of the alimony of the child. If none is in doubts and the woman and men have already established illegitimate relations and a child is born, then father can again be obliged to payment due to lineage. In this connection, Dr. Emami states alimony is of sufficiently obligator for that one who is needy and the common sense obliges the rich to take care of the child and the parents creating the child of adultery are obliged to do so. However, it seems parents are obliged to pay the alimony of the child just because of lineage (Imami, 1995). Also, Dr. Asadolla Emami maintains that given the interest of the society and innocent child because of lineage and civil responsibility, parents are obliged to pay the alimony and in case their marriage is not possible, it is better they [children] are taken care of in one of the general institutes under proper education styles for entering I to the society (Imami, 1995).

Sunnite scholars believe there is no parentage for the adulterer, because establishing parentage is favor and compensation is not established by favor, rather the holder of compensation is also the holder of retaliation. An adultery with which parentage is not established a deed void of any uncertainty will for forfeit limit and in case, there is uncertainty in adultery, the description of the compensation will be removed or forfeited. Should limit is forfeited, parentage will be established. However, if a person claims parentage towards someone who is like him and this person's parentage is not known, his parentage is established should he does not refrain to say it's caused by adultery. Some Sunnite scholars do not attribute the child born of adultery to the father, saying there is no relationship between father an the child . They claim the semen by which the child was created was outsider an thus m, the father could marry the child should it is a girl, as Shafeiy and Malek consider as permissible marriage with the girl of adultery, because she is outsider. They also claim her parentage is not legal and heredity cannot be established between them and more there is no alimony on them. However, Hanabele and Hanife have stated they're unlawful as legal daughters, because the one from whose semen they're created, they're habitually their daughter. Based on the verse" thy mothers and daughters are forbidden for you" this girl is the daughter of the adulterer created of this semen. This is a fact not different with lawful and unlawful and this daughter is a party of his body and is not lawful to him like a child born of

marriage. According to the stated problems, it is concluded that there is no unanimous views among Muslim scholars with regards to the lack of the attribution of natural child to be father. As we said, some have attributed father-child rights excepting inheritance. While some other scholars call the child of adultery as outsider, believing in the lawfulness of marriage with her (Rashidi, 2014).

Payment of alimony based on general rules of commitment: This idea has been stated by some other scholars regarding the obliging conventional gather to paying the alimony of the illegitimate child (Katouzian, 1998). Given this view, according to general rules of commitment, implementation of commitment to promise will convert the natural debt to laws because in most cases, the deceived girls receives a letter from the lover in which she has been promised by him to see her life secured and the two sides live together for a while and they are committed to carry out their own commitment and the court can based on this explicit or implicit commitment and in reference to the contract established between the men and women obliges the man to pay the costs incurred by keeping the child. The benefit of this theory is that commitment is laid on keeping the illegitimate child (Katouzian, 1998).

Of course, what is notable in here is that it creates no independent and new commitment for father rather is gives natural debt some legal sanctions. For the same reason, father's commitment involves all the impacts relating to alimony and is not subjected to conventional contacts and it is among commitments whose proof needs not documents (Katoozian, 1998).

Researcher's view: Given the fact that one of the means for alimony is relation, though there is no relation legally and from Sharia based point of view and such a relation is a conventionality and since the adulterer has caused such a child, thus he is considered to be the conventional father of the illegitimate child and assumes his alimony.

Inheritance of illegitimate children

1. Inheritance is property which is inherited by relatives through lineage and relations (Ibn Fares, 1987).
2. Inheritance is idiomatically speaking referred to a right based on the law ruling and Sharia based resulting from a real dead or a ruling upon a true living which is transferred (Langarodi, 1993). After knowing the definition of inheritance, it has to be stated that what causes inheritance is relation and lineage where lineage are personal relations with the latter through a sharia based matrimony or being an Imam and the like (Langarodi, 1993). Thus, what causes inheritance is relation and lineage where relation is connection of somebody with another by means of the latter whether relation is led to him or not (Imami 1993).

Views of Imamy scholars concerning inheritance of the illegitimate child

1. Most Imamy scholars assume lack of inheritance between the illegitimate child and his natural parents. In this regard Sheikh Toosi states:" child of adultery does not have lineage and does not inherit from the adulterer and the one who bore him and his heritage reaches his children and in case children do not exist, the property [inheritance] belongs to the Imam. Contemporary scholars assume lack of inheritance between the child of adultery and his parents (Khoee, 1996:414). Thus, what causes inheritance is relation and lineage where relation is connection of somebody with another by means of the latter whether relation is led to him or not (Imami 1993).

Views of Sunnis scholars regarding inheritance of the child of adultery

Regarding inheritance between child of adultery and his parents, it should be said that most Sunnis scholars consider lack of inheritance between the child of adultery and his conventional father, but Elhagh Ibn Rahvye and Ibn Teimye and some others have maintained that in case the woman lacks an owner, inheritance can be proved and he has stated that adultery about father and mother is proven and according to a Koranic verse, there needs to be inheritance established between him and his father. With regards to inheritance between mother and child of adultery and maternal relatives, jurisprudence scholars assume inheritance between them. Therefore, he inherits from his mother and maternal relatives and his mother and maternal relatives inherit from him.

Legal ruling on inheritance of the illegitimate child

In Iranian civil law, following Imamy laws, there is no inheritance between child of adultery and his parents. It is for this that article 884 of the civil law states child of adultery does not inherit from his parents and their relatives but of the prohibition of the relationship where the child is fruit of them is proved and with regards to one of the them due to reluctance and doubts, the child will inherit from this side and his relatives and vice versa, because inheritance is among impacts of legal lineage and there is no such lineage relation between parents. An issue which is raised by law scholars is whether birth out of adultery hinders inheritance or that the child of adultery will not inherit at all?

1. Some state that relation being legitimate is not a condition for inheritance and it has impacts on creation of its requirement, i.e. inheritance occurs when relation starts and when relation is not legitimate it will be lost (Katouzian, 1989).
2. Another group says birth out of adultery hinders inheritance, i.e. there are causes and conditions for inheritance; an obstacle like adultery is like murder which hinders inheritance (Imami, 1993; Shahidi, 1996).

Researcher's view: given jurisprudential studies, inheritance is among relational impacts, because relation of such a child doesn't reach his parents, thus he will not inherit from them; however, the current medical sciences via accurate DNA experiments, one can establish the true father and mother who has become pregnant is clear. Thus, such a child is entitled to inherit from his parents.

3. CONCLUSION

Imamy scholars maintain that right of paternal custody and also the right of parents' guardianship as inferred from explanations is among impacts of legal relations and between the natural parents and the child born out of adultery, he does not belong to the adulterer; hence, natural parents have no natural right over the guardianship over their natural child. Meanwhile, Sunnis scholars argue that since there is a relational relationship established between him and his mother; hence the mother is entrusted with the right of guardianship and the alimony which is the same giving edibles, housing and clothes. Imamy scholars maintain that alimony of these children are vested in the conventional father because from a Sharia and legal point of view there is no relation between them, but child of adultery is customarily the child of the adulterer, though this is a conventional truth. According to Sunnis, such a child

will rule after his mother and his alimony will paid because there is a relation being established between him and his mother.

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