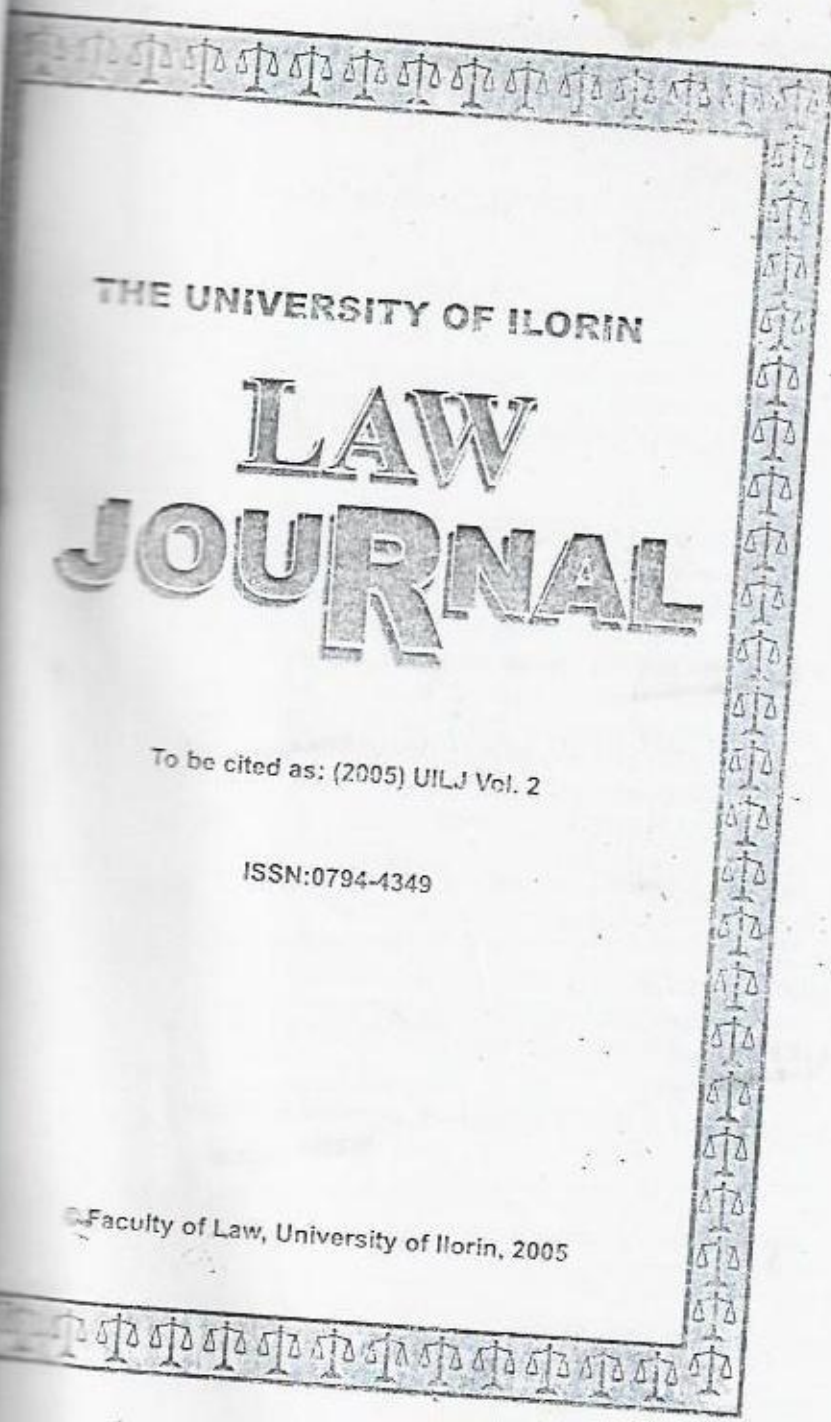




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PROOF OF PATERNITY UNDER ISLAMIC LAW

BY

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INTRODUCTION

The essence of marriage in Islam is the provisions of companionship and procreation of children. For a marriage to be valid under the Islamic Law there must be marriage guardian for the wife, payment of dower and presence of minimum of two witnesses. These are the essentials of a valid marriage envisaged in Islamic Law.¹

Thus, it is the establishment of a valid marriage that gives rise to proper legitimacy or paternity of children in Islamic Law. There is a saying in Islamic Law that *Firash*, i.e. matrimonial authority belongs to the husband. All the jurists agreed that commission of illicit relations by a wife or a husband does not affect the validity of marriage, but the Prophet (PBUH) and all the Jurists condemn it.² If as a result of illicit relation the wife becomes pregnant and if the husband is aware and keep mute for sometime or cohabits with her after his awareness and then come round to disown the paternity through *Li'an*, it shall not be allowed and the child shall be affiliated to him.³

The jurists further held the commission of adultery by the wife does not affect the marriage contract but it is recommended that the husband should divorce her.⁴ Under Islamic Law, where paternity of a child is unknown, uncertain and, cannot be established; such a child is affiliated to the mother and would be declared *Walad Zina* i.e. bastard⁵. Therefore, every child must have a father and one real

Abu Zaid Al-Qairawaniy (ND), *Hashiyatul 'adawiy*, Commentary on Risalah, Vol. 2, Darul-Ikht, Beirut-Lebanon, p. 34

Sheikh M.T. El-Nimairi, *Personal Status in Islam* (Unpublished Manuscript) p.62

Sharia Court of Appeal, Ilorin 2001 Annual Report, (2003), Shebiotimo Publications, Ijebu-Ode p.26

M.T. El-Nimairi, op. cit., p. 62 and M.A. Ambali (2003) *The Practice of Muslim Family Law in Nigeria*, Tamaza Publishing Company Ltd., Zaria, p. 228.

Hammudah 'Abd al 'Ati, (1982). *The Family Structure in Islam*, IPB, Lagos, pp. 196 - 198

father. Once his fatherhood is established, it is irrevocable. Every child must be assured of placement.

The prophet (PBUH) was reported to have said a woman who misplaces a child's legitimacy by relating its descent to someone who is not responsible for its conception has committed a grave offence, alienated herself from God, and will be denied the bliss of eternity. Likewise, a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted upon himself undue disgrace⁶.

Mention need be made of the current popular slogan of 'Separate parenthood', which cannot replace paternity. It is a phenomenon, which is not recognized under Islamic Law.

PROOF

Under Islamic Law, Paternity may be established through: -

- (i) Marriage
- (ii) Acknowledgement, and
- (iii) Evidence.⁷

WE SHALL DISCUSS THESE SERIALLY.

(I) PATERNITY THROUGH MARRIAGE

As earlier discussed, marriage is the right channel through which paternity may be established. The marriage in question must be valid and all essentials of marriage contract must be complied with. These are: consent of the two parties, consent of the parents especially the father or his representative, payment of dower and the ceremony to take place between at least two witnesses⁸. A virgin's silence signifies her assent to the proposed marriage. A woman who has lost her virginity must give her assent in words.⁹ In Islamic Law, a virgin can only be given in marriage

⁶ Ibid. p. 190

⁷ Sheikh M.T. El-Nimairi, op. cit., pp 208 - 214.

⁸ F. H. Ruxton, (1978) *Maliki Law*, Luzac & Company, London p. 92.

⁹ Ibid. pp. 93 - 94

by her guardian (father or his representative) but the divorced or the widow has the right to give herself in marriage, and prohibit the guardian from interference when the woman herself is satisfied.¹⁰ Although Imam Abu Hanifah gives freedom to the virgin who has reached the age of puberty to marry according to her choice, the consent of the guardian is still one of the conditions of marriage.¹¹

However, the types of marriage where paternity can be established include where such marriage is not prohibited under Islamic Law like the presence of factors that make a woman permanently prohibited to man. These are *nasab* (consanguinity), *ridā'a*, (fosterage) or *musaharah* (affinity).¹² Other forbidden marriage include a marriage with a woman in *ikram* during *Hajj*, marriage with a man who has four wives, marriage during *Iddah*, marriage with a married woman, *Nikahush-Shubhah*, i.e. marriage contracted in genuine mistake, and *Nikahush-Shigar* which occurs when marriage is in exchange for the marriage of another woman.¹³

It is important to stress that after a couple might have complied with all the essentials of a valid marriage under Islamic Law,

there must be consummation of such marriage.¹⁴ It is after consummation that legitimacy can be fully established.¹⁵

A child's paternity or affinity is not considered through physical resemblance but by consideration of the period within which the child is born after consummation of the marriage of his parents.¹⁶

MINIMUM PERIOD OF GESTATION:

According to all Sunni Schools of Islamic Jurisprudence, the minimum period of gestation is six months.¹⁷

¹⁰ Abdulrahman I. Doi, (ND), *Shariah: The Islamic Law*, Iksan Islamic Publishers, Ibadan, p. 141.

¹¹ *Ibid*.

¹² M.A. Ambali, op. cit., p.157

¹³ *Ibid*, pp. 158 – 161

¹⁴ Sheikh M.T. El-Nimari op. cit., p. 208.

¹⁵ *Ibid*.

¹⁶ *Jatou V. Mallatia* (1998) ISCNJ p.48 at 51, particularly holding 4.

¹⁷ *Hasbiyah Dasuqi*, (ND), *Darul-fikr*, Beirut-Lebanon Vol. 2, p. 459, see also the case of *Jatou vs Malatia*.

by her guardian (father or his representative) but the divorced or the widow has the right to give herself in marriage, and prohibit the guardian from interference when the woman herself is satisfied.¹⁰ Although Imam Abu Hanifah gives freedom to the virgin who has reached the age of puberty to marry according to her choice, the consent of the guardian is still one of the conditions of marriage.¹¹

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¹² M.A. Ambali, op. cit., p.157
¹³ *Ibid*, pp. 158 – 161
¹⁴ Sheikh M.T. El-Nimairi op. cit., p. 208.
¹⁵ *Ibid*.
¹⁶ *Jatau V. Mallafia* (1998) ISCNJ p.48 at 51, particularly holding 4.
¹⁷ *Hashiyah Dasuqi*, (ND), Darul-fikr, Beirut-Lebanon Vol. 2, p. 459, see also the case of *Jatau vs Mallafia*.

urists make a condition that the husband should be fully-grown
ause no pregnancy is normally expected from a minor and they also
ie on the question of the six months. The above is a consensus. But
consensus was because of their understanding from the two verses of
Qur'an on the subjects. They are chapter 46 verse 15 and chapter 31
3:14. We will now look at the two verses together.

*"... The carrying of the child to his weaning is a
period of thirty months..."¹⁸*

*"... In travail upon travail did his mother
bear him, and in years twain was his
weaning..."¹⁹*

the first verse says that the child's carrying and his weaning take
months while the second verse says his weaning is two years.
fore by subtracting the two years i.e. 24 months from 30 months we
5 months, which is considered the minimum period for a body to
plete its growth and come out of its mother's womb.²⁰ In effect the
tributes to the

and the paternity of a child born to his wife not less than six months
marriage²¹

urists unanimously tolerate five days less than six months and no
²². Although they agreed as to the period of six months, they
ed from what time does that period count. The three Imams say that
d counts from the date of consummation, or the possibility of
immation, while Imam Abu Hanifa says: 'the period counts from the
of the contract, because of the saying of the prophet (SAW) that
nacy is to wedlock'.²³ In Islamic Law, the legal presumption that a
born to a married woman is the legitimate child of her husband is
t on the Arabic maxim "Al-Walad-Lil-Firash" meaning "the child

¹⁸ Qur'an 46:15, As-Sayyid Sabiq (ND), *Fiqhus-Sunnah*, Darul-Turath, Cairo, Vol. 3 p. 327

¹⁹ Qur'an 31:14 see further Qur'an 2:233

²⁰ *Shiyah Dasuqi* Vol. 2 p. 459.

²¹

²² ²³ Abul-Walid Muhammad Al-Qurtabi (1425-1426/2005), *Bida'ayat al-Mujtahid wa
ayat ul-Muqtasid*, Dar El Fikr, Beirut-Lebanon, Vol. 2 pp.291 - 292.

²⁴

paternity of the wife's pregnancy or child. In this case, the husband must establish the allegation of *Zina*, i.e. adultery, by producing eyewitnesses of unimpeachable status. If he fails to prove it according to the court would resort to *Li'an*. He is then subjected to take oath four times and the fifth time he would be asked that the curse of Allah be on him if he was telling lies.

The wife may react to the allegation and the oath, if she admits; the oath takes its course. But if she denies, she too is subjected to take oath four times and the fifth oath should be that she solemnly invokes the wrath of Allah on herself if he is telling the truth.²⁹

The consequence of such an oath is that the woman will be free from adultery punishment and the child remains legally fatherless. The child could inherit his mother but not his father nor is the father able to inherit out of the son's property if he was

to die before the father. The marriage between the couple is dissolved forever.³⁰ If the husband refrains from taking the Oath he is to be punished by "*Hadd*" of *qadhaf* i.e. 80 lashes. Imam Shafi'i and Hanbal agree to this, but Abu Hanifa said he is to be detained or imprisoned if he swears or the wife confesses or she divorces or withdraws his accusation or else he is to be punished. If the wife too refuses to swear then she is to be punished by "*Hadd*" of stoning if the marriage is consummated or 100 lashes. Both Imam Shafi'i and Hanbal agree, but Abu Hanifa says she is to be detained or imprisoned until she swears.³¹ As soon as both husband and the wife complete the oath the judge will pronounce divorce.³² This type of divorce is known as *Talaq ba'in* where the parties are permanently prohibited to re-marry. They can never marry each other again and the child will not be attached to the husband.

According to both Imam Shafi'i and Hanbal and Abu Yusuf of the Hanafi School if later the husband declares that he lied on her, then he will

²⁹ Qur'an 24:6-9

³⁰ "Introduction to Islamic Law of Abdulkadir Orire in 1991 Judicial Lecture: Continuing Education for the Judiciary Professional Publisher Limited, Lagos, p.28

³¹ Sheikh M.T. EL-Nimairi, op.cit., p.191

³² Hashiyah Dasuqi, Vol. 2 p.467

punished by *hadd* and they can remarry and his previous denial of paternity will be removed and the child will be attached to him³³. It is important to stress that *Li'an* is only resorted to when the couple are Muslims, sane and mature. In the case of denial of paternity, the husband must be capable of putting a woman in a family way.³⁴

Also, before there can be *Li'an*, there must not be sexual relation between the couple at all, or the sexual relation would have been too far away or too short to deliver the child³⁵.

That mere resemblance of the child and the father should not be used as a basis of determining the paternity of the child³⁶.

MAXIMUM PERIOD OF GESTATION:

Though, all jurists agreed as to the minimum period they differed as to the maximum period. Imam Maliki says that a child stay for a period of 5 years in its mother's womb while the Maliki Jurists say the child remain in its mother's womb for seven years³⁷. Muhammad Ibn Al-Hakam, the great scholar said that a baby does not remain in his mother's womb for more than one year³⁸. The Shafi'i and the Hanbali jurists say that the child may remain in its mother's womb for four years. The Hanafi jurists say that the child may remain in its mother's womb for two years³⁹. The Zahiri jurists together with Imam Ja'afar Sadiq say that a baby remains in its mother's womb for nine months only⁴⁰. None of those statements is supported by any authority. It is just a mere experience.

Imam Rushd, the great Maliki jurist affirms and prefer the views of Ibn Al-Hakam and the Zahiri jurists and he adds that the rules are based on the normal happening and that on the exceptional case the period of nine months and one year are the normal periods.⁴¹ Speaking on the

Sheikh M.T. El-Nimari, op.cit., p.192

M.A Ambali, op.cit pp.227 - 228

Ibid

Ibid

Bid'ayat al-Mujtahid, Vol. 2, p.291

Al-sayid Sabiq, op.cit., p.327

Ibid.

Abdullah Nuri (1391 - 1971), *Kitab-Sa'atun*, Darul-kitab, Sudr, Vol. 1, p.39

Ibid

maximum period of gestation, the court of Appeal⁴² held that it attributes to the husband the paternity of a child born to his wife within a period of not less than six months of the marriage between the parties. The same result will follow where the child is born within a period of not more than seven years of the termination of the marriage if the birth of the child represents the end of the wife's Iddah period.

This is in a situation where the wife carries the pregnancy for several months after the termination of the marriage between her and the husband. The birth of the baby terminates the wife's Iddah period. In that case, it means she has been pregnant before the divorce took place and she could not deliver it at the normal period of nine months until after the divorce. In Islamic Law, Iddah of a pregnant woman terminates when she is relieved of the burden.⁴³

The Court of Appeal held further that under Islamic law in any case where paternity of a child is in dispute and where the mother has since contracted a second marriage, the essential thing to establish paternity is long is the period from the date of the second⁴⁴ marriage to the delivery of the child by her of the child.

Thus, if a woman gives birth to a child within a period that did not exceed the maximum period of pregnancy the child delivered will be presumed to belong to the first husband unless he waives the paternity through a formal imprecation (*Li'an*)⁴⁴.

It is important to stress here that this rule is limited to women who are divorced or who remarried and gave birth to the child before the six months of the marriage. If this happens, her subsequent marriage becomes voidable, because the woman has married while observing Iddah;⁴⁵ and she will be ordered to go back to her first husband. If the woman gave birth after six months from the date the marriage was contracted, then the child will be that of the second husband.⁴⁶

(II) PATERNITY THROUGH ACKNOWLEDGEMENT

⁴² *Aishetu Mayaki and 1 Or Vs Alhaji Nda and Bida'ayat al- Mujtahid*, Vol. 2 p.291.
⁴³ Qur'an 65:4

⁴⁴ *Aishetu Mayaki and 1 Or Vs Alhaji Nda*

⁴⁵ Qur'an 2:235; *Hashiyah Dasuqi*, Vol. 2 p.218 and Ruxton, *Maliki Law Ch. V*, pp. 90 – 91

⁴⁶ *Hashiyah Dasuqi*, op.cit., Vol.2 p.459

In the preceding lines it has been explained how paternity of children is established during wedlock or Iddah. But sometimes it happens that a marriage takes place between a man and Taiwo and all essentials of contract of marriage as stipulated by Islamic Law have been complied with. After this, the man now travels out and after some years come back, inquire about his wife and were told that she has traveled to Lagos. On getting there, the man mistook Kehinde to be his legal wife and she also pretends as if she is Taiwo. The two of them have affairs together and the man travel out again. After some years again come back and were told that his wife is pregnant and the wife (Taiwo) denied that she is not pregnant. But Kehinde now says she is pregnant for the man and he acknowledge it saying he mistook Kehinde for Taiwo because they resemble one another. In Islamic law, such acknowledgement or declaration is the strongest proof that the child is the legitimate child of that man. It means he was acting under a mistaken believe that Kehinde was his wife.

In Islamic Law, a marriage contracted innocently in error, like the above example is adjudged by all schools as void but punishment of *Zina* shall be waived.⁴⁷ In a situation where the punishment of adultery is waived, the child is affiliated to the man. If the punishment is waived for *Shubhah*, excusable error, there is no consensus on the validity of such marriage but the child shall be affiliated to the man. It is only when the punishment is not waived that the child is not affiliated.⁴⁸

However, Kehinde was aware and pretended not to know. There are two rules here. First, is Kehinde a virgin and second, is she a divorced or widow? If she is a virgin and a minor she ought to have obtained the consent of her guardian, and there must be witnesses. The dowry may be differed and paid later.⁴⁹

⁴⁷ Ash-Shaykh Ahmad b. Ghunaim Al-Azhari (1374/1955), *Al-Fawakihud Dawwaniy: Commentary on Risalah*, 3rd ed., Mustafa Al-Babiy Al-Halabi & Sons Press Ltd, Cairo, Vol. 2 p.41

⁴⁸ Muhammad b. Yusuf Al-Katly (ND), *Ihkamul Ahkam ala Tuhtatul Hukkam*, Darul Fikr, Lebanon, p.85

⁴⁹ Abdul Rahman I. Doi, *op.cit*, p.141 and p.165, see also M.A. Ambali, *op.cit*, p.154.

She has failed to comply with the rules and there was no legal union between them. It means she has offered herself for marriage and a woman cannot be married by herself under Islamic Law.⁵⁰ Therefore, the relationship could be declared null and void and the child become illegitimate.⁵¹

But if Kehinde is a divorced or a widow, she has right to dispose of herself (in marriage) than her guardian.⁵² It means marriage between them is valid and the child is a legitimate child. Under Islamic Law, in this situation, she has not committed any offence but what she has done is wrong morally.

THE CONDITIONS OF ACKNOWLEDGEMENT ARE:

- (a) the paternity of that child is unknown or uncertain and has not been established in anyone else;
- (b) the ages of the acknowledger and the acknowledged child should be such that they may be father and son or daughter i.e. there should be a difference of about say 15 years of ages;
- (c) the child if it is at an age of understanding should consent and agree with the acknowledgement; and
- (d) the acknowledger could have been the lawful husband of that child's mother i.e. there was no marriage impediment, whether permanent or temporary and that she was not known as a common prostitute.⁵³

In Maliki *madh-hab* such acknowledgement should be based on accurate facts and that which appear to be true⁵⁴.

(III) PATERNITY THROUGH EVIDENCE

It may happen that a husband may be away for a short period and when he comes back his wife tells him that she gave birth to this particular child. If the husband doubts it, then the wife may bring

⁵⁰ Ibid. p.141

⁵¹ Ibid.

⁵² Ibid.

⁵³ Sheikh M.T. El-Nimairi, *op.cit.*, p.213

⁵⁴ Ibid.

evidence to prove her allegation. In such cases evidence of two females is sufficient⁵⁵.

In Hanafi school the evidence of one woman is sufficient and Hanbali school share the same view while in Shafi'i School, the minimum number for such evidence is four females.⁵⁶

CONCLUSION

In the foregoing study I have given an exposition of Proof of Paternity under Islamic Law. It has been shown clearly that Islamic Law as a legal system is capable of facing even modern challenges where matured girls became pregnant and the parents are aware of her relationship with the man involved and pretend not to know until she becomes pregnant.

They as parents have the right to separate them but they keep mute. It means they have given their implied consent and the entire community stands as witnesses to the relationship because they have been seen together for a very long time. The Dower may be paid later as earlier discussed in the paper.

Furthermore, the study has thrown more light on the proof of paternity in both the substantive and procedural aspect. The issues are, for purposes of refreshing our memories, the following; paternity through marriage, paternity through acknowledgement and paternity through evidence. Likewise, an attempt has been made to examine all the above issues within the meaning of the Holy Qur'an, Hadith and other subsidiary sources in line with views of various Schools of Islamic jurisprudence. At the end of it all, it is my considered opinion that Islamic Law serves all time and purpose.

⁵⁵ Ibrahim Ibn 'Ali Ibn Farhun, (ND) *Tabsiratul Hukkam*, Darul-Fikr, Beirut-Lebanon Vol. 2, p.294 and Jatau Vs. Mallafiya at p.51 holding 6.

⁵⁶ Sheikh M.T. El-Nimairi, *op.cit.*, p.214.