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EXPLORATORY STUDY OF RIGHTS OF ILLEGITIMATE CHILD UNDER THE *SHARĪ'AH* AND INTERNATIONAL CHILD RIGHTS INSTRUMENTS

Imam-Tamim, Muhammad Kamaldeen. PhD.*

Abbas, Wardah Itannaola**

Abstract

This paper aims at conducting an exploratory study of the rights of children born out of lawful wedlock (also described as illegitimate children) with a view to exploring their "right to rights" (as postulated by Hannah Arendt) under both the *Sharī'ah* and international instruments on child rights. The paper proceeds on the common belief that in many legal cultures, including the *Sharī'ah*, such children are deprived of their natural and fundamental rights, which some Eurocentric scholars believe the international child rights instruments came to rectify. The paper finds out that the *Sharī'ah*, like the international instruments, recognises and protects the rights of all children including the illegitimate children. However, unlike the international instruments, the *Sharī'ah* restricts certain rights from the parents (particularly the putative father) of those children, which consequentially affect the children because *Sharī'ah* does not dissociate the morality behind the unlawful process of the child's birth from its legal consequence. The paper adopts a doctrinal method of legal research by conducting a qualitative documentary and content analysis of primary and secondary sources of legal research. The paper concludes that the difference between the rights of illegitimate children under the *Sharī'ah* and international instruments on child rights is as a result of the different values and sanctity attached to the institution of marriage by both systems.

* Department of Islamic Law, Faculty of Law, University of Ilorin, Nigeria.
Email: lawyertamim@gmail.com; imamtamim@unilorin.edu.ng. Phone: +234 703 44 999 44. [corresponding author]

** Postgraduate Candidate, Faculty of Law, University of Ilorin.

Introduction

The reality of legal pluralism has interfered and intervened in the cognition and application of legal concepts in the contemporary legal worlds. One of the areas where such legal conundrums thrive in the contemporary societies is the status of illegitimacy of children. Millions of children are born into the world everyday but not all children are born through the legal relations between a man and a woman who are legally married. The children who are born outside the realm of marriage are commonly known as illegitimate children across legal cultures. In many societies, these children are considered as “*fillus nullus*”,¹ “*walad ul zinā*”,² “*harami*”,³ etc., not recognised and are, therefore, regarded as not being entitled to the rights enjoyed by the legitimate children.

But under international human rights law, every child, irrespective of his circumstance of birth, possesses his “right to have rights”,⁴ which, by extending Hannah Arendt’s original postulation of

¹ Meaning: “son of no one” or “son of nobody”. See FreeDictionary, “*Filius Nullius*” <<http://legal-dictionary.thefreedictionary.com/filius+nullius>> (accessed 15 January 2017).

² The term is used in *Shari’ah* to connote “child of illicit sexual intercourse”. See Dawahnigeria, “What is the sin of an illegitimate child?” <http://dawahnigeria.com/articles/fatawa-islamic-law-marriage-and-family/what-sin-illegitimate-child> (accessed 10 January 2017).

³ This is the word used for ‘bastard’ and ‘children born out of marriage’ in Hindi and Afghan. See Urban Dictionary, “*harami*” <http://www.urbandictionary.com/define.php?term=harami> (accessed 20 January 2017); “Afghan Terms and Definitions” <https://sites.google.com/site/athousandsplendidsunslhs/afghan-terms-and-definitions> (accessed 20 January 2017).

⁴ This is an uncommon concept of rights that was postulated by, Hannah Arendt, a German turned American in several of her articles on the plight of stateless persons (refugees, exiled, asylum seekers, etc.) in a foreign land. Some of her relevant works include: Arendt, H., “The Decline of the Nation State and the End of the Rights of Man” in Arendt, H. (Ed.), *The Origins of Totalitarianism*, rev. ed. (New York: Harcourt, 1973) pp. 267; Arendt, H., “The Rights of Man” What are They?” (1949) Vol. 3 No. 1 *Modern Review* pp. 24.

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this concept,⁵ include the child's right to lineage, identity and other ancillary rights. Therefore, since the inception of the United Nations Child Rights Convention 1989, several initiatives to realise and uphold the rights of children have been advanced by many governments and civil societies. However, in some legal cultures and jurisdictions, particularly Islamic legal culture and Islamic countries, some of the rights enshrined in the Convention are not provided to children born out of wedlock thereby presenting the question as to whether these rights are reserved for certain categories of children. Rights such as that of lineage, parenthood or guardianship, alimony, nationality, dignity of human person and most importantly, the right to inheritance are among the categories of rights at the crux of the legal conflicts between Islamic law and international human rights law.

This paper, therefore, is an exploratory study of the position and status of an illegitimate child under the *shari'ah* and international instruments. It will examine the rights enjoyable by children under the two systems as well as the position of illegitimate children and the rationale behind each viewpoint.

Children's Rights under International Law

Before the nineteenth century, children were mainly considered to be quasi-property and economic assets.⁶ They had no voice of their

⁵ In Arendt's original postulation of the concept of "right to have rights", she argues that Man should first be recognised as a human and should be accorded rights on that basis before seeing him as a citizen of the state. See, Kesby, A., *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University Press, 2012) pp. 2-6.

⁶ Ross, H. L. & Sawhill, I. V., "The Family as an Economic Unit" (1977) *The Wilson Quarterly* <http://www.jstor.org/stable/40255183> (accessed 10 January 2017); Lindert, P. H., "Child Costs and Economic Development" in Richard A. Easterlin (ed), *Population and Economic Change in Developing Countries* (Chicago: University of Chicago Press, 1980) pp. 5-80; Paarlberg, D., "The Future of the Family Farm", *The Saturday Evening Post* (March 1976), 42-43;

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own nor did they have the right to make choices in general matters that affect them.⁷ However, in the late nineteenth century, a nascent children's rights protection movement countered the status quo. In 1959, the United Nations adopted the Declaration of the Rights of the Child,⁸ which affirmed the rights of children everywhere to receive adequate care from parents and the community. The UN Convention on the Rights of the Child adopted in 1989, attempts to consolidate the international law on the basic rights of children to survival, education, and protection from abuse and exploitation.⁹ It provides for four basic categories of rights which are according to Van Bueren referred to as the four Ps¹⁰. These are: participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.

Schultz, T. W., "The Value of Children: An Economic Perspective" (1973) Vol. 81 No. 2, Part 2, *Journal of Political Economy*, pp. S2-S13.

⁷ Potter, M., "The Voice of the Child: Children's "rights" in Family Proceedings" (2008) 2 *The Family in Law* pp. xv-xxxvi.

⁸ Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959. This was the basis of the basis of the Convention of the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990. See <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> (accessed 10 January 2017).

⁹ Zeldin, W., *International Laws: Children's Rights* (The Law Library of Congress, 2007) pp. 2.

¹⁰ Van Bueren, G., *The International Law on the Rights of the Child* (London: Martinus Nijhoff Publishers, 1995) pp. 35. Van Bueren calls these "the four 'P's"; other scholars refer to the Convention as being concerned with the three types of children's rights, called the three 'P's: provision, protection, and participation. See, for example, Peters, J. K., "How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study" (2006) 6 *Nevada Law Journal* pp. 971.

The Convention on the Rights of the Child, however, created new rights for children. These include the child's right to preserve his or her identity which is contained in articles 7 and 8, the rights of vulnerable children like refugees to special protection in articles 20 and 22, and indigenous children's right to practice their culture found in articles 8 and 30. New obligations are also imposed on state parties with regard to the protection of children, in areas such as banning traditional practices prejudicial to children's health and offering rehabilitative measures for victims of neglect, abuse, and exploitation as provided under articles 28(3) and 39. Finally, the CRC sets forth an express ground obligating States Parties not to discriminate against children's enjoyment of CRC rights.¹¹ It is argued that the right to participate in proceedings together with the principles of non-discrimination in Article 2 and provision for the child's best interests in Article 3 form the guiding principles of the Convention.¹²

The African Charter on the Rights and Welfare of the Child also sets forth the principles of non-discrimination and the best interest of the child. By virtue of articles 6-12, children have the rights to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; privacy; education; and rest and leisure. The Charter also provides that children should be protected against all forms of torture, maltreatment, and abuse¹³ and against harmful social and cultural practices.¹⁴ The European Convention on the Exercise of Children's Rights¹⁵ also has similar provisions to that of the Convention on the Rights of the Child and the African Convention on the Rights and Welfare of the Child.

¹¹ Kilkelly, U., "The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child" (2001) *Human Rights Quarterly* pp. 311.

¹² Ibid.

¹³ Article 16 of the ACRWC.

¹⁴ Article 21 of the ACRWC.

¹⁵ Treaty No.160 opened for ratification at Strasbourg on 25 January 1996.

Article 24 of the International Covenant on Civil and Political Rights is also specifically devoted to children. It stipulates that “every child shall have, without any discrimination to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” It further prescribes that every child must be registered immediately after birth and have a name and that every child has the right to acquire a nationality.¹⁶ From this provision, it is observed that reference is made to the circumstances of the birth of a child, i.e. that children enjoy these rights without discrimination to the nature of his birth. Therefore, the international law views the child as possessing sufficient legal personality as to confer them with legal rights.

Children’s Rights under the *Shari’ah*

Long before the UDHR, CRC and other international instruments on the protection of children’s rights, the *shari’ah* has established rules to protect the rights of children.¹⁷ In Islamic law, the responsibilities of believers towards children are inviolable. This is because under the Islamic jurisprudence, rights correlate with duties and vice versa. Children are viewed as vulnerable and by this, their parents and society as a whole need to ensure they are looked after, not only because children have inherent rights, but because Muslims have a duty to be charitable. Islam regards safeguarding children’s rights as important because every human life is sacred to Allah.¹⁸ The imperativeness of the

¹⁶ Zeldin, W., *International Laws: Children’s Rights* (The Law Library of Congress, 2007) p. 17.

¹⁷ Imam-Tamim, M.K, Ismail A.M & Kadir O.R. “An Appraisal of the Child Rights Act, 2003 from the Shari’ah perspective” in *Human Rights in Islam* (Zaria: Ahmadu Bello University, 2012); Imam-Tamim, M. K., “The Rights of the Nigerian Child under the Shariah and Child Rights Act” (2004) Vol. 9, No1 *The Jurist*, pp.197-215.

¹⁸ Arfat S., “Islamic Perspective of Children’s Rights: An Overview” (2013) Vol. 2, No. 1 *Asian Journal of Social Sciences & Humanities*, pp.299-307.

rights of children under Islamic law is underscored in the following hadith of Umar bn Khattāb:

“One day a man came to ‘Umar ibn al-Khattāb to complain of a disobedient son. So Umar had brought the boy to him and he blamed him for his disobedience. Then the boy addressed Umar by saying ‘O Commander of the faithful: Are there no rights for a boy against his father?’ ‘Umar said “Yes”. Then the boy said ‘What are these rights O Commander of the Faithful?’ Umar said, ‘To choose a good mother for him, to select a good name to him and to teach him the Qur’ān’. Then the boy said: ‘O Commander of the faithful; my father has not accomplished any of these rights. As for my mother, she was a black slave for a Magian; as for my name, he has named me *Jual* (beetle); and he has not taught me even one letter from the Qur’ān’. Then Umar turned round to the man and said ‘You came to me complaining disobedience on the part of your son, whereas you have not given him his rights. So you have made mistakes against him before he has made mistakes against you.’”¹⁹

This hadith has mentioned some of the rights of a child over her/his parents although there are other rights that are not mentioned. The hadith explains that even the right of parents to obedience from the children flows from the responsibility of the parents to give the children their due rights. The rights mentioned in the hadith are highlighted below:

¹⁹ Olgar, M. A., “Upbringing of Children” <www.albalagh.net> (accessed 23 August 2016).

Right to noble and well-mannered parents: This right begins from the very first stage of selecting a partner with whom a child will be brought into this world. In *fiqh an-Nikkah*, choosing a righteous partner is one of the highly recommended requirements by Prophet Muhammad. In explaining the import of the part of surah an-Nisā' verse 3 where Allah says: "...*mā tābalakum mina an-nisā'i*..." ("...whatever pleases you of women..."), Al-Jibāly identifies the selection of a righteous partner as the first and most vital quality.²⁰ This position conforms to several *ahādith*²¹ of Prophet Muhammad. According to a hadith reported in Sunan ibn Majah, the Prophet (PBUH) was reported to have said "Make a good choice for (your) spouse, for blood will tell".²² In another hadith reported by Abu Hurairah, Prophet Muhammad was reported saying:

A woman is sought in marriage for four reasons: wealth, social status, beauty, and *din* (piety). So seek the one with *din* – may you then be successful.²³

The Prophet was also recorded to have said in some *ahādith* that one of the three best treasures a person can keep is a righteous partner that assists her/his spouse in the affairs of her/his life and religion.²⁴ The plethora of *ahādith* on choosing a righteous partner shows that the right of the children to have parents of noble and righteous character cannot be underplayed.

Right to lineage: It is also the right of children in Islam to have a legitimate birth (being born from parents who are legally married). This right is an apparent fall-out of the right to righteous parents. One of the

²⁰ Al-Jibali, M. M., *The Quest for Love and Mercy: Regulations for Marriage and Weddings in Islam* (Beirut: al-Kitab & as-Sunnah Publishing, 2005) pp.22.

²¹ Plural form of hadith in Arabic.

²² Arfat, S. op. cit.

²³ Reported in Sahih Bukhari and Sahih Muslim.

²⁴ See al-Albani, *as-Sahihah*, Hadith No. 2176; al-Albani, *Sahih ul-Jami'*, Hadith No. 4409.

effects of the *ahādith* discussed above is that the righteous prospective partners will advise each other regarding the rights of Allah and forbid each other from committing sins, one of which is *zinā*. The importance of the child's right to a lineage under Islamic law is underscored by the inclusion of *al-'ird* (lineage) as one of the *daruriyyāt* (essentials) of the *maqāsid al-Shari'ah* ([ultimate] objectives of Shari'ah).²⁵ Therefore, those who give birth to children outside of wedlock deprive these children from that right to lineage²⁶ because, in Islamic law, when a child loses access to her/his parent, particularly father, the lacuna cannot be filled by other parent(s) claiming parenthood of the child by way of direct or indirect adoption.²⁷

Other rights guaranteed to children in Islam include: right to nurture²⁸, right to life²⁹, right to proper upbringing³⁰, right to socialization, right to

²⁵ Abdulraheem, T. A., "Sociolegal Study on the Right of Children to Health under Shariah and Nigerian Law" (PhD Thesis, USIM, 2016) pp.76-77.

²⁶ Arfat, S., op. cit., p.4.

²⁷ Ibid.

²⁸ The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do" (Al-Qur'an:2:233).

²⁹ "For whosoever kills a soul unless for murder or spreading mischief in the land-it would be as if he/she has killed the whole of humankind and whosoever helps to save a soul, it is as if he/she has saved the whole of humankind" (Al-Qur'an: 5:32). Say: "Come, I will rehearse what Allah hath (really) prohibited you from": Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; - We provide sustenance for you and for them; - come not nigh to shameful deeds. Whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom" (Al-Qur'an: 6:151).

just and equal treatment, right to maintenance, right to basic education, and right to fair and just treatment and against exploitation.

Illegitimacy under International Law

Under a lot of legal systems including Common Law, an illegitimate child is a child born outside the bounds of marriage. International law conventions do not provide for a definition of illegitimacy, most of the conventions, however, provide that every child irrespective of nationality, age, sex or status shall be entitled to enjoy all the rights contained in them without any form of discrimination.³¹ The word "Status" here may be interpreted to cover cases of the legitimacy or illegitimacy of the child. This means that under international law, no child is considered illegitimate. The status of a child as an illegitimate and the disadvantages that come with it, therefore, have been abolished under international laws by the virtue of the prohibition of discrimination on the basis of status or birth. The Universal Declaration of Human Rights expressly makes pronouncement on the issue of legitimacy or otherwise of the child. It provides under Article 25(2) that "all children whether born in or out of wedlock shall enjoy the same social protection."³²

As the attention of the world shifted towards the welfare of children, the negative attitude towards illegitimacy became gradually narrowed especially in many countries.³³ The attitudinal change was

³⁰ "Order your children for salat when they are seven, discipline them for it when they are ten and separate their beds" (Abu Daud). Parents have to do their best to make sure the wellbeing of their children both here and hereafter. The Prophet said, "It's better to leave your children self-sufficient than to leave them on the mercy of others" (Tirmidhi). Parents will have to work to develop hatred within their children against (*akhlaq al-Dhameemah*) all aspects of bad character and to culture within them the love for (*akhlaq al-Hameedah*) praised attribute of character. Our children have to internalize Islamic values and principles.

³¹ Ibid.

³² Van Bueren, op. cit., p.18.

³³ Shah, A., "Rights of the Child" <http://www.globalissues.org/article/152/rights-of-the-child> (accessed 12 January 2017).

premised on the realisation that no child has the capacity to choose to be born legitimate or illegitimate. Discrimination against illegitimate children was described as "one of the most deplorable hypocrisies in family law, whose pernicious effect was to punish illegitimate children for matters for which they were not in the slightest degree responsible."³⁴ On the contrary, some have argued that the legal recognition of illegitimate children undermines the legitimacy and stability of the marriage institution.³⁵ However, the viewpoint of the international laws is that the parents and not these children should suffer the consequences of their own actions.³⁶ Therefore, depriving the children of rights in relation to their fathers will neither eradicate adultery and fornication nor reduce the rising number of illegitimate births.

Many countries have taken steps in recent times to improve the condition of illegitimate children. Countries like Brazil³⁷ South Africa,³⁸ Trinidad and Tobago,³⁹ Zambia,⁴⁰ Tanzania,⁴¹ Germany⁴² and many other European countries all have legislation that place legitimate and

³⁴ de Oliveira Leite, E., "Family Law and the New Constitution" (1997) *The International Survey of Family Law* p.61.

³⁵ Kusum, "Rights and Status of Illegitimate Children" (1998) Vol. 40 No. 1/4 *Journal of the Indian Law Institute* p. 296.

³⁶ Uzodike, E., *Trends of Human in Family Law* (Lagos: University of Lagos Press, 2011) p.27.

³⁷ The New Constitution of Brazil.

³⁸ Intestate Succession Act, Act 81 of 1987, S. 1 (2); Law of Succession Amendment Act, Act 43 of 1992, S. 4.

³⁹ Status of Children Act 1981, Chap. 46: 07 of the Laws of Trinidad and Tobago.

⁴⁰ Intestate Succession Act, Chap. 59, Laws of Zambia, 1989; Wills and Administration of Testate Estates Act, Chap. 60, Laws of Zambia 1989.

⁴¹ Rwezaura, B., "Gender Justice and Children's Rights: A Banner for Family Law Reform in Tanzania," (1997) *The International Survey of Family Law* p.415.

⁴² Equal Status in Succession Act 1997, came into force on April 1, 1998.

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illegitimate children on the same footing.⁴³ The Brazilian Constitution has abolished the use of “illegitimate”, “adulterine” or any other similar words connoting discrimination in any of the country’s statutes, thus, by implication, eliminating any legal justification for the stigmatisation of children born outside of lawful wedlock.⁴⁴

Illegitimacy under the *Sharī‘ah*

Under Islamic law, illegitimate children are children who have been born as a result of prohibited sexual intercourse between non-intimate men and women.⁴⁵ In other words, an illegitimate child is a product of an illegal intercourse between a man and woman. Under the *shari‘ah*, the biological relationship between a *walad al-zinā* and his supposed father would be automatically severed.⁴⁶ Thus, Islam does not impose the duty of fathering the child on the man who impregnated the child’s mother even if he acknowledged the pregnancy. The legal support for this position is found in a hadith where the Prophet was reported saying that:

If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may any one inherit from him.⁴⁷

⁴³ Uzodike, op. cit.

⁴⁴ Ibid.

⁴⁵ Ardakani, M. H. M. & Rashidi, A., “Status of guardianship, alimony and inheritance of illegitimate children in Islam” (2016) Vol. 44 *World Scientific News* pp.291-301.

⁴⁶ Raja Gopal, M. D., “Does Illegitimacy Status of Children Matter? A Review on Malaysian Perspectives” (2015) Vol. 5 No. 4 *International Journal of Applied Psychology* p.110.

⁴⁷ Reported in Tirmidhi.

Marriage is a sacred and important institution among the Muslims.⁴⁸ Thus, children born before the solemnisation are considered illegitimate.⁴⁹ One of the primary reasons why *shari'ah* intervenes in the legitimisation of children is to protect their lineage (*nasab*) and identity because *nasab* is important in Islamic law.⁵⁰ The importance is underscored by the primacy of *'ird* (protection of lineage) as one of the *daruriyyāt* (essentials) of the *maqāsid al- sharī'ah*.⁵¹ Under the *sharī'ah*, the child acquires his 'right to rights' (including right to father, the right to a name, the right to maintenance, inheritance and guardianship) primarily through his legitimate status. Although the *nasab* can be established in many ways, calculation of the period of pregnancy is considered the most common.⁵² Thus, majority of scholars, relying on the combined import of some Qur'ān verses,⁵³ accept 6 months as the minimum period of pregnancy.⁵⁴ But the scholars are highly divergent regarding the maximum period of pregnancy as they stipulate periods

⁴⁸ Imam-Tamim, M. K., "Multi-Tiered Marriage Contracts in Nigeria and the Need for Reforming the Nigerian Family Law" (PhD Thesis, IIUM, 2015), p.361. See also 'Abd al-'Ati, H., *The Family Structure in Islam* (Riyadh: IIPH, 1977) p.59.

⁴⁹ Gurin, A. M., *An Introduction to Islamic Family Law*, 2nd Ed. (Lagos: Malthouse Press, 2014), pp.193-194; Zubair, M., Khattak, S., Hidayat-ur-Rehman and Khan, M. A., "The Laws of Inheritance in Islam" (2014) 4 (8) *J. Basic. Appl. Sci. Res.*, p.88.

⁵⁰ Raja Gopal, op. cit.

⁵¹ Abdulraheem, T. A., "Sociolegal Study on the Right of Children to Health under Shari'ah and Nigerian Law" (PhD Thesis, USIM, 2016) pp.76-77.

⁵² Raja Gopal, op. cit., p.111.

⁵³ The Qur'an verses are surah 2:233, surah 31:14, surah 46:15.

⁵⁴ Aluffi Beck-Poccoz, R., *La Modernizzazione del diritto di famiglia nei paesi arabi* [Modernisation of family law in the Arab countries] (Milano: Giuffre, 1990) pp.157-158.

between 9 months⁵⁵ and 7 years⁵⁶. The maximum of 2 years is the position of the Hanafī scholars, which is based on the hadith, reported by 'Āishah that "a child in a mother's womb cannot be more than two years"⁵⁷. On the other hand, the Maliki scholars hold that the gestation period could be up to 7 years although Imam Malik personally limits the period to 5 years.⁵⁸ The reasons for extending the gestation period this far include helping a child that was born out of wedlock or between 2 and 7 years of the death of the husband or divorce to be able to establish his paternal *nasab*⁵⁹. It also serves as a social protection for both the child and the mother as the allegation of adultery or fornication could result to the death of the woman and discrimination against the child who would be marginalised for being illegitimate.⁶⁰ The position of the Maliki School, which conforms to medico-scientific theory of "sleeping foetus", has therefore been applied in many contemporary Muslim-majority and Islamic countries in North Africa to establish paternal *nasab* between children and fathers. Thus, women who birthed children years after separation from or death of their husbands have had recourse to the theory to acquire economic benefits from their former husbands in favour of the putative children.⁶¹

⁵⁵ This is the position held by the minority of scholars comprising mainly the *Zahiri* School jurists.

⁵⁶ Some scholars rely on the theory of "sleeping foetus" to argue that the period of a pregnancy could well extend beyond the traditional 9 months. See: Colin, J., "L'enfant endormi dans le ventre de sa mere" [The child asleep in his mother's womb] (1999) Vol. 15 *Medecine/Sciences* pp.260-263.

⁵⁷ Noor Aziah, *The Rights of Illegitimate Children in Malaysia: A comparative study between Islamic and Civil laws in Malaysia*, 2007-2009.

⁵⁸ Atighetchi, D., *Islamic Bioethics: Problems and Perspectives* (Dordrecht, The Netherlands: Springer, 2007) p.106.

⁵⁹ Aluffi, op. cit., p.158.

⁶⁰ Atighetchi, op. cit., p.106.

⁶¹ See Benomran, F. A., "Sleeping Foetus? – Medicolegal Consideration of an Incredible Prolonged Gestational Period" (1995) Vol. 35 No. 1 *Medicine, Science and the Law* pp.75-78, which described a case that occurred in Libya.

In Islam, illegitimacy does not only arise out of illegal sexual relationships; it can also arise out of a void marriage such as that of a prohibited degree of marriage, that is, that of consanguinity, affinity or fosterage.⁶² However, where parties to a marriage are within a prohibited degree of relationship but had no idea of it, a child born out of such a relationship is attributed to the man in such relationship⁶³ on the strength of his acknowledgement and in so far as he does not declare the child to be a product of *zinā*, which will eventually lead to declaring that child to be illegitimate.⁶⁴

There is a difference of opinion amongst Islamic scholars as to the legitimacy of a child in the event that an adulterer makes a voluntary confession of an extra-marital sexual relationship with a particular woman and that her baby is his own biological son.⁶⁵ The majority of scholars agree that such confession will not legitimise the baby.⁶⁶ This, according to them, is because *nasab* (lineage) is Allah's blessing upon which anything unlawful cannot be built.⁶⁷ But other scholars led by Abu Hanifah including Ibn Taymiyyah,⁶⁸ Ishaq bn Rahawiyyah, Ibn Qudaamah,⁶⁹ Ibn Muflih,⁷⁰ Ibn Sireen among others are of the view that the confession of such an adulterer legitimises the baby and as such his

⁶² Gurin, op. cit., pp.196-197.

⁶³ *Fataawa al-Lajnah al-Daa'imah* (20/387).

⁶⁴ Raja Gopal, op. cit., p.112; 'Abd al-'Ati, op. cit., p.191.

⁶⁵ Ambu, M. M., *Fiqh al-Muwarith fi dau' al-Kitab wa Sunnah* (Cairo: Maktab al-Iman, n.d.) p.226.

⁶⁶ *Fataawa Islamiyyah*, 3/370; *Fataawa al-Shaykh Muhammad ibn Ibraaheem* (11/146). See also Gurin, A. M., *An Introduction to Islamic Family Law*, 2nd Ed. (Lagos: Malthouse Press, 2014) p.197; Islam Question and Answer, "33591: An illegitimate daughter is asking, whose daughter am I?" <https://islamqa.info/en/33591> (accessed 14 January 2017).

⁶⁷ Aminu, M. Y., "Illegitimate Child (Walad Al-Zina) and his Position in Islamic Succession" (2015) Vol. 20 No. 12 *IOSR Journal Of Humanities And Social Science* pp. 25-27.

⁶⁸ *Al-Fataawa al-Kubra*, 3/178.

⁶⁹ *al-Mughni*, 9/122.

⁷⁰ *al-Furoo'*, 6/625.

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nasab (blood relation) is valid. This argument is premised on the fact that since the child's *nasab* (lineage) has been traced to his father who has acknowledged him; then the child will be purified of his initial illegitimacy.⁷¹ It is argued further that this is to protect the dignity and *nasab* of the child in the society as he should not be blamed for an evil that he did not commit based on the declaration in the Qur'an that:

"If you disbelieve indeed, Allah is free from need of you. And He does not approve for His servants disbelief. And if you are grateful, He approves (i.e. likes) it for you; and no bearer of burdens will bear the burden of another then to your Lord is your return. He will inform you about what you used to do. Indeed He is knowing of that within the breasts."⁷²

In another verse of the Qur'ān, it is stated that: "And no soul shall bear the sin of another".⁷³ The minority of the scholars thus base their rulings on the premise of the provisions in the Qur'ān and concluded that provide the male adulterer has confessed and admitted the child as his own, then the child will be cleansed of his status as illegitimate. They further argue that the manner of the child's birth is not the sin of the child and that no matter the circumstance through which a child is brought into the world, all of his rights including rights to identity and sustenance remain valid under Islamic Law.⁷⁴

The foregoing notwithstanding, *sharī'ah* does not totally deprive the illegitimate child of right to identity and inheritance. The rights to

⁷¹ *al-Mughni*, 9/122.

⁷² Qur'an chapter 39 verse 8.

⁷³ Qur'an chapter 35 verse 18.

⁷⁴ Arshed, I. A. "Parent-Child Relationship in Islam and Imam Al-Ghazali's views on children's education"
<<http://www.islam101.com/sociology/parchild.htm>> (accessed 10 January 2017).

identity and inheritance of an illegitimate child are ascribed to his mother and her relations. Thus, according to the *fiqh* of Hanafi, Hanbali, Maliki, and Shafi'i schools, the illegitimate child is entitled to inherit from his/her mother and his/her relations whether legitimate or illegitimate and they can inherit from him/her.⁷⁵ The mother and her relatives inherit from an illegitimate child according to normal Islamic rules of succession.⁷⁶ The position of the four orthodox *fiqh* schools is in apparent contradistinction with the Imamiyyah School of the *Shi'i fiqh*. The latter school holds that the *walad al-zinā* does not possess the right to inherit from even the mother for the same reason (of *zinā*) it was debarred from inheriting its putative father.⁷⁷ Although the position of the Imamiyyah School is of the minority opinion and may appear to be harsh on the child, who is not culpable in the wrongful act of its parents, the position underscores the strong value that *shari'ah* attaches to the marriage institution and how it only recognises lawful and legitimate sexual intercourse.

In line with the objective of *shari'ah* to cater for the welfare of all persons without discrimination, *shari'ah* requires that the state must ensure that an illegitimate child, like every other child, enjoys his basic human rights such as the right to life, basic education, welfare and right against exploitation. The rationale behind the *shari'ah* ruling on illegitimacy is to deter the Muslims from procreating outside the bounds of a lawful and valid marriage.⁷⁸ Although, the fault of illegitimacy is borne by the parents, the child still carries the stigma throughout his

⁷⁵ Oniye, M. A., *The Distribution of Estate in Islam: The Law and Practice* (Ilorin: n.p., 2008) pp.23-24.

⁷⁶ Hussain, A., *The Islamic Law of Succession* (Riyadh: Darussalam, 2005) p.252; Fauzan, S., *Al-tahaqiqat al-Mardiyyah fi al-Mabahis al-Fardiyyah* (Madinah: Islamic University, 1415 A.H.) p.218.

⁷⁷ Allamah Muhammad Jawad Maghniyyah, *Inheritance according to the Five Schools of Islamic Law*, Vol. 7 (Tehran: Islamic Culture and Relations Organisation) p.25.

⁷⁸ Ambali, M. A., *The Practice of Muslim Family Law in Nigeria*, 3rd Ed. (Lagos: Princeton Publishing Co., 2014) p.344.

life.⁷⁹ It is from the foregoing that it is unacceptable in accordance with the *sharī'ah* principles to abolish the status of illegitimacy of a child as this will no doubt undermine the sacredness of marriage and the ideal Islamic family system in general.⁸⁰

Conclusion

It is acknowledged in every system of law, including both the international law and *sharī'ah* that discrimination and stigmatisation especially by the circumstances of a person's birth is anti-human rights. Nevertheless, it is equally acknowledged by every system of law that freedom of persons to satisfy their whims and caprices should not be allowed to destroy the foundation of the society – the family. Marriage has ever been recognised and is still recognised by majority of contemporary societies including Muslim communities, as the most acceptable means of creating a family and legitimising sexual relationship between persons (of opposite gender). Thus, states have understandably been involved in regulating how families are created through valid marriage. One of the outfalls of the state's involvement in the regulation of marriage contract is the legitimisation of children born in wedlock. Thus, any child born outside wedlock of a valid marriage would be considered illegitimate. This attitude has been considered an act of discrimination, which the international community has addressed through the adoption of various human rights treaties particularly the Convention on the Right of Child. The African community supported this by adopting the African Charter on the Rights and Welfare of Child. These treaties contain provisions that protect children against discrimination as a result of the circumstances of their birth. This position is based on the view that all children are born innocent. On the other hand, even though *sharī'ah*, like the international law, propounds rules prohibiting discrimination against persons without just cause, it denies a child born out of wedlock right to identity and lineage. The denial highlights the importance that *sharī'ah* ascribes to the sanctity of

⁷⁹ See *al-Manaaral-Muneef*, 133; Ibn Taymiyyah, *al-Fataawa al-Kubra*, 5/83.

⁸⁰ Ambali, *Ibid*; 'Abd al-'Ati, *op. cit.*, pp.56-57.

the institution of marriage.⁸¹ Under the *sharī'ah*, marriage is one of the means of legitimising sexual intercourse between a man and a woman. Any unlawful sexual intercourse is a sin and the illegitimacy of a child aided by such illegal intercourse is one of its legal consequences.

The findings from the analysis in this paper have shown that the ultimate aim of both the international law and *sharī'ah* is to protect the best interest of every child by guaranteeing the child's right to dignity, identity and pure lineage. However, a bird's-eye view of the approaches by the two systems of law portrays that they are irreconcilable. This is because while the international law aims at saving the child from a life-time stigma by simply abolishing the status of the illegitimacy; the Islamic law attaches the legitimacy of the child to the sanctity of marriage institution. It thus stipulates that in order to preserve the sanctity of marriage and the values of the Islamic family system, every child considered legitimate must be born in wedlock.

In the light of the common objective of both *sharī'ah* and international law for protecting the right of the child to legitimacy, it is expected that the international law should also, like it is done under the *sharī'ah*, adopt a strong aversion to adultery and fornication, which are often the cause of rendering a child illegitimate and thereby leading to the suffering of innocent children. Therefore, the focus of the law should not only be fixed on abolishing the stigmatisation of the illegitimate child but also to prevent the process of bringing an illegitimate child into the world.

⁸¹ Abdur Rahim, M. A., *The Principles of Islamic Jurisprudence* (New Delhi: Kitab Bhavan, 2006) p.311.