



Research Article

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Extra-Marital Child (*Walad Al Zina*) and His Right to Maintenance (*Nafaqah*): A Comparison of Islamic Law and South African Common Law

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Abstract

Islamic law forbids fornication and adultery (*zina*) because they result in several societal problems such as bitterness in relationships, spread of diseases and the confusion of lineage. Any child born because of *zina* is regarded as *walad al zina* (an extra-marital child). There is consensus amongst the various Islamic schools of thought (*madhab*) that an extra-marital child (*walad ala zina*) has no relationship with his or her biological father. As a result of this absence of connection, the biological father faces no legal obligation to maintain his extra-marital child. On the contrary, every parent regardless of marital status has a full legal obligation to maintain his or her children under the South African common law. It is submitted that the exclusion of an extra-marital child from receiving child maintenance from his biological father merely because he was born outside marriage, does not promote the principle of the best interest of the child at all. Furthermore, the exclusion also constitutes a violation of the child's equality rights and dignity and is therefore unconstitutional.

Keywords: *Walad Al Zina, Nafaqah, Comparison of Islamic Law, South African, Law*

1. Introduction

Fornication (*zina*) is prohibited by many cultural groups, if not all of them, in the Southern African Development Community (SADC) (Ngema and Ndaba, 2022). Moreover, almost all the revealed religions of the world forbid fornication and adultery (*zina*). In the Islamic religion the rules demand that guide lines concerning sexual behaviour must at all times be obeyed and observed to the letter because the failure to do so leads to numerous social ills, such as sexually transmitted diseases, disintegration of families and confusion of the bloodline. In Islamic law sexual intercourse is something that is specifically meant for married persons. If unmarried persons engage in sexual relations that lead to procreation, the resulting offspring is regarded as an extra-marital child. The consequence of such a birth is that the child's right to receive child maintenance (*nafaqah*) from the biological father becomes affected. The term *nafaqah* literally means what a person spends on his family (Sabreen, 2020). *Nafaqah* (maintenance) refers to the right of every child to receive maintenance and support from his or her father while still a minor. The father is not only expected to

maintain his children but also his wife. However, this paper will focus on the maintenance of extra-marital children. Maintenance and guardianship rights highly depend on the lineage (*nasab*) of a child. As a result, the legitimacy or otherwise of a child, becomes a critical factor in the determination of maintenance rights. Paternity is created based on legitimacy and the legitimate child has a legal right to *nafaqah* from his or her biological father, but an extra-marital child has no legal right to *nafaqah* from the biological father (Pearl and Werner, 1998; Safir Syed, 1998; Muhamad Al-Husaini Al-Shirazi, 1997). A child is regarded as legitimate if he or she was born from parents who have legally tied a wedding knot. Any child procreated outside the confines of a lawful wedlock belongs only to his or her mother and her lineage. The mammoth responsibility of paying an extra-marital child's maintenance (*nafaqah*) rests solely on the mother and her relatives (Esposito, 1982; Nasir, 1990; Pearl, 1987, and Tanzil-ur-Rahman, 1978). This paper intends to test the constitutionality of excluding extra-marital children from receiving child maintenance from their biological father. The paper is divided into seven thematic parts: namely, the first part will discuss the responsibilities of parents in Islamic law; the second part will discuss the factors that contribute to the relative social standing of an extra-marital child in Islamic law; the third part will discuss the impact of being an extra-marital child on the child's right to child maintenance; the fourth part will discuss the South African common law position on the issue of child maintenance; the fifth part will juxtapose the exclusion of extra-marital children from receiving child maintenance from their biological father with the principle of the best interest of the child in South African law; the sixth part will discuss the South African obligation under international law to promote an egalitarian society; lastly, the seventh part will test whether the exclusion of extra-marital children from receiving maintenance from their biological father is in line with the Constitutional right to parental maintenance or not.

2. The Responsibilities of Parents in Islamic Law

Initially, the father is the one who has the responsibility to maintain his family. He is expected to maintain his male children until they reach puberty and support his female children until they are finally marry off to their husbands (Denson and Carnelly, 2009). The legal obligation of the father to pay maintenance (*nafaqah*) arises because of a legally valid marriage and by operation of law. However, where he is indigent, the obligation to pay *nafaqah* can be directed to the mother if she can bear that duty (Denson and Carnelly, 2009). The scope of *nafaqah* is wide enough to include the duty to provide a minor with shelter, food, medical care, education, and clothing (Denson and Carnelly, 2009). The financial status of the father together with his standard of living play an extremely important role in determining the level of support that he can afford to provide (Denson and Carnelly, 2009). If the father fails to honour his duty to support his offspring, the wife could liaise with a Muslim scholar to remind her misbehaving husband about his obligation to support his children. Several factors play a major role before the child can be regarded as an extra-marital child in Islamic law.

The following section will provide a brief exposition of such factors.

3. Factors Contributing to a Child Being Regarded as an Extra-Marital Child in Islamic Law

3.1 Fornication and adultery (*zina*)

As already mentioned, sexual intercourse outside the confines of a lawful marriage is viewed as the main cause for a child born out of that relationship to be regarded as an extra-marital child (Ahmad Ibrahim, 1979). Islamic law mandates that all sexual activity must be within the marriage relationship. In consequence, it condemns any sexual intercourse outside the confines of lawful wedlock. *Zina* is highly forbidden in Islamic law and attracts very serious punishment against the perpetrators. This legal point is confirmed by the holy Quran which provides that any person found guilty of committing fornication must be flogged with one hundred stripes (Quran: Surah 24: 2). In a similar

vein, the Quran also forbids adultery and discourages it by providing that:

“If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them or Allah ordain for them some (other) way” (Quran: Surah 4: 15).

Notably the above verse from the Quran does not make explicit mention of the term *zina* but uses lewdness (*fahisha*) instead. *Fahisha* means adultery and fornication. *Zina* occurs through illicit sexual relation where both the man and woman are not married to each other (fornication) or adultery, when one or both perpetrators are married. The resultant child becomes an extra-marital offspring (*walad al zina*).

3.2 *Li'an*

Li'an is a situation where a husband alleges that his wife has partaken in an adultery but does not provide four eyewitnesses to support his allegation or provide a confirmatory confession from his wife (Ahmad Ibrahim, 1979). *Li'an* involves a process of taking an oath with the sole intention of dodging the penalty for partaking in the *hudud* crime of (*qadf*). If a man alleges that his wife participated in an adultery, but fails to provide evidence of four witnesses or a confession from his wife, he would be charged with the *hudud* crime of *qadf*. However, a husband can allege that his wife participated in an adultery, reject the paternity of the child born to his wife and escape the penalty for committing *qadf*. He can evade the penalty for committing *qadf* if he can swear four times, by Allah, that his wife participated in an adultery. For the purposes of divorce, a husband is expected to make an oath four times that his wife committed adultery and that, seriously, he is telling nothing but the truth. Obviously, it is believed that the oath should bring a curse of Allah upon himself if he was not telling the truth. In her turn, the accused wife can take an oath before Allah, four times, denying any form of involvement in an adultery and on the fifth time, her false oath should summon the curse of Allah upon herself if she is telling a lie (Quran 24 al Nur 4-7; Ahmad Ibrahim, 1979).

The impact of the husband who divorced his wife through *li'an* is that there is no lineal relationship between the child born to his wife and his biological father. The result is that the child belongs to the lineage of his mother. (Ahmad Ibrahim, 1979) The South African Law Reform Commission (SALRC) compiled a Draft Bill on Muslim Marriages in 2003 (SALRC, 2003). However, the Bill was silent on the issue of *li'an* as a form of divorce (Bakker, 2010). This lack of preciseness raises some concerns because the husband is a human being who is likely to err about the infidelity of the wife and the paternity of the child. In view of the development in medical science and technology, it is possible to ascertain the paternity of the child through the DNA tests. It is highly disturbing that a husband who denied the paternity of his child through *li'an* and did not undergo a DNA test does not get involved in the maintenance and guardianship of the child at all. The writers argue that this injustice is likely to encroach upon the doctrine of the best interest of the child in South African law and the child's equality rights enshrined in the Constitution.

The following section discusses the impact of being classified as an extra-marital child on the child's right to maintenance in Islamic law.

4. Impact of Being Regarded as an Extra-Marital Child on the Child's Right to Maintenance in Islamic Law

In Islamic law legal paternity (*nasab shar'i*) is created when both parents are legally married to each other. As a result of this, a child begotten by a married couple enjoys the social status of a legitimate child, while the one begotten out of wedlock receives an inferior socio-legal status of an extra-marital child. Non-marital children together with their mothers are stigmatised in Muslim society for the entire duration of their existence. This stigmatisation is clearly reflected in the illegitimate child's

social and legal disadvantage (Siddiqui, 1994). In expanding on the issue of stigmatisation, Coulson argued that in the eyes of the law, unmarried lovers are not given the social status of a husband and wife. In a similar vein, a father and his biological son born out of wedlock, are not viewed as father and son (Coulson, 1971). While a legitimate child has a legal right to receive child maintenance, guardianship, and inheritance from his biological father, an extra-marital one is completely excluded from enjoying such rights (Ghanem, 1981; Mujuzi, 2021; Fyzee, 1964; Schacht, 1964). Almost all the sources of Islamic law agree that a child would receive legitimate status only if he or she was conceived and born from married parents. The legitimacy of a child is not an issue to joke about because it involves lineage (*nasab*) which is pertinent in legitimacy matters (Khalequzzaman, 2018). If a child is legitimate, his lineage (*nasab*) is traced to his or her father, while an extra-marital child (*walad al zina*) enjoys no connection of any kind with his or her biological father just because he or she is regarded as a product of illicit sexual intercourse (Khalequzzaman, 2018). In other words, a child begotten through fornication and adultery (*zina*), is regarded as an extra-marital child and is excluded from benefitting any form of maintenance from his or her biological father (Mujuzi, 2021).

5. South African Common Law Position

Section 1 (1) read in conjunction with section 18 (2) of the Children's Act 38 of 2005, do not impose the duty of support on the father of the child alone but it also equally imposes it on the mother of the child. As a result, both parents have reciprocal duties and rights which include, inter alia, the upkeep of the child, keeping sustained communication with the child, and, acting as the child's guardian and making some contribution to the general upkeep of the child. In the same vein, the Children's Act describes care as all-embracing. Care encompasses providing the child with shelter or dwelling place that is suitable for the child's development, health, and well-being. The Act also describes care as providing the child with financial support and maintenance. In terms of section 28 (1) (b) of the Constitution, the right to be taken care of by the parent or the family is clearly spelt out. The child has the right to be provided with an alternative place that is suitable, if removed from the family environment. Moreover, the Constitution mandates all parents to provide food, accommodation, health, and social services in terms of section 28 (1) (c). In the case of the *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC), the highest court of the country made it categorically clear that the parents and the family have the primary duty to care and maintain their children as mandated by section 28 (1) (c) of the Constitution. The duty of support is only transferred to the state if the parents of the child and the family are so indigent to the extent that they are unable to comply with their obligations. Be that as it may, this paper will put more attention on the primary duty of support which is imposed by private law on both the child's parents and the family. The duty to provide for maintenance that exists between a parent and a child arises *ex lege* during the birth of the child (Spiro, 1984). However, the high court in the case of *Gliksman v Talekinsky* 1955 (4) SA 468 (W) extended this *ex lege* duty of child maintenance to grandparents of the child if both parents of the child are unable to comply with their parental duty of support. It appears that extra-marital children have tended to suffer some degree of discrimination in the past because paternal grandparents had no duty to support their grandson born from their single son who has not yet decided to get married. In *Peterson v Maintenance Officer* (2004) 1 All SA 117 (C), the Western Cape High Court held that such a differentiation between children born of unmarried and married parents is unconstitutional because it constituted unfair discrimination on the ground of birth, a violation of human dignity and the best interest of the child. In the case of *Ex Parte Pienaar* 1964 (1) SA 600 (T) the High Court further extended the duty of support to the nearest family members, such as siblings, in a situation where both parents and grandparents were so indigent that they were unable to meet up with their duty to support. Siblings could be brothers, sisters, half-brothers, and half-sisters.

6. The Best Interest of the Child

In terms of section 28 (3), the Constitution of the Republic of South Africa clearly defines a child as any person that is below the age of eighteen years. This definition of a child is in line with the international trends. The Republic of South Africa has made some efforts in promoting and protecting the best interest of the child by making it categorically clear in terms of section 28 (2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child. The constitutional provision that protects the best interest of the child has permeated to the Children's Act 38 of 2005 which defines the child as a person below the age of eighteen years. It further stipulates that in any situation concerning the provision of what is necessary for the health, welfare, maintenance and protection of the child, the best interest of the child is of paramount importance. The interpretation of section 28 of the Constitution is in conjunction with section 9 of the Children's Act. It shows that South Africa has domesticated the Convention on the Rights of the Child (CRC). The CRC makes it clear that in every situation in connection with the child, the doctrine of the best interest of the child must be a primary consideration. South Africa is a member state to the Convention and is therefore legally obliged to adhere to its provisions. It is commendable that South Africa has ratified the Convention and has made some efforts to domesticate it. However, there is still uncertainty surrounding the concept of the best interest of the child. It cannot be easily defined with absolute certainty as to what the best interest of the child means in precise terms. In the case of *Minister of Welfare and Population Development v Fitzpatrick* the court held that the problem of uncertainty about what constitutes the best interest of a child has been exacerbated by the fact that it has not been adequately addressed in local, foreign and international jurisprudence. This uncertainty led Thoko Kaime to infer that the concept is indeterminate to such an extent that working with it surely requires the wisdom of the King Solomon (Kaime, 2009). Mahlobogwane also submitted that what is best for a particular child cannot be determined with a firm conviction that it is really the best for every child (Mahlobogwane, 2010). The indeterminacy of the concept of the best interest was also acknowledged by the Constitutional Court in the case of *S v M 2008 (1) SA 232 (CC)* para 24. To promote the best interest of the child it is of crucial importance to listen to the child's opinion in all issues affecting the child, such as during maintenance battles (Tobin, 2005). The need to consider the views of the child in matters affecting the child is also emphasised in article 4(2) of the African Charter on the Rights and Welfare of the Child (ACRWC). Grossman emphasised the importance of listening to the views of the child and indicated that doing so would assist the court to understand the needs of the child, aspirations, personality, problems and the kind of relationship he or she would like to have with each parent (Grossman and Scherman, 2005). The reading of the last mentioned human rights instruments shows that the exclusion of the extra-marital child from receiving child maintenance from his biological father does not adequately promote and protect the best interest of the child.

7. Right to Equality in International Law

The normative commitment to an egalitarian society for all is reflected in the international human rights instruments. This commitment to reach an ideal equality for all worldwide, indicates without any doubt, its significance. One of the commentators concluded that the right to equality is part and parcel of *jus cogens* and that this right has been the norm since the Second World War (Berat, 1991). If the right to equality has truly acquired the position of *jus cogens*, it means that it forms part and parcel of customary international law. As a result, all countries of the world are therefore expected to accomplish their responsibilities in safeguarding against its violation. It is apparent that the customary character of the right to equality is codified by numerous human rights instruments that promote the protection of gender equality provisions. This development attests to the powerful force enjoyed by customary international law.

According to the authors, it remains a major concern that Islamic law continues to discriminate against extra-marital children (*walad al zina*) merely because such children are a product of illicit sexual intercourse. The failure to allow extra-marital children to receive maintenance from their biological father is tantamount to deliberate discrimination against them. This discrimination demonstrates beyond any doubt that the issue of discrimination continues to pose a challenge around the world despite the existence of numerous international and regional human rights instruments that prohibit discrimination. The instruments that forbid discrimination at an international arena, do so by making specific provisions in terms of articles 1 (3), 13 (1) (b), 55 (c) and 76 of the United Nations Charter (UN Charter), articles 2 and 7 of the Universal Declaration of Human Rights (UDHR), articles 2 (1) (2) and (3) of the International Covenant on Economic, Social and Cultural Rights (ICESR), articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR), articles 2, 3, 18 and 28 of the African Charter on Human and Peoples Rights (ACHPR), article 2 of the Convention on the Rights of the Child (CRC), and articles 2 and 16 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The reading of the listed instruments that dedicated some provisions to outlaw discrimination and other forms of inequality, shows a strong normative commitment to the attainment of equality for all in all parts of the world.

In July 2004, the African heads of states convened in Addis Ababa (Ethiopia) to adopt a Solemn Declaration on Gender Equality in Africa and reaffirmed their normative commitment to gender equality as protected in the Constitutive Act of the African Union and the United Nations instruments. One amongst their objectives was to encourage the enactment of legislation that is designed to guarantee women's property, inheritance, and land rights. South Africa remains a signatory to the last mentioned instruments and has domesticated them through the Constitution and relevant other legislation. The following section intends to discuss equality in the South African context.

8. *Walad Al Zina's Disqualification from Obtaining Child Maintenance and the Issue of Gender Equality*

On the face of it, one may claim that the disqualification of extra-marital children from receiving maintenance from their biological father merely because they are a product of illicit sexual intercourse, constitutes an encroachment upon their equality rights and dignity. This encroachment necessitates an analysis of the equality provision to find out whether such disqualification against children born out of wedlock really constitutes an encroachment upon the equality rights of extra-marital children. The equality clause commences by making it very clear that "everyone is equal before the law and has the right to equal protection and benefit of the law." (Section 9, 1996) The use of the word 'everyone' would validate the assumption that equal protection also includes extra-marital children who practice Islamic law. The equality clause goes further to forbid any form of unfair discrimination against anyone, whether it is direct or indirect. This shows that the drafters of the Constitution anticipated that there would be some form of differentiation one way or the other. Yet, nonetheless decided only to prohibit unfair discrimination. In determining the constitutionality of any conduct or provision that seems to be discriminatory upon a person or a group of people, the Constitutional court developed a multi-stage test in the case of *Harksen v Lane* 1998 (1) SA 300 (CC). The initial phase of the test is to assess whether the disqualification of extra-marital children discriminates between individuals or group of people. The answer is in the affirmative. Under the Islamic law, extra-marital children are deprived of maintenance from their biological father while children that are born within the confines of lawful wedlock are entitled to full maintenance from their biological father. Section 9 (3) of the Constitution specifies the prohibited grounds of discrimination. Birth falls under one of those prohibited grounds of discrimination. So, the exclusion of extra-marital children from maintenance merely because they were not conceived and born within a marriage is amounts to direct discrimination on the listed ground of birth. No one has control over

when and how he is born, whether from a married couple or unmarried lovers. Therefore the incidents of birth become something that is far beyond any child's control.

The second phase of the test for discrimination is to assess whether the discrimination is fair or not. In doing so, it is of crucial importance to evaluate the effects of discrimination on the victim or the complainant. Judge Goldstone held that some factors have to be taken into consideration when measuring the effects of discrimination on the victim, namely: (a) the social status of a victim and whether he suffered discrimination in the past; (b) the purpose of discrimination is another factor to be taken into consideration in assessing the fairness of a discriminatory provision or conduct; and (c) whether the differentiation has led to the impairment of the victim's dignity or not.

Getting back to the above factors, the social status of extra-marital children prejudices their rights because they are stigmatised as *walad al zina* who have no relationship of any kind with their biological fathers. Hence, extra-marital children cannot get maintenance or inheritance from their biological fathers. However, the purpose of depriving extra-marital children from getting maintenance is not clear and does not seem to serve any important societal goal. The discrimination against extra-marital children strikes at the core of their dignity because it impairs their chances to a normal life in the community. The reading of the equality test that was expounded in *Harksen's* case in conjunction with some constitutional provisions such as sections 1, 7, 36 and 39 and some Constitutional Court decisions of *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC) para 31, and *Dawood and others v Minister of Home Affairs and others* 2000 (8) BCLR 387 (CC) para 35 shows beyond any doubt that our equality jurisprudence is centred on the constitutional value of human dignity. In *Dawood's* case O'Regan J emphasised the value of human dignity and held that:

"Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all other rights. The court has acknowledged the importance of the constitutional value of human dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman, and degrading way, and the right to life."

The above quotation confirms the equality jurisprudence of the Constitutional Court which understands equality as a right that should be informed by another constitutional value, in that it does not stand as a self-determining value. Cowen submitted that, if equality would stand alone as a self-determining value, it would be difficult to explain precisely what is it that we seek to defend or accomplish (Cowen, 2001). So far, the response of the court is that we intend to defend human dignity (Cowen, 2001). An important societal goal of forbidding *zina* amongst the Muslims, is to promote morality and public decency. However, the exclusion of extra-marital children from receiving maintenance from their biological father does not appear to serve any worthy and important societal purpose other than that further problems ensue when the human dignity of extra-marital children are violated in the name of religious conviction. In sum, the exclusion of extra-marital children amounts to a clear affront to the equality rights and human dignity of such children.

9. Conclusion

The comparison of the common law position and the position in Islamic law shows that common law does not discriminate against extra-marital children on maintenance matters. On the contrary, the Islamic law position blatantly discriminates unfairly against extra-marital children. According to Islamic law, an extra-marital child (*walad al zina*) has no relationship of any legal nature with his biological father. The lineage (*nasab*) of an extra-marital child is that of the mother but not that of the biological father (*nasab*). Some factors contribute to a child being regarded as an extra-marital child in Islamic law. Fornication and adultery (*zina*) are an example of those factors. Islamic law not only forbids *zina* but anyone who partakes in it is severely punished with one hundred lashes. The sins of the parents who committed *zina* also affects their children in one way or the other because any child begotten through fornication and adultery (*zina*) will be treated as an extra-marital child

and will remain as such even if both biological parents end up getting married to each other one day. Any child begotten through illicit sexual intercourse (*zina*) is not entitled to receive child maintenance from his biological father. As we saw, another factor that contributes to a child being regarded as an extra-marital child is when the husband divorces his wife through the process of *lia'n* and denies the paternity of the child born from his wife. A child that was denied by his biological father through the process of *lia'n* will be stigmatised as an extra-marital child that is not entitled to receive any form of child maintenance from his biological father.

The barring of extra-marital children from receiving maintenance from their biological father does not promote the best interests of the child which is of paramount importance in any matter concerning the child. South Africa is a signatory of many International human rights instruments that contain some provisions dedicated to the protection of the best interests of the child. It is commendable that the instruments that protect the best interests of the child have been domesticated in the South African legal order through the provisions of section 28 (2) of the Constitution and section 9 the Children's Act.

The exclusion of extra-marital children from receiving maintenance from their biological father amounts to a clear violation of their right to equality and human dignity. The equality jurisprudence of the Republic of South Africa only forbids unfair discrimination that has the impact of impairing the dignity of the victim or the complainant. The purpose of excluding extra-marital children from getting child maintenance in Islamic law do not appear to serve any important societal goal. In consideration of this unfairness, it encroaches upon their right to equality and dignity. In closing, the disqualification of extra-marital children from receiving child maintenance violates their equality rights, dignity and fails to promote the best interests of the child.

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