

## A Question on Legitimacy of Children Born Out of Wedlock before Their Father Became a Muslim

by Khalid Yahya Blankinship

Question:

Does a man who begat children out of wedlock before becoming a Muslim have any connection with those children under Islam? In particular, does not the well-established hadith, “The child belongs to the marriage bed, and the adulterer gets the stone (or: gets nothing),” prove that such a man has no responsibility to his children born out of wedlock before he became a Muslim?

Response (Originally rendered 5 Sha‘bân 1424/1 October 2003):

To say that a man who has children out of wedlock before becoming a Muslim and then upon becoming a Muslim ceases to have any responsibility for such children is completely unacceptable and should by no means be allowed or admitted. This is because all genealogies recognized in the Jâhiliyyah continue to be recognized in Islam. Thus, if any man has children out of wedlock from before embracing Islam but has in any way acknowledged those children in the past or present, whether by explicit statement or merely by his actions of treating them as his children, those children are unalterably his children forever, and he cannot subsequently repudiate them. However, if a man has had children outside of marriage in the Jâhiliyyah and has never recognized them as his own, that is another matter and has to be adjudicated before the qâdî. Even in the latter case, the matter cannot be dealt with summarily by the man acting alone.

Islam does not actually recognize non-Muslim marriage rules as having a bearing on Muslims. Therefore both legal marriages and common-law marriages established in the Jâhiliyyah count in Islam.<sup>1</sup> Even if common-law marriages between non-Muslims were not recognized by the state, a couple living together would still be deemed as having established a household and thus a non-Muslim common-law marriage as far as Islam is concerned. This is especially true of non-Muslim majority lands such as ours where the Sharî‘ah of Islam does not prevail. Thus, the children of such pairings are legitimate and must be attributed to their true fathers. The fact that common-law marriages are actually recognized by the State of Pennsylvania only further strengthens this point here in Philadelphia.

On the other hand, once people are Muslims, Muslim law applies and children subsequently born out of wedlock to Muslim parents are not supposed to be recognized, according to the hadith. But even so, there is in the law the provision of *istilhâq* or legitimation, whereby a man recognizes a child as his.

While in general this requires a statement of the father before the judge, other proofs are also accepted to establish the supposition of a lawful marriage, thus recognizing the legitimacy of the children. These other proofs include sworn testimony of at least two ‘udûl witnesses that the father acknowledged the child before. Also, as cited in Mulla, these proofs also include “the continuous cohabitation of the alleged parents; treatment (by the father) of the mother and child (as if they were his wife and child); and repute and notoreity of the father as part of a marriage among the members of the family, the community, or respectable members of society. Legitimacy of a child may be presumed from these circumstances without any direct proof of the marriage, and without any formal act of legitimation.”<sup>2</sup> Once established, such legitimacy cannot later be altered by the father's denial.<sup>3</sup> It should be noted that these rules considerably parallel the rules for recognizing common-law marriages in the states that do so here in America.

There are a number of crucial references on this point, including hadiths. The most important are principles drawn from Mâlik’s *al-Muwatta’*<sup>4</sup> and commentaries on it, especially *al-Muntaqâ sharh al-Muwatta’* of Abû al-Walîd al-Bâjî (d. 484/1091), the Andalusian Mâlikî Qâdî, who wrote an extensive study of this very point.<sup>5</sup> Also, the scholar of hadith and fiqh, Dr. Husayn Shawât (Houcine Chouat) of the American Open University and *Majma’ Fuqahâ’ al-Sharî’ah bi-Amrikâ*, agrees with the position here taken.

The hadith that the questioner bases his argument on, while it is a sahih hadith found in both the collections of al-Bukhârî and Muslim<sup>6</sup> as well as *al-Muwatta’* of Mâlik as cited above, does not at all support the conclusion that he has stated. In this hadith, Sa’d ibn Abî Waqqâs and ‘Abd ibn Zam’ah were disputing who should have charge of a child born by the slave woman of ‘Abd’s father Zam’ah. Neither Sa’d nor ‘Abd had a right to claim the child because neither was the father. The Prophet (SAAS) thus ruled in this case that the child belongs to ‘Abd as a brother on the basis that, in the absence of any conclusive proof or declaration to the contrary, the child belongs to the marriage bed, or, in this case the bed of concubinage. Thus, ‘Abd would have the rights to inherit ownership of the child of Zam’ah’s slave woman as a part of his inheritance. But ‘Abd stated that this boy was his brother, thus freeing him from any suspicion of slavery. That did not suffice, however, to establish his nasab or genealogy as being from Zam’ah; therefore, the Prophet (SAAS) told his wife Sawdah bint Zam’ah to veil herself from the boy when he was around. Had Zam’ah been established as the boy’s father, the Prophet (SAAS) would not have said this. None of this has anything to do with what the brother brought up. In particular, note that both Sa’d and ‘Abd were seeking to get custody of the boy in order to raise him, not to escape from their parental responsibilities.

As for the aspect dealing with the statement in this hadith, “The child belongs to the marriage bed, and the adulterer gets the stone (or: gets nothing),” that only applies when people have become Muslims, at which time Muslim marriage becomes mandatory. The Prophet (SAAS) never required anyone to go through a new marriage upon becoming Muslim; thus, he recognized the offspring of the various types of marriage relationships extant in the Jâhiliyyah as well as the marriages themselves as legitimate and established in relationship. As stated in *al-Muwatta’* cited above and even more explicitly in *al-Mudanwanah*,<sup>7</sup> ‘Umar ibn al-Khattâb used to attribute children born in the Jâhiliyyah to their real fathers as legitimate, even if they were the offspring of relationships other than proper marriages.

There is also a hadith found in a hasan version in Ahmad ibn Hanbal's *Musnad* in which the Prophet (SAAS) states, “Whoever denies being the father of a child in this life, thereby putting the child to shame (or: in order to put the child to shame), Allâh will put that father to shame on the Day of Resurrection before all the witnesses, as a just punishment for each offense.”<sup>8</sup> Thus, fathers should be reminded of their responsibilities for their children and how they will be asked about this on the Day of Judgement.

Khalid Yahya Blankinship

1 Muwaffaq al-Dîn ‘Abd Allâh ibn Ahmad Ibn Qudâmah al-Maqdisî, *al-Mughnî*, Beirut: Dâr Ihyâ’ al-Turâth, Vol. 10, p. 271, mas’alah 8555.

2 Mulla, *Principles of Mahomedan Law*, Pakistan ed. revised by M. A. Mannan, from the 17th Indian ed. revised by Hidayatullah, Lahore: Law Publishing Co., 1977, p. 322, Chapter XVII, section 339.

3 Shams al-A’immah Muhammad ibn Ahmad al-Sarakhsî, *al-Mabsût*, Cairo: Matba‘at al-Sa‘âdah, 1324-1331/1906-1913, Vol. 17, pp. 98-99.

4 Mâlik ibn Anas, *al-Muwatta’*, Cairo: Dâr al-Sha‘b, no date, pp. 460-462, Kitâb al-aqdiya, bâb al-qadâ’ bi-ilhâq al-walad bi-abîhi, bâb al-qadâ’ bi-mîrâth al-walad al-mustaldaq, and bâb al-qadâ’ fî ummahât al-awlâd; in English: Imam Malik, *al-Muwatta*, edited by Idris Mears, translated by ‘A’isha ‘Abdarahman at-Tarjumana [Bewley] and Ya‘qub Johnson, Norwich: Diwan Press, 1982, pp. 344-345, sections 36.21-36.23, traditions nos. 20-25; Imam Malik, *Muwatta*, edited and translated by Muhammad Rahimuddin, pp. 319-321, Bk. XXV, Chs. 443-444, traditions 1415-1420 (note that the Rahimuddin translation is an inferior abridgement, as it omits the words of Mâlik from the original).

5 Abû al-Walîd Sulaymân ibn Khalaf al-Bâjî, *al-Muntaqâ sharh Muwatta' Mâlik*, edited by Muhammad 'Abd al-Qâdir Ahmad 'Atâ, Beirut: Dâr al-Kutub al-'Ilmiyyah, 1420/1999, Vol. 2, pp. 332-356, especially pp. 347-348.

6 Muhammad Ibn Ismâ'îl al-Bukhârî, *al-Jâmi' al-sabîh*, Kitâb al-buyû', bâb tafsîr al-mushabbihât; in English: al-Bukhârî, *The Translation of the Meanings of Sabîh al-Bukhârî*, translated by Muhammad Muhsin Khân, 2<sup>nd</sup> revised edition, Ankara: Hilal Yayinlari, 1976-1977, Vol. 3, pp. 153-154, hadith 269; Muslim ibn al-Hajjâj, *al-Sabîh*, Kitâb al-ridâ', bâb al-walad li-al-firâsh wa-tawaqqî al-shubuhât; in English: Muslim, *Sahih Muslim*, translated by Abdul Hamid Siddiqi, Lahore: Shaykh Muhammad Ashraf, 1391-1394/1971-1974, Vol. 2, pp. 744-745, hadiths 3435-3438.

7 Sahnûn ibn Sa'îd al-Tanûkhî, *al-Mudawwanah al-kubrâ*, Beirut: Dâr al-Kutub al-'Ilmiyyah, 1415/1994, Vol. 2, p. 551.

8 Ahmad ibn Hanbal, *al-Musnad*, edited by Sidqî Muhammad Jamîl al-'Attâr, Beirut: Dâr al-Fikr, 1414/1994, Vol. 2, p. 255, hadith 4795=CD ROM *Jâmi' al-fiqh al-islâmî*, Harf Co., *Musnad Ibn Hanbal*, hadith 4564.