ISTILHĀQ AND ITS ROLE IN ISLAMIC LAW

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INTRODUCTION

This article seeks to examine the institution of *istilhāq* and its role in Islamic law by looking briefly at its background, the definition of *istilhāq* according to the Muslim jurists and its differences with other terms used in Islamic family law, like *ilhāq*, *iqrār*, *iqrār bi’l-nasab*, *di‘wa*. Further, this article analyses how to validate *istilhāq* and rules governing *istilhāq*. Finally, *istilhāq* as regard the child of *zīnā* will also be discussed, irrespective of whether the *mustalḥiq* is male or female.

BACKGROUND

Disputes concerning rights of paternity have been common in Arabia since pre-Islamic times. Slave girls would practise prostitution and share their profits with their masters who actually made them practise this trade. If they gave birth to a child, various individuals could lay claim to it as their offspring. This kind of claim was known as "di‘wa". If the di‘wa was accepted the claimed son assumed the *nasab* of this "new" father.1 In this context, it was related by Abū Dāwud and others from the narration of Husayn al-Mu‘allim from ‘Amr b. Shu‘ayb from his father, and from his grandfather, who said, in the conquest of Makkah, a man stood up and said, "such a boy is my son". The Prophet is reported to have said: "In Islām, no one is allowed to claim someone to be his father. A decree of pre-Islamic times has died off (dhahaba amr al-jahiliyyah), the child is belonged to the bed and the fornicator needs to be stoned".2

At least there are three Traditions which show that *istilhāq* has taken place. One Tradition is reported in al-Muwatta’ which says:

Yahyā said from Mālik from Ibn Shihab from ‘Urwa Ibn al-Zubayr that ‘Āishah, the wife of the Prophet, may Allah bless him and grant him peace, said: ‘Utba Ibn Abī Waqqās disclosed to his brother, Sa‘d Ibn Abī Waqqās that he had fathered the son of the slave-girl

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of Zam‘ah and made him promise to look after him (after his death)”. In the year of the Conquest, Sa‘d took him and said: “He is the son of my brother. He made a covenant with me about him”. ‘Abd Ibn Zam‘ah stood up and said: “He is my brother and the son of my father’s slave girl. He was born on his bed”. They went to the Messenger of Allah, may Allah bless him and grant him peace. Sa‘d said, “He is my brother’s son. He made a covenant with me about him”. ‘Abd Ibn Zam‘ah said: “He is my brother and the son of my father’s slave girl and was born on my father’s bed”. The Messenger of Allah, may Allah bless him and grant him peace said: “He is yours ‘Abd Ibn Zam‘ah”. Then the messenger of Allah, may Allah bless him and grant him peace, said: “A child belongs to the household (where he was born) and the adulterer is stoned”. Then he told Sawdah bint Zam‘ah: “Veil yourself from him”, since he saw that he resembled ‘Utbah Ibn Abī Waqqās. ‘A‘ishah added: “He did not see her from then on until he met Allah, the Might, the majestic”.

Dispute about paternity of ‘Abd b. Zam‘ah has been discussed by many commentators of the hadîth, like al-‘Asqalānî (d. 852 AH), al-Zurqānî (d. AH), Ibn Qayyim al-Jawziyyah (d. 751 AH) and al-Kaḥlānī (d. 852 AH). The attention of those commentators was on the validity of the acknowledgment of paternity because of three reasons, i.e., (i) the mother of the child was a slave girl; (ii) the child was illegitimate; and (iii) the claimant of the child, who is not the father, was allowed to acknowledge paternity.

It is related by al-‘Asqalānî, that Zam‘ah Ibn Qays b. ‘Abd Shams al-Qurashî al-‘Āmirî, the father of Sawdah, wife of the Prophet Muḥammad, has a child called ‘Abd al-Raḥmān; in this context the child is being identified as ‘Abd b. Zam‘ah from his slave girl, a Yemenite woman. Thus Sawdah and ‘Abd (al-Raḥmān) are the children of Zam‘ah. The original of this story, in pre-Islamic times, as related by al-Zurqānî, stated that masters (asyād) used to have many slave girls. These slave girls used to practice prostitution. The proprieter of a slave girl was also allowed to have sexual intercourse with his slave girl. If these slave girls conceived, not only would the sayyīd acknowledge the child, but also the fornicator who had sexual intercourse with the slave girl would acknowledge it. If the sayyīd dies and there was acknowledgment of paternity being made, then the heir of the sayyīd would acknowledge the child; this acknowledgment is established, but the claimant (mustalḥiq) who in this context is the heir of the sayyīd, is not allowed to have a share of the inheritance – except if the acknowledgment takes place before the inheritance was divided – and if the sayyīd denies the claim, the acknowledgment is not established.

In this regard, it was told that this Yemenite slave girl, being in the legal ownership of Zam‘ah, has committed fornication with ‘Utbah, and the culture of pre-Islamic times, like this case, determines that if the sayyīd of the slave girl acknowledges paternity of the child, the child is affiliated to the sayyīd, but if the sayyīd denies it and it is acknowledged by someone else, then the child would be returned to the sayyīd or physiognomist. It is reported that ‘Utbah committed