

A Refereed Study

DNA Testing and Paternity

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Foreword

All praise belongs to Allah, the Lord of all the worlds, and may His peace and blessings be upon the most honourable Prophet, his family, his companions and those who follow in his footsteps till the Day of Judgment.

Allah has sent his noble Messenger Muhammad (peace and blessings be upon him) a witness, an announcer of good tidings, a herald, a preacher to the way of Allah by Allah's permission and an enlightening torch; with his message Allah has completed the pillars of faith and accepted it as the final way for gaining his good pleasure: "Today, I have completed your religion for you, perfected My favours on you and accepted for you Islam as your religion."²

The Islamic *Sharee'ah* has been revealed as an all-encompassing and perfect way of life; it has all the characteristics that make it sustainable and eternal and the perfect rules through which solutions can be sought for all issues and cases at all places and times. It is balanced and built on sound and solid foundations that cater for all the requirements and needs of human beings. Therefore, Muslims must not resort to any other law, be it secular or otherwise, finding search of solutions for any problems that may arise nowadays for the simple fact that the Islamic *Sharee'ah* is absolutely sufficient for them.

In the Holy Qur'an, Allah has foretold human beings that they will explore new dimensions and discover new things that were unknown to them both in the sky and on the earth. He has given them the means by which they can explore the secrets of the sun, the moon, the stars, the night, the day, the wind, the rain, thunder, lightening, the plants, the trees, the mountains, the oceans and many other signs of His miraculous creation, let alone the secrets that they have discovered and will discover within themselves, which all point to His precise design of the human body as a sperm, a clot, an embryo, a foetus and eventually as a well-shaped sensible and rational human being.³ "We will show them Our signs in the horizons and within themselves so that it will become clear to them that it is the

² Surat Al-Maa'idah, 5:3.

³ Al-Jaami' li Ahkaam Al-Qur'an, 25/374-375.

truth. Is it not sufficient for your Lord that He is a Witness over everything?"⁴

All things that man may discover in this colossal universe are but clear proofs and signs of the oneness of Allah, His omnipotence and all-encompassing knowledge.

One of the novel discoveries of the present time is the DNA, which should be invested in reinforcing belief in Allah Almighty and used for the best interests of human beings in the present time and the times to come. The discovery of the DNA is a scientific revolution to which Muslim jurists and medical professionals should give their utmost attention for the great effect it has on the human life.

Moreover, the discovery of the DNA has eventually led to unveiling the secrets of the human genome; a discovery that prompted both Bill Clinton, former President of the United States of America, and Tony Blair, former British Prime Minister, to have a say in announcing the event. The new discovery was described as one of the most important scientific events in history so much so that it has been likened to the discovery of the atomic energy. In a press conference in London, Dr. Michel Dexter, Director of the British Wilcom Institute which financed the British part of the project, described the outcomes as an important achievement in the history of humankind equal to the landing of man on the moon. He added, "The new information will change our way of thinking about ourselves and will eventually lead to using new techniques for the diagnosis and treatment of diseases." It also hoped that reading of the human genome and identifying the genetic sequence would lead to the treatment of such diseases as cancer, diabetes, cardiac diseases, and the like.⁵

Given the importance of this new discovery, I have decided to research it and elaborate on the juristic provisions related to paternity for the great role paternity plays in people's lives and for the salient interest of the Islamic *Sharee'ah* in preserving lineages against any forms of tampering.

The present study has been divided into an introduction, two parts and a conclusion, as follows:

⁴ *Surat Fussilat*, 41:53.

⁵ <http://news.bbc.co.uk/hi/Arabic/news> and *The Genome: Is it the Beginning of the End?* by Dr. Husaam Arafah; see <http://www.islamonline.net>.

Introduction: The Meaning of the DNA Test and the Meaning of Paternity. The introduction is divided into three topics:

Topic One: Definition of the DNA Test:

I. Linguistic Definition

II. Technical Definition

Topic Two: Meaning of Paternity:

I. Linguistic Definition

II. Technical Definition

Topic Three: DNA Characteristic and Analysis:

I. DNA Characteristics

II. DNA Analysis

Part One: Proving Paternity through DNA Test. This part is divided into three chapters:

Chapter I: Means of Proving Paternity in the Islamic *Sharee'ah*. This chapter includes two topics:

I. Generally Approved Means. It includes four sections:

1. Matrimonial Bed (*Firaash*)

2. Claiming Paternity to a Child of an Unknown Parentage

3. Testimony of Paternity

4. Testimony based on public knowledge

II. Controversial Means. This includes three sections:

1. *Qiyaaafah* (Art of judging someone's parentage by studying his features)

2. Lot Casting

3. Claiming Paternity to a Child Born as a Result of Adultery outside Wedlock

Chapter II: Means Inapplicable in Proving Paternity. This includes three topics:

I. Transfer of Paternity

II. Adoption

III. Claiming Paternity to a Child Born on the Matrimonial Bed by an Adulterer

Chapter III: Proving Paternity through DNA Testing. This includes three topics:

I. Hereditary Relations in the Islamic *Sharee'ah*

II. Scholars' Statements and Evidence on Proving Paternity through DNA Testing

III. Conditions of Applying a DNA Test. This includes two sections:

1. Legal Conditions
2. Technical Conditions

Part Two: Denial of Paternity through DNA Testing. This is divided into three chapters:

Chapter One: *Li'aan*. This is divided into three topics:

Topic One: Definition of *Li'aan*

I. Linguistic Definition

II. Technical Definition

Topic Two: Legitimacy of *Li'aan*

Topic Three: Denial of Paternity through *Li'aan*

Chapter Two: Ruling on Denial of Paternity on the Pretext of Coitus Interruptus and Resemblance to other than Parents. This includes two topics:

Topic One: Coitus Interruptus. This is divided into two sections:

I. Definition of Coitus Interruptus

II. Ruling on Denial of Paternity as a Result of Coitus Interruptus

Topic Two: Resemblance to other than Parents. This is divided into two sections:

I. Definition of Resemblance

II. Ruling on Denial of Paternity due to Resemblance to other than Parents

Chapter Three: Denial of Paternity through DNA Testing. This includes two topics:

Topic One: Jurists' Views and Evidence on Denial of Paternity through DNA Testing

Topic Two: Ruling on Performing a DNA Test before Involvement in *Li'aan* for Denial of Paternity

Conclusions and Recommendations

I pray to Allah Almighty to grant us good knowledge and assist us in doing righteous deeds, to guide us to the right path and to make this work sincere for His sake. I also ask Him to forgive any error or fault that may appear in this work. May Allah have peace and blessings upon the most honourable Prophet, his family and companions.

Introduction

Meaning of DNA Test and Paternity

Topic One: Definition of DNA Test

I. Linguistic Definition: The Arabic word "*basma*" means a fingerprint. In other words, it is the impression that the finger leaves on a material.⁶ The word "*wiraathiyyah*", on the other hand, means something which a living person inherits from a dead one. Thus, inheritance is the estate left by a dead person for a living one without the need for any contractual arrangement. It also means the legacy of some person. It is narrated that the Prophet (peace and blessings be upon him) said, "Stand at your ritual sites for they are the legacy of your father Ibraaheem."⁷ Hence, "*wiraathiyyah*", or hereditary, means the traits that pass from one generation to another. By linking the linguistic meaning of DNA to the relationship between the child and his or her parents, it can be said that the DNA is the genes that are inherited by the child from his or her parents through which his personality and paternity can be identified.

2. Technical Definition: The DNA test is a new term that is not mentioned in juristic works of our predecessors. Therefore, the Academy of Islamic Jurisprudence of the Muslim World League in Makkah has adopted a definition of the DNA as "the genetic structure that determines the individual hereditary characteristics of each person."

The scientific literature states that the DNA can be taken from any human cell and that the DNA test is a highly precise means that makes the task of forensic medicine easier.⁸

⁶ *Lisaan Al-Arab*, 12-50-51 and *Al-Mu'jam Al-Waseet*, p. 60.

⁷ Reported by Abu Dawood in his *Sunan*, Book of Rituals, part on standing at Arafaat, no. 1919, p. 281 and At-Tirmidhee in his *Sunan*, Book of Pilgrimage, part on standing at Arafaat and supplication, no. 883, p. 217. He commented that it is a good authentic *hadeeth*.

⁸ Resolutions of the Academy of Islamic Jurisprudence, 7th Resolution on the DNA Fingerprinting and Fields of Use, 16th Session, 21-26.10.1422 AH, Makkah Al-Mukarramah, p. 343.

The Symposium on Genetics, Genetic Engineering, Human Genome and Gene Treatment: An Islamic View defined DNA as the detailed genetic structure that identifies the personality of every separate individual.

Hence, the DNA test is a technique that rarely gives inaccurate results in identifying the biological paternity and personal characteristics of any person.⁹

Topic Two: Meaning of Paternity

I. Linguistic Definition: The Arabic word "*nasab*" means paternity or lineage; i.e. the chain of kinship especially with parents. Sometimes it is used to mean belonging to a certain country or even craft. It is said that the Arabs originally used to link their lineages with their tribes, but when they settled in villages and towns they imitated other nations in linking their lineages to countries or towns. Therefore, the word "*nassabah*" means the genealogist who has knowledge in the field of genealogy, namely familial and tribal relationships among people.¹⁰ To sum up, genealogy or lineage signifies the relationship between a person and other people or the belonging to a certain country or profession.

II. Technical Definition: Muslim jurists have not dealt with the technical meaning of paternity as it seems that the linguistic meaning of general lineage is considered appropriate for indicating the technical meaning, as stated by Al-Khateeb Ash-Shirbinee who considered both lineage and paternity as having one and the same meaning.¹¹

Commenting on the Qur'anic statement "It is He Who has created from water a human being and made him [a relative by] relations of lineage and marriage; for your Lord is the Most Capable",¹² Ibn Al-Arabee writes, "Technically speaking, paternity is the mixing between the water [fluid] of the male and that of the female under a legal matrimonial relationship."¹³ Al-Qurtubee writes, "Lineage and paternity cover any kinship between two human beings. However, marriage

⁹ www.Islamset.com.

¹⁰ *Lisaan Al-Arab*, 1/755 and *Al-Misbah Al-Muneer*, 736.

¹¹ *Mughnee Al-Muhtaaj*, 2/259.

¹² *Surat Al-Furqaan*, 54.

¹³ *Ahkaam Al-Qur'an*, 3/1426.

denotes the mixing of two lineages, and hence the Arabic word "*sihr*" is used to describe the marital relationship with another family." He notes the difference between the relationship of *nasab* and that of *sihr*. He indicates that the *sihr* is the kinship of marriage while the *nasab* is the relationship between parents and offspring. He adds that the *nasab* is the relationship on the part of males while the *sihr* is the relationship on the part of females.¹⁴

Ibn Al-Arabee states that the difference between paternity (*nasab*) and marital relations (*sihr*) is that the first is the separate lineage of the two married individuals while the second is the lineage of both of them together with other members of the two families. In his commentary on the above verse, Abus-Su'ood writes, "Allah divides lineages into two parts: Those related to males (*nasab*) and those related to females (*sihr*)."¹⁵

Anyway, Allah has made maternal and paternal relations complementary to each other. It is the blessing of Allah that no lineage of any kind may be established under illegal relations. Any prohibited sexual relationship would never produce a valid lineage or paternity.¹⁶

In this paper, it is meant to restrict the term "*nasab*" to the specific relationship between children and parents, namely "paternity". It should be noted that lineage relates to both the father and mother which is not the subject-matter of this paper. Therefore, it is meant here to restrict the issue of lineage and paternity to the relationship between a father and a child, which naturally excludes the issue of proving relation to the mother for such a relationship is established by the mere fact of the mother giving birth to the child: "Their mothers are only those who has given birth to them."¹⁷ Al-Qurtubee comments, "No woman can claim to be the mother of a certain child except the one who has given birth to him or her."¹⁸ Therefore, maternity is established by the event of birth itself, and no woman who has given birth to a child can deny being his

¹⁴ *Al-Jaami' li Ahkaam Al-Qur'an*, 13/59-61.

¹⁵ *Tafseer Abus-Su'ood*, 4/190.

¹⁶ *I'laam Al-Muwaqqi'een*, 3/243.

¹⁷ *Surat Al-Mujadalah*, 58:2.

¹⁸ *Al-Jaami' li Ahkaam Al-Qur'an*, 17/279.

or her mother; it is an irrevocable evidence of maternity.¹⁹ Ash-Shirbinee writes, "The rule as to maternity is that the woman who gives birth to you is your real [biological] mother; the one who had given birth to the one who gave birth to you is your grandmother or metaphorically the one who gives birth to your ancestors."²⁰ Ibn Muflih said, "All those women to whom you belong as a result of birth are mothers, be they actual like your direct mother or metaphorical like your grandmothers.²¹ Hence, the direct mother excludes any other mothers. Some scholars contend that the genuine paternity is the one established between the child and his or her father unless denied.²²

As to inheritance, lineage spans wider relationships between parents, be they direct or remote, and includes top, lower and side relations among individuals.²³

Topic Three: DNA Characteristics and Analysis

I. DNA Characteristics

In 1953, American biochemist James Watson and British biophysicist Francis Crick published the first description of the structure of DNA. Their model proved to be so important for the understanding of protein synthesis, DNA replication, and mutation that they were awarded the 1962 Nobel Prize for Physiology or Medicine for their work. It is the nucleic acid that contains the genetic instructions used in the development and functioning of all known living organisms. The main role of DNA molecules is the long-term storage of information. DNA is often compared to a set of blueprints, since it contains the instructions needed to construct other components of cells, such as proteins and RNA molecules. The DNA segments that carry this genetic information are called genes, but other DNA sequences have structural purposes, or are involved in regulating the use of this genetic information.

Within cells, DNA is organized into structures called chromosomes.²⁴ These chromosomes are duplicated before cells divide,

¹⁹ *Badaa'i' As-Sanaa'i'*, 6/255.

²⁰ *Mughnee Al-Muhtaaj*, 3/174.

²¹ *Al-Mubdi'*, 7/56.

²² *Ibid*, 8/105.

²³ *Satisfactory Investigations into the Doctrine of Inheritance*, p. 37.

in a process called DNA replication. Eukaryotic organisms such as animals, plants, and fungi store their DNA inside the cell nucleus, while in prokaryotes such as bacteria it is found in the cell's cytoplasm. Within the chromosomes, chromatin proteins such as histones compact and organize DNA. These compact structures guide the interactions between DNA and other proteins, helping control which parts of the DNA are transcribed.

Human cells have 23 pairs of large linear nuclear chromosomes, giving a total of 46 per cell. In addition to these, human cells have many hundreds of copies of the mitochondrial genome. Sequencing of the human genome has provided a great deal of information about each of the chromosomes. Number of genes is an estimate as it is in part based on gene predictions. Total chromosome length is an estimate as well, based on the estimated size of unsequenced heterochromatin regions.

In 2000, scientists discovered the genome and announced the details of the human genome project.²⁵

The most important characteristics of the DNA are the following:

1. Every person has his own special DNA which is different from that of other persons. It is impossible to have identical DNA's except in identical twins, which makes one well assured that the results of DNA analysis are totally accurate.

2. The results of DNA test provide conclusive evidence as the accuracy of results amounts to 98-100%.

²⁴ Chromosomes were so named in 1863 by the German Scientist Heinrich Wilhelm Gottfried von Waldeyer-Hartz. However, human genetics had no real role until the discovery of the number of chromosomes (46 chromosomes) in 1965. The new technologies used in the cellular genetics for the study of human chromosomes enabled scientists to distinguish each chromosome and to put down maps for these genes. See *Applications of DNA Testing Technology in Investigation and Forensic Medicine*, p. 37. Chromosomes are organized structures of DNA and proteins that are found in cells. Chromosomes contain a single continuous piece of DNA, which contains many genes, regulatory elements and other nucleotide sequences. Chromosomes also contain DNA-bound proteins, which serve to package the DNA and control its functions. The word *chromosome* comes from the Greek χρώμα (*chroma*, color) and σῶμα (*soma*, body) due to their property of being stained very strongly by some dyes.

²⁵ *The DNA Testing as Technical Evidence before Courts*, pp. 21-22.

3. The genes and the DNA molecule are capable of reproduction, and thus they can transcribe the traits of a generation to another generation.

4. The genes of the body cells of a certain person are identical. Therefore, the genes of the white blood cells are identical to those of any other cell in any other part of the body like hair, skin and bones. They are also identical with any fluids of the body such as the saliva, the sperms and the mucosa.

The characteristics of the DNA sample include the following:

1. The DNA is characterized by high resistance against rotting, environmental changes and pollutants. It resists all factors of dissolution, namely it preserves its properties for a very long period under the harshest environmental conditions (heat, moisture and dryness).

2. The DNA of a certain individual is equally inherited from his father and mother. The child normally takes 50% of his traits from his father (through the sperms) and the other 50% from his mother (through the ova). In other words, half the genetic traits of every individual match with the genetic traits of his mother, and the other half matches with those of his father but the total traits do not match with either those of his mother or his father, hence his individuality.

3. The DNA extracted from samples can be stored for a very long period.²⁶

II. DNA Analysis

A molecule of DNA consists of two strands composed of a large number of chemical compounds, called nucleotides, linked together to form a chain. These chains are arranged like a ladder that has been twisted into the shape of a winding staircase, called a double helix. They are special for every human being that distinguishes him from other human beings. One of the chains represents the genetic traits taken from the father and the other represents those taken from the mother. The DNA analysis uses a very advanced technology. The results are easy to

²⁶ *DNA Testing Technology Applications*, pp. 152-153; *DNA Testing and its Effect on Juristic Provisions*, p. 48; *Biological Analysis of Human Genes and its Authority as Evidence*, pp. 73-74 and *DNA Testing as Technical Evidence before Courts*, pp. 26, 31 and 47 and *DNA Testing and its Legal Applications*, p. 84.

be read and stored by the professional who has been trained in how to perform the test. They can also be stored in the computer until the time they are needed.²⁷ Two DNA technologies are applied in the majority of criminal laboratories all over the world. These are:

1. Restriction Fragment Length Polymorphisms (RFLP) technology. This is one of the oldest technologies of DNA testing. This technology depends on cutting DNA by the restriction enzymes at precise points producing a collection of DNA fragments of precisely defined length. These can be separated by electrophoresis, with the smaller fragments migrating farther than the larger fragments. One or more of the fragments can be visualized and compared by the use of a probe.
2. Polymerase Chain Reaction (PCR) technology which is commonly used these days. It involves the production of a relatively large number of copies (millions of copies) of a specific part of the DNA.²⁸

²⁷ *DNA Testing and its Legal Applications*, p. 82 and *DNA Testing as Technical Evidence before Courts*, p. 28.

²⁸ *DNA Testing Technology Applications*, p. 82ff and *DNA Testing as Technical Evidence before Courts*, pp. 28.

Part One: Proving Paternity through DNA Testing

Chapter One: Means of Proving Paternity in the Islamic *Sharee'ah*

I. Generally Approved Means

1. Matrimonial Relationship (*Al-Firaash*)

The matrimonial relationship (termed by Muslim jurists as the *firaash*, or matrimonial bed) is a key mean of establishing paternity.²⁹ This is the relationship that joins a man and a woman. Hence, a child born to the couple six months after the occurrence of the actual or potential sexual intercourse is considered to be the offspring of the husband because it is born as a result of such a legal matrimonial relationship.³⁰

The evidence to this is the *hadeeth* reported in the two authentic *hadeeth* books³¹ on the authority of Aishah (may Allah be pleased with her): "Sa'd bin Abi Waqqaas and Abd bin Zam'ah disputed over a boy. Sa'd said, 'O Allah's Messenger! This boy is my brother's son and he has taken a promise from me that I will take him.' Abd bin 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 Prophet (peace and blessings be upon him) looked at the boy and found a clear resemblance between him and Utbah. He then

²⁹ *Al-Mabsoot*, 17/99, *Badaa'i' As-Sanaa'i'*, 6/242, *At-Tamheed* by Ibn Abdul-Bar, 18/312,319 and 320 and *Zaad Al-Ma'aad* by Ibn Al-Qayyim, 5/410.

³⁰ Scholars differed as to the means whereby a woman is to be considered as a legal wife. Some scholars argued that it is the mere marriage contract that makes a woman a legal wife even if the husband divorces her on the spot. This is Abu Haneefa's point of view. Some other scholars contended that it is both the marriage contract and the potential sexual intercourse. This is Ash-Shaafi'ee's and Ahamd's point of view. Yet other scholars stressed that it is the marriage contract combined with the actual sexual intercourse rather than the potential one. This is Ibn Taymiyah's point of view and a narration ascribed to Ahmad. See *Zaad Al-Ma'aad*, 5/415.

³¹ *Saheeh Al-Bukhaaree*, Book of Sales, part on buying a slave from a belligerent, gifting and freeing him, no. 2218, p. 354 and *Saheeh Muslim*, Book of Nursing, part on a born baby belongs to the husband in a legal matrimonial relationship and avoidance of suspicions, no. 3613, p. 620.

said, 'The boy is for you, O Abd bin Zam'ah.' Then said he added, 'The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has had illegal sexual intercourse.' The Prophet told his wife Sawdah bint Zam'ah to screen herself from that boy. So, the boy did not see her until he died." According to Muslim's version, he never saw Sawdah thereafter.³² Abu Bakr bin Al-Arabee comments, "This *hadeeth* is a great and a strong fundamental in the *Sharee'ah* as it lays down the rules of establishing paternity and lineage which Allah's wisdom has made the basis of acquaintance and solidarity among people. Originally, the rule is based on a hidden sexual relationship which Allah has established the bond of marriage for it to become known for people, for He is the Most Wise, and hence established visible signs as indication of hidden practices which are only known to him alone."³³ Ibn Al-Qayyim writes, "This Prophetic ruling is the foundation on which proving paternity through matrimonial relationship is based."³⁴ Ash-Shawkaanee states, "As long as the matrimonial relationship is present, the child born as a result of such a relationship is certainly the father's."³⁵

Jurists are of the opinion that the mere actual sexual intercourse even in cases other than the legal matrimonial relationship are subject to the same rule. For example, sexual intercourse under a corrupt marriage contract, the case of suspicion (thinking that the one he is having the sexual intercourse with was his wife), having sexual intercourse with a slave-girl shared with another man and the like are cases that give the born baby the privilege of being the son or daughter of the man who is involved in such a sexual intercourse. As paternity is applicable in these cases the same as the permissible sexual intercourse with one's legal

³² Ibn Hajar said that the Hanafites took this *hadeeth* as evidence that the Prophet (peace and blessings be upon him) did not give him to Zam'ah. Had he done so, the boy would have been Sawdah's brother and a sister does not screen herself from her brother. However, the majority of scholars contended that instructing Sawdah to screen herself from the boy was meant as a precaution for the similarity he noticed between the boy and Utbah. See *Fathul Baaree*, 12/37.

³³ *Al-Qabas*, 18/300.

³⁴ *Zaad Al-Ma'aad*, 5/410.

³⁵ *Assayl Al-Jarraar*, 2/402.

wife, prohibition of marriage is also applicable to the same extent as expressed by the unanimous opinion of scholars. Ibn Al-Mundhir writes, "All those from whom we have gained knowledge from different countries are unanimously agreed that the man who has sexual intercourse with a woman under a corrupt form of marriage or invalid acquisition will make the said woman prohibited to be married by his father, son, grandfathers and stepsons."³⁶ *Imaam Ahmad* states, "Anyone released from punishment [for adultery] should accept paternity to the born baby."³⁷

2. Claiming Paternity to a Child of an Unknown Parentage

It is when a man admits that the child of unknown parentage to be his son or daughter. For this case to be applicable, certain conditions need to be met by the one claiming paternity to such a child. These are as follows:

a. The child should be of unknown parentage. Therefore, it is invalid to claim paternity to a child of known parentage, for such an act is an attempt to abolish his established parentage. The Prophet (peace and blessings be upon him) said, "He who claims to be the child of other than his actual father with his knowledge will never be admitted to Paradise."³⁸

b. The claim of parentage should not be disputed by any other man. A dispute over the parentage of a child will necessarily cause contradiction; therefore, attaching the child to the lineage of either disputant will be no better.

c. The claimant should be in a state likely to have such a child. If the child is of an age that is not likely to be the offspring of such a man, no claim of paternity should be accepted, as the actual reality renders such a claim false.

d. The claimed child should be in a state under which he has no say to accept or reject the claim of paternity, like a very young child, an

³⁶ *Al-Mughnee*, 9/528.

³⁷ *Ibid*, 11/171.

³⁸ *Saheeh Al-Bukhaaree*, Book of Inheritance, part on who claims to be the offspring of other than his actual father, no. 6766 and *Saheeh Muslim*, Book of Faith, part on one who dispenses with paternity to his real father with his knowledge, no. 219-220, p. 47.

insane person or a person who confirms the claimant's claim, i.e. a person of a legal age.³⁹

e. The claimed person should be of legal age, rational and falling under no force of duress to accept such a claim.

When the above conditions are met, a child of an unknown parentage can be claimed by the claimant for the Legislator is keen on keeping lineages pure.

3. Testimony of Paternity

It is when witnesses who have full legal capacity testify that the child is the claimant's son or daughter.

Ibn Al-Qayyim writes, "The third [means] is the testimony of two witnesses that the claimed child is the claimant's son or daughter and that he is born on his bed from his legal wife or slave-girl. If two witnesses among the inheritors testify to the same, the objection made by the other inheritors should not be considered. Paternity to the child becomes certain, as agreed by all scholars."⁴⁰

As has already been stated, Ibn Al-Qayyim states that the means of proving paternity are four: the matrimonial bed, claiming paternity to a child of unknown parentage, testimony and *qiyaafah* (the art of judging someone's parentage by studying his features

) and that the first three are agreed among all scholars.⁴¹

4. Testimony Based on Public Knowledge

It is the testimony of paternity that is given based on information available in the public domain.

Ibn Arafah defines this means as "the testimony that is given by a witness based on hearing statements concerning paternity from unspecified persons."⁴² The words "unspecified persons" excludes any testimony quoted or transmitted from specific and definite persons. Therefore, the witness to paternity should not say that he has heard it from specific known persons. In this case, it is not a testimony based on

³⁹ *Badaa'i' As-Sanaa'i'*, 7/228; *Sharh Az-Zarqaanee*, 6/104-105; *Mughnee Al-Muhtaj*, 3/259 and *Al-Mughnee*, 7/317.

⁴⁰ *Zaad Al-Ma'aad*, 5/417.

⁴¹ *Ibid*, 5/410.

⁴² *Sharh Hudood Ibn Arafah* by Ar-Rassaa', 2/593-594.

public knowledge but a testimony based on another testimony given by a specific person.⁴³

Muhammad bin Al-Hassan states that a testimony based on public knowledge of paternity should be narrated by several persons to the extent that the case becomes known to a good number of people who are not expected to connive with one another. Anything proved by multiple narrations is the same as the thing proved by sighting and hearing. Therefore, a testimony based on public knowledge is as valid as a testimony based on sighting.⁴⁴

This type of testimony is used for issues based on information that go public like death, marriage and paternity which cannot be known if not declared in public. Paternity is something known to some very close people who may testify to the whereabouts of such paternity and whose testimony should be accepted; otherwise, proofs of paternity would become difficult to establish, and hence any subsequent rulings related to inheritance and consanguinity.⁴⁵ As paternity is established on the basis of public knowledge, it is then valid when it is testified to be extant by testimony to this effect.⁴⁶

Therefore, if someone hears people saying that such-and-such is the son or brother of such-and-such, he may testify to such a relationship based on the information he has heard from the public.⁴⁷ Ibn Qudamah writes in *Al-Mughnee*, "All the scholars have agreed that the testimony based on public knowledge is valid in cases of paternity and birth. Ibn Al-Mundhir writes, 'I have no knowledge of any scholar who objects to using testimony based on public knowledge in matters related to paternity.'⁴⁸

⁴³ *Tabsirat Al-Hukkaam*, 1/296.

⁴⁴ *Badaa'i' As-Sanaa'i'*, 6/266.

⁴⁵ *Al-Mabsoot*, 15/150; *Sharh Az-Zarqaani*, 7/198; *Mughnee Al-Muhtaj*, 4/448; *Rahmatul Ummah fi Ikhtilaafil A'immah*, 576-577; *Al-Mughnee*, 14/141; *Islamic Jurisprudence and its Evidence*, 7/696 and *The Encyclopedia of Jurisprudence*.

⁴⁶ *Badaa'i' As-Sanaa'i'*, 6/267.

⁴⁷ *Al-Mabsoot*, 15/149 and *Mu'een Al-Hukkaam*, 110.

⁴⁸ Ibn Qudamah, 14/141. In *Mughnee Al-Muhtaj*, 4/448, it is stated, "Ibn Al-Mundhir said, 'I know of no difference on this issue.'"

In *Mu'een Al-Hukkaam* we read, "Testimony based on public knowledge is unanimously accepted in four things: marriage, paternity, death and judicature."⁴⁹

II. Controversial Means

1. *Qiyaafah* (The Art of judging someone's parentage by studying his features

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The art of *qiyaafah* (reading resemblances like face reading) is a means of establishing paternity if other means are unavailable or have not worked out.⁵⁰ Hence, the word "*qaa'if*" means the person who is capable of judging someone's parentage by studying his features.

This art is not special to any specific tribe; rather anyone who is known to have successfully used it on several occasions can be relied on as a *qaa'if*. However, scholars have differed as to using this means in establishing paternity.

First Opinion: The advocates of this opinion argue that *qiyaafah* is a valid means of establishing paternity and hence the *qaa'if*'s decision on cases of paternity should be accepted. This view is held by the Shaafi'ites and Hanbalites. It is also a view held by some Maalikites but is not known to be their unanimous view though they believe that it is a reasonable means of establishing paternity. Ibn Hazm states, "*Qiyaafah* is a valid art for the establishment of paternity and resemblances."

Second Opinion: The decision of a *qaa'if* is valid in the case of a baby born to a slave-girl but not to a free woman. This applies when a slave-girl has sexual intercourse with two men during one and the same period of purity and the baby is born with some resemblances to them. This is the Maalikites' known opinion.

⁴⁹ At-Taraabulsee, 109. Ibn Al-Qayyim considered knowledge of an event by a large number of people as a way of acquiring knowledge that leaves the witness and the judge released from suspicion. It is stronger than the testimonies of two acceptable witnesses. See *At-Turuq Al-Hukmiyyah*, 202. I am of the opinion that this testimony applies in cases where a testimony is accepted.

⁵⁰ *Majmoo' Al-Fataawaa*, Ibn Taymiyah, 20/351.

Third Opinion: *Qiyaafah* is not a valid means of establishing paternity. This is the Hanafites' view.⁵¹

Evidence and Argumentation

I. Evidence supporting the third point of view is as follows:

1. The part of the *hadeeth*, "The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has committed illegal sexual intercourse."⁵²

Argumentation: The Prophet (peace and blessings be upon him) considered the matrimonial relationship as the means governing the establishment of paternity and nothing else. Therefore, the matrimonial relationship is the conclusive and exclusive way of establishing paternity.⁵³ However, the above argumentation can be refuted by the fact that the text of the *hadeeth* does not in any way signify specificity; rather it indicates that the evidence of matrimonial relationship is stronger than any similarities that the *qaa'if* uses to identify paternity to a certain person.

In this respect Al-Khattaabee writes, "The art of judging someone's parentage by studying his features can only be used in case no stronger evidence is available. Such aspect of similarity has been revoked by the act of *li'aan* (accusation of adultery by a husband and denial by a wife) because the matrimonial relationship is stronger as evidence of paternity. This is similar to using analogy if no textual proof is available. However, if there is an obvious textual proof, analogy does not apply."⁵⁴

Ibn Hajar states, "This *hadeeth* signifies that a *qaa'if* can be used to determine paternity if no stronger evidence is available."⁵⁵

2. Ibn Abbaas (may Allah be pleased with him) narrated, "Those involved in a case of *li'aan* were mentioned before Allah's Apostle. 'Aasim bin Adiy said something about that and then left. Later on a man

⁵¹ *Badaa'i' As-Sanaa'i'*, 6/244; *Al-Mu'tasar min Al-Mukhtasar*, 2/48-49; *Al-Qabas*, 18/310; *Al-Furooq*, 3/125 and 4/99; *Tabsirat Al-Hukkaam*, 2/100, *Sharh Az-Zarqaanee*, 6/110; *Al-Haawee*, 17/380; *Mughnee Al-Muhtaj*, 4/48; *Al-Mughnee*, 8/371; *Sharh Muntahaa Al-Iraadaat*, 2/487 and *Al-Muhallaa*, 10/149.

⁵² Already commented on.

⁵³ *Badaa'i' As-Sanaa'i'*, 6/242 and *Means of Evidence in the Islamic Sharee'ah*, p.548.

⁵⁴ *Ma'aalim As-Sunan*, 3/182-183.

⁵⁵ *Fathul Baaree*, 12/35.

from his tribe came to him and told him that he had found a man with his wife. On that 'Aasim said, 'I have not been put to task except for what I have said [about *li'aan*].' 'Aasim took the man to Allah's Apostle and he told him of the state in which he found his wife. The man was pale, thin and lank-haired, while the other man whom he had found with his wife was brown, fat with thick calves and curly hair. Allah's Apostle said, 'O Allah! Reveal the truth.' Then the lady delivered a child resembling the man whom her husband had mentioned he had found with her. So Allah's Apostle ordered them to carry out *li'aan*." A man from that gathering said to Ibn 'Abbaas, "Was she the same lady regarding whom Allah's Apostle said, 'If I were to stone to death someone without witnesses, I would have stoned this lady?'" Ibn Abbaas said, "No, that was another lady who, though being a Muslim, used to arouse suspicion because of her outright misbehaviour."⁵⁶

Argumentation: Resemblance is the basis on which the *qaa'if* builds his decision of paternity. The above *hadeeth* signifies that the *qaa'if's* decision is not to be used in this case.⁵⁷

However, the above argumentation is refuted by the fact that the rule of resemblance is only invalid in cases when a clear textual proof is present. Hence, the art of judging someone's parentage by studying his features can only be applied if there is no other obvious and stronger proof. Yet, if doubt prevails, the art of judging someone's parentage by studying his features can be used to determine paternity.⁵⁸

3. Muslim scholars have not differed as to the case of the man who denied to be the father of his wife's son and whom she claimed to be his son. They are unanimous that the rule of *li'aan* should be applied and as a result, the child is not to be considered the husband's son or daughter because Allah has established the rule of *li'aan* between couples for cases of denial of paternity. Even if his mother uses numerous *qaa'ifs* to support her claim, their decision will not be of any use to her. Allah has

⁵⁶ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on the Imaam's statement: "O Allah! Reveal the Truth", no. 5316, p. 950 and Muslim in his *Saheeh*, Book of *Li'aan*, no. 3578, pp. 650-651.

⁵⁷ *Fathul Baaree*, 9/464.

⁵⁸ *Ibid*.

never enjoined on us to use a *qaa'if* to decide on this case. Therefore, had the *qaa'if*'s decision had authority, we would have been enjoined to resort to it in case of doubting paternity to a child.⁵⁹

However, the above argumentation is objected to. It is contended that giving preference to *li'aan* over the decision of the *qaa'if* does not impede the application the latter when the rule of *li'aan* is not applied.⁶⁰

4. The *qaa'if*'s decision is mere conjuring and an allegation to have knowledge of something which only Allah knows, namely the creation of the foetus in the uterine. A *qaa'if* cannot produce any proof to have such knowledge. Therefore, when there is no substantial proof, the *qaa'if*'s decision is exactly the same as blackmailing and tracing offspring to other than their real fathers. The *qaa'if* relies on resemblances, but a child might have resemblances to his direct father or even to his remote grandfather. Moreover, resemblances might occur between a child and a man with whom he has no consanguineous relationship or there might be no resemblance between a child and a man with whom he has very close relationship.⁶¹

However, the above argumentation is rejected as follows:

a. Ibn Hazm writes, "*Qaa'ifs* do not decide based on pure conjecture; rather they do so based on sound knowledge which is acquired by persons who seek it. The Prophet (peace and blessings be upon him) would never decide a case based on pure conjecture."⁶²

b. Resemblances often occur among persons who have a common lineage, a rule that Allah has made most likely to apply among those having the same kinship relations. Such resemblances, taken as a proof of paternity, cannot be denied as a strong proof when there is no stronger evidence like the matrimonial bed (*firaash*) that signifies paternity. Moreover, the latter rule might not apply in certain cases such as when a child is born as a result of a relationship with a man other

⁵⁹ *Al-Mabsoot*, 17/70 and *Al-Mu'tasar min Al-Mukhtasar*, 2/48.

⁶⁰ *Al-Mughnee*, 8/374.

⁶¹ *Al-Mabsoot*, 17/70.

⁶² *Al-Muhallaa*, 10/105.

than the legal husband. However, this fact does not invalidate the actual matrimonial bed as evidence of paternity.⁶³

II. Evidence Supporting the Second Opinion is as follows:

1. A slave-girl might be exchanged by more than one person and all of them may have sexual intercourse with her during one and the same term of purity; hence they are equal as to ownership of the slave-girl and as to having sexual relationship with her. The same applies when a man sells a slave-girl with whom he may have had sexual intercourse just before selling her to another man and the buyer may also have sexual intercourse with her immediately after buying her. This is contrary to the case of a free woman who cannot be a wife of two men at the same time, and hence equality as to sexual relationship is not valid for that matter.⁶⁴

2. Paternity to a child from a free wife cannot be denied except through the rule of *li'aan*, whereas paternity to a child from a slave-girl can be denied in ways other than *li'aan*. Denial of paternity based on the art of judging someone's parentage by studying his features is a matter based on discretion. Therefore, paternity to a child from a free wife cannot be overruled based on discretion as long as certainty is the rule. Yet, as paternity to a child from a slave-girl can be denied based on a mere claim, it can also be denied based on the result of the art judging someone's parentage by studying his features.⁶⁵

The above two proofs have been rebutted. It is argued that the difference in this case is invalid because the abovementioned Prophet's statement is concerned with free wives rather than slave-girls. Therefore, this argumentation is baseless.⁶⁶

III. Evidence Validating the Use of *Qiyaafah* as a Means of Establishing Paternity:

1. A'ishah (may Allah be pleased with her) said, "Allah's Apostle once entered upon me in a very happy mood, with his features glittering with joy, and said, 'O A'ishah! won't you see that Mujazziz (a *qaa'if*)

⁶³ *At-Turuq Al-Hukmiyyah*, pp. 229-230.

⁶⁴ *Tabsiratul Hukkaam*, 2/100.

⁶⁵ *Tabsiratul Hukkaam*, 2/100.

⁶⁶ *Al-Qabas*, 18/310.

looked just now at Zaid bin Haarithah and Usaamah bin Zaid with their heads covered and their feet visible and said, 'These feet (of Usaamah and his father) belong to each other.'⁶⁷

Argumentation: Had *qiyaafah* been considered as invalid means of establishing lineage, the Prophet (peace and blessings be upon him) would not have been pleased with its result, for it is illegitimate to be pleased with the result of something deemed invalid.⁶⁸

The above argumentation has been refuted by the fact that paternity to Usama is originally established through the actual matrimonial bed rather than through the *qaa'if*'s statement. The pagans were objecting to his lineage to Zaid because of the difference in complexion between the father and his son. Therefore, when the *qaa'if* gave his decision, it was a clear rebuttal of the pagan's claims. The Prophet's joy over hearing such a statement does not in any way mean that the *qaa'if*'s statement is binding authority regarding paternity according to the rules of *Sharee'ah*.⁶⁹

However, the advocates of using *qiyaafah* as a means of proving paternity replied that the evidence based on *qiyaafah* is consistent with the evidence based on the actual matrimonial bed. The Prophet's cheerfulness as to the result of *qiyaafah* was due to the multiplicity of proofs of paternity which support each other and not because of the *qaa'if*'s statement alone. It is a pleasure that is based on the consistency between the different proofs of paternity.⁷⁰

2. Umar (may Allah be pleased with him) ruled according to the *qaa'if*'s decision in the presence of the Prophet's companions (may Allah be pleased with them); no one of them objected to his ruling, and hence it is a proof of the consensus approval of the result of *qiyaafah*.⁷¹

⁶⁷ Reported by Al-Bukhaaree in his *Saheeh*, Book of Inheritance, part on the *qaa'if*, no. 6770 and 6771, pp. 1167-1168 and Muslim in his *Saheeh*, Book of Marriage, part on the application of the *qaa'if*'s decision, no. 3617, p. 621.

⁶⁸ *Al-Haawee*, 17/383 and *Al-Mughnee*, 8/372.

⁶⁹ *Al-Mabsoot*, 17/70.

⁷⁰ *Zaad Al-Ma'aad*, 5/422.

⁷¹ Reported by Al-Athram through his chain of narrators from Sa'eed bin Al-Musayyib. It is also reported in *Al-Mughnee*, 8/372; *Zaad Al-Ma'aad*, 5/419-420 and *Mughnee Al-Muhtaaaj*, 4/488.

3. Analogical reasoning and the fundamentals of the *Sharee'ah* are in favour of using *qiyaafah* as a means of establishing paternity. *Qiyaafah* can be a rule that relies on explicit and implicit knowledge of lineages, which gives more assurance similar to that of the rules of criticism and evaluation.⁷²

The Preponderant Opinion: Upon deliberating on the views and proofs given by different scholars and the related arguments, it appears to me that the first opinion which advocates using *qiyaafah* as a means of proving paternity is the preponderant one because it relies on stronger and more reliable evidence than that furnished by the advocates of the other two opinions. Allah knows best.

2. Lot Casting

Muslim scholars have differed as to using lot casting as a means of establishing paternity as follows:

First Opinion: Lot casting is a valid means of establishing paternity; it can be used to settle a dispute over paternity to a child of unknown parentage. This opinion is advocated by a group of the Shaafi'ites, a view reported from *Imaam* Ahmad and the established view of Ibn Hazm.

Ibn Al-Qayyim states, "It is a means stronger than many of the means used by those who consider lot casting invalid. In fact, it is stronger than the ruling based on *firaash* by mere contracting if the husband and wife are known to have not met with each other and even stronger than ruling by mere denial."

He then commented on the narration from Ahmad through Ishaq bin Ibraheem and Ja'far bin Muhammad that lot casting is a legitimate means of proving paternity.

Al-Athram said, "Abu Abdullah (Ahmad) considered lot casting an authority on proving paternity. Ahmad said, 'Some people ignorantly argue that lot casting is tantamount to gambling when five *hadeeths* have been narrated from the Prophet (peace and blessings be upon him) validating it.'"

⁷² *At-Turuq Al-Hukmiyyah*, p. 219.

Second Opinion: Lot casting is not a valid means of proving paternity. This is the view of both the Hanafites and Maalikites, the view adopted by a group of Shaafi'ites and a narration from Ahmad.⁷³

Evidence and Argumentation

1. The evidence supporting the second opinion states that lot casting was valid but was abrogated later on. The last ruling by Ali did not apply lot casting because he knew that it was abrogated.⁷⁴ He would not contradict any rule established by the Prophet (peace and blessings be upon him).

However, this argument is refuted by the fact that Ali did not apply lot casting in some instances for the possibility of having other evidence supporting a different means of proving paternity. This does not in any way mean that lot casting was abrogated.⁷⁵

2. The evidence supporting the first opinion is as follows:

a. Zayd bin Arqam said, "While we were sitting with the Prophet (peace and blessings be upon him), a man from Yemen came and said, 'Three Yemeni men were involved in a dispute over paternity to a child. All of them had sexual intercourse with a woman during one and the same term of purity. He (Ali) asked two of them to surrender the child to the third man but they objected. He asked the other two to surrender the child to the third man but they objected. He said: You are disputing partners and I will use lot casting among you. Any one of you wins the lot shall have the child and pay the other two thirds the blood amount.

⁷³ *Sharh Ma'aanee Al-Aathaar*, 4/382; *Al-Mu'tasar min Al-Mukhtasar*, 2/79; *Al-Furooq*, 4/111; *Tabsirat Al-Hukkaam*, 2/97-99; *Al-Haawee*, 17/380; *Al-Muhadh-dhab*, 1/455; *Al-Insaaf*, 6/458; *At-Turuq Al-Hukmiyyah*, 216, 289; *Al-Qawaa'id* by Ibn Rajab, 385-359; *Al-Muhallaa*, 10/150 and *Encyclopedia of Jurisprudence*, 33/148. The Hanafites argued that lot casting was applied in the early days of Islam but it was abrogated later on based on the fact that Ali ruled that the child of a couple involved in *li'aan* belongs to both of them; he inherits from them and they inherit from him. *At-Tahhaawee* writes, "It is impossible for Ali to rule contrary to what was applicable during the time of the Prophet (peace and blessings be upon him). He only rejected a means that was already abrogated." See *Sharh Ma'aanee Al-Aathaar*, 4/382 and *Al-Mu'tasar min Al-Mukhtasar*, 2/79

⁷⁴ *Al-Mu'tasar min Al-Mukhtasar*, 2/79; *Sharh Ma'aanee Al-Aathaar*, 4/382 and *Nasb Ar-Raayah*, 4/108.

⁷⁵ *Means of Evidence in the Islamic Sharee'ah*, p. 841.

He cast the lot and gave the child to the man who won the lot.' The Prophet (peace and blessings be upon him) laughed to the extent that his molars appeared."⁷⁶

⁷⁶ Reported by Imaam Ahmad, Abu Dawood, An-Nasaa'ee and Al-Baihaque through Abdullah bin Al-Khaleel, Imaam Ahmad's *Musand*, 4/374; *Sunan* Abu Dawood, Book of Divorce, part on those who advocate lot casting if paternity to a child is disputed, no. 2269, p. 329; *Sunan* An-Nasaa'ee, Book of Divorce, part on lot casting to rule paternity to a child, no. 3519, p. 490; *As-Sunan* Al-Kubraa, Book of Claims and Evidence, part on lot casting if no readers of similarities are available, 10/267. In *Zaad Al-Ma'aad*, Ibn Al-Qayyim writes, "The chain of narrators includes Yahya bin Abdullah Al-Kindee Al-Ajlah whose narrations are inauthentic. However, it is narrated by Abu Dawood and An-Nasaa'ee through a trustworthy chain of narrators from Abd Khair from Zaid bin Arqam." He quoted the *hadeeth* and commented, "This *hadeeth* has been deemed weak by the fact that it is reported from Abd Khair but drops Zaid bin Arqam and hence the *hadeeth* is *mursal* (with a broken chain of narrators, missing one or two people). Abd Khair met with Ali, about whom the story is reported and heard from him. Assuming that Zaid bin Arqam is not mentioned in the chain of narrators, where does such description of a *mursal hadeeth* come from? However, it can be said that Abd Khair did not see the Prophet (peace and blessings be upon him) laughing; Zaid or another companion of the Prophet is the one who saw the Prophet laughing. Abd Khair did not mention the man who saw the Prophet laughing. Hence, the *hadeeth* is *mursal*. However, it can be said that the chain of narrators to Abu Khair from Zaid bin Arqam is sound, and hence the chain of narrators is complete to the Prophet. Yet, those who advocate the completeness of the chain of narrators rely on their confidence in the narrators but those who advocate the narration reported by the narrators who are more accurate and more discrete argue that Ali did not tell Zaid the story, and hence it is a *mursal* narration. However, the *hadeeth* is made stronger by other uninterrupted chain of narrators." In *At-Turuq Al-Hukmiyyah*, p. 234, it is stated, "The *hadeeth* narrated by Zaid bin Arqam ... is a very controversial." In *Al-Muhallaa*, Ibn Hazm writes, "It is strange that they divert from the ruling made by Ali with the knowledge of the Prophet (peace and blessings be upon him) which is a sound and authentic ruling and accept the ruling based on a weak and untrue narration ascribed to Umar as giving two men the right of paternity to a child. The Qur'an, the *Sunnah* and wise reasoning refute this latter ruling." In the same book, 10/150, he adds, "This is an authentic narration reported by trustworthy narrators and is an authority on this issue." See also *Sunan* Abu Dawood, no. 2270, p. 329 and *Sunan* An-Nasaa'ee, no. 3518, p. 490. Ibn Abdul-Bar writes, "Another good *hadeeth* is reported on this issue and is accepted by a group of *Ahlul-Hadeeth* (traditionalists of Islamic law and practice who don't rely so much in *qiyaas*, or analogy) and the *Dhaahirees* (those who interpret religious texts according to their literal meaning). This *hadeeth* is narrated by Ath-Thawree from Salih bin Hay from Ash-Sha'bee from Abd Khair Al-Hadramee..." See *Al-Istidhkaar*, 18/343.

In support of accepting the *hadeeth* as an authority on this issue, Ibn Hazm writes, "The Prophet (peace and blessings be upon him) would not just laugh without giving his ruling on something if it was unlawful. This indicates that he was happy with the ruling. The Prophet would only be happy when the truth is established and would not in any way admit anything invalid. The narration is reported by trustworthy narrators and is an authority on this issue."⁷⁷

2. Lot casting is the most valid evidence established in this case. It is also accepted in claims related to ownerships which are not substantiated by any clear evidence or sign. Therefore, the use of lot casting in establishing paternity based on invisible similarities decided by the person who judges people's parentage by studying their features (*qaa'if*) is more reasonable.⁷⁸

The Preponderant Opinion: Upon considering the two points of view and the evidence given by their advocates, and upon considering the discussion of the arguments given by those who object to using lot casting, it seems to me—and Allah knows best—that the opinion advocating the use of lot casting in establishing paternity is the preponderant one as it is supported by evidence stronger than those given by the scholars who oppose using it as a means of proving paternity.

3. Claiming paternity to a Child Born out of Wedlock

Jurists have differed as to the case of claiming paternity to a child born out of wedlock, namely if the adulterous woman is not a wife under the legal bond of matrimony. Two opinions can be discussed in this regard as follows:

First Opinion: The child is attached to the lineage of the adulterer if he claims to be his father. This is the point of view of Ibn Taymiyah and Ibn Al-Qayyim.⁷⁹

⁷⁷ *Al-Muhallaa*, 10/150.

⁷⁸ *Al-Insaf*, 6/463.

⁷⁹ *Majmoo' Al-Fataawaa*, 32/112-113; *Zaad Al-Ma'aad*, 5/426; *Al-Mubdi'*, 8/106 and *Al-Insaf*, 9/269.

Second Opinion: The child is not attached to the lineage of the adulterer if he claims to be his father. This is the point of view of the Hanafites, Maalikites, Shaafi'ites and Hanbalites.⁸⁰

Evidence and Argumentation

I. Evidence Supporting the Second Opinion

1. The Prophet's statement, "The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has committed illegal sexual intercourse."⁸¹ It is argued that the child is attached to the man who owns the matrimonial bed and the adulterer owns no matrimonial bed.⁸²

However, the above evidence is argued to be applicable to the case when the adulterer and the legal husband dispute over paternity to the child. This is an agreed contention because it is inconceivable that the legal husband would not dispute with the adulterer over paternity to the child born on his bed.⁸³

2. The child is not attached to the lineage of the adulterer if he does not claim to be his own father. The child should not be given to the adulterer as if the mother of the child is under the legal bond of matrimony with another man.⁸⁴

However, the above argument can be refuted as follows:

a. If the adulterer claims paternity to the child, he is then admitting that the child is his own, and hence the child should be given to him. However, if he does not claim paternity to the child, then he is not admitting that the child is his own.

b. The analogy set between seclusion with the woman and the legal bond of matrimony is valid but there are some differences between the two as a result of the availability of the textual proof: "The child is for the bed (i.e. the man on whose bed he was born) and stones

⁸⁰ *Al-Mabsoot*, 17/154; *Badaa'i' As-Sanaa'i'*, 6/242; *Sharh Az-Zarqaanee*, 6/104; *Sharh Al-Khurashee*, 6/101; *Al-Haawee*, 8/162; *Asnaa Al-Mataalib Sharh Rawdh At-Taalib*, 3/20; *Al-Mughnee*, 9/123; *Al-Mubdi'*, 8/106; *Al-Insaaf*, 9/298 and *Kashaaf Al-Qinaa'*, 5/427.

⁸¹ Already commented on.

⁸² *Al-Mabsoot*, 17/154 and *Majmoo' Al-Fataawaa*, 32/113.

⁸³ *Zaad Al-Ma'aad*, 5/425.

⁸⁴ *Al-Mughnee*, 9/123.

(disappointment and deprivation) for the one who has committed illegal sexual intercourse."

II. Evidence Supporting the First Opinion

1. Abu Hurairah (may Allah be pleased with him) narrated that the Prophet (peace and blessings be upon him) said, "None spoke in the cradle but only three [persons, Isa (Jesus) son of Maryam (Mary), the second one was the companion of Juraij who was a pious person. Juraij took a secluded monastery for worship and confined himself in it. His mother came to him as he was busy in prayer and she called, 'Juraij!' He said, 'My Lord, my mother [is calling me while I am engaged in] my prayer.' He continued with the prayer. She returned and she came on the next day and he was [still] busy in prayer. She called, 'Juraij!' And he said, 'My Lord, my mother [is calling me while I am engaged] in prayer'; he continued with the prayer, and she returned. Then on the next day she again came while he was busy in prayer and called, 'Juraij!' And he said, 'My Lord, my mother [is calling me while I am engaged] in my prayer.' And he continued with the prayer. She said, 'My Lord, don't let him die until he has seen the faces of prostitutes.' The story of Juraij and that of his meditation and prayer spread amongst Banu Israel. There was a prostitute who had been a beauty personified. She said [to the people], 'If you like, I can lure him to evil.' She presented herself to him but he paid no heed [to her]. She came to a shepherd who lived near the temple and she offered herself to him. He (i.e. the shepherd) had sexual intercourse with her and so she became pregnant. When she gave birth to a baby she said, 'This is from Juraij.' So they came and asked Juraij to get down and demolished the temple and began to beat him. He asked them what the matter was. They said, 'You have committed fornication with this prostitute and she has given birth to a baby from you.' He said, 'Where is the baby?' They brought him [the baby] and then he said, 'Just leave me so that I should perform prayer.' He performed prayer and when he finished, he lifted the baby in his stomach and asked him, 'O boy, who is your father?' The baby answered, 'He is such-and-such a shepherd...'"⁸⁵

⁸⁵ Reported by Al-Bukhaaree in his *Saheeh*, Book of Work during Prayer, part on if a method calls her son while he is praying, no. 1206, p. 192 and Muslim in his *Saheeh*,

Argumentation: Allah gave the baby the ability to speak, a fact which cannot be falsified or even denied. The Prophet (peace and blessings be upon him) told that Juraij ascribed the baby to the adulterer and Allah approved such ascription by making the baby speak the truth. The Prophet (peace and blessings be upon him) told this story about Juraij as an indication of the acceptance and authority of this rule. Therefore, paternity to the child is established and all related consequences come into effect accordingly.⁸⁶

2. Umar (may Allah be pleased with him) used to attach the children born out of wedlock in the pre-Islamic era to those who claimed to be their fathers after the advent of Islam.⁸⁷

Argumentation: Umar (may Allah be pleased with him) used to attach the children born out of wedlock in the pre-Islamic era to their fathers after the advent of Islam. This indicates that if the adulterer claims paternity to the child, he should be given the right of having the child. This is also an unequivocal Islamic rule.

However, this argument is objected to by advocates of the first opinion who argue that this applies to attaching the children born to prostitutes in the pre-Islamic period but not to prostitutes after the advent of Islam. They also argue that the rulings on prostitutes in the pre-Islamic period are easier than those on prostitutes after the advent of Islam. In the instance of prostitutes in the pre-Islamic period there is an element of suspicion under which the child may be given to the adulterous father, but this ruling does not apply, especially when there is no element of suspicion after the advent of Islam.⁸⁸

However, this objection can be refuted as follows:

1. Suspicion exists when the adulterer claims that the child born out of wedlock is his own. Therefore, the child may be given to his father even though there is an element of suspicion. There is no difference

Book of Obedience, part on giving priority to the obedience of parents to optional prayers, no. 6509, pp. 1118-1119.

⁸⁶ *Al-Jaami' li Ahkam Al-Qur'an*, 5/115; *Zaad Al-Ma'aad*, 5/426 and *Fathul Baaree*, 6/483.

⁸⁷ Reported by Imaam Maalik in *Al-Muwatta'*, Book of Justice, part on annexing a child to his father, no. 1486, 18/332 and Al-Baihaqee, in *As-Sunan Al-Kubraa*, Book of Claims and Evidence, part on *Qaa'ifs* and claiming paternity to children, 10/263.

⁸⁸ *Al-Haawee*, 8/162-163.

between the two elements of suspicion without evidence, and such evidence is not available.

2. The action taken by Umar realized a great interest; the Muslim who commits adultery and is aware of the presence of the child who is born as a result of his act as well as of the painful psychological effects resulting from ignoring him will realize a great interest in admitting to be his father which will eventually protect the child against loss. On the contrary, if he leaves the child with unknown parentage, this will lead to a great harm such as spreading mischief and defamation of the reputation of the child which will accompany him all his life. The child will always feel the burden that has been caused by others and that he does not belong to the community without having the option to correct the situation. This again will reflect on society, for members of society will look down on the child as a product of infamy. Therefore, the father admitting paternity to the child achieves great benefits to the child and society. Muslims are aware of the great benefits that such admission of paternity realizes in the present time.

3. Sound analogy dictates that the child born out of wedlock should be given to the adulterous father since the father is a party to the act of adultery and since the child is naturally attached to his mother, and hence the child inherits from her and she inherits from him, let alone the relationship that exists between the child and the relatives of his mother though he is a product of adultery. The child is the result of sperm's nucleus fusion with the egg's nucleus of the adulterous father and mother, who have agreed that the child belongs to them. Therefore, there is no objection to attaching the child to his father if no other person claims the child to be his own. This is a case of pure analogy that is valid and sound.⁸⁹ However, this argument can be invalidated by the fact that analogy in this case is controversial because attaching the child to his mother cannot be denied by *li'aan* or admission by any other person that he has committed adultery with the mother. This is a fact that cannot be denied; as for the father, he can deny being the father of the child.⁹⁰

⁸⁹ *Zaad Al-Ma'aad*, 5/426.

⁹⁰ *Al-Muntaqaa*, 4/83.

4. Although the father can deny being the father of the child through *li'aan*, he can admit to be his father later on, a case which also applies to the child born as a result of adultery.⁹¹

However, this argument was refuted by the fact that the child involved in a case of *li'aan* is totally different from the child involved in a case of adultery. The difference between the two is that the child involved in a case of *li'aan* is attached to his father before the action of *li'aan*, and hence he can be attached to him after admitting him to be his child because he is originally his child anyway; however, the act of adultery is emergent and the child born out of wedlock is not originally attached to any father. Therefore, the case involving the child after the father has admitted him to be his child should be the same as the one before admitting him.⁹²

The Preponderant Opinion: After deliberating on the statements of scholars and the evidence they have given in support of their arguments and the objections given by their opponents, it can be said that the preponderant opinion is that of Ibn Taymiyah and his disciple Ibn Al-Qayyim which states that the child born out of wedlock should be given to the adulterer if the latter claims him to be his child for the strong arguments they have given and the weak evidence and arguments given by their opponents.

The elements that make this opinion preponderant over the other one can be summed up in the following:

1. The Islamic *Sharee'ah* is keen on establishing paternity to children who are of unknown parentage. Therefore, the weakest evidence indicating paternity can be accepted to realize this end. As there is no disputant against the adulterer who claims paternity to a child born as a result of adultery, the child should be attached to the said adulterer's lineage in order to protect the child against loss and corruption.

2. It is well-known that no one should bear the burden of any sin committed by another one, and this child who is born out of wedlock has not committed any sin, and hence he should not bear the consequences of the sin committed by others, nor should his lineage be

⁹¹ *Al-Haawee*, 8/162.

⁹² *Ibid.*, 8/163.

severed from a person who claims to be his father without anyone disputing such a claim.

3. As Islam is keen on establishing paternity to children who are of unknown parentage, it is also keen on unveiling the truth. Thus, the adulterer's admission that he is the father of the child born as a result of adultery should not be doubted, especially if no one else disputes such admission. Therefore, there is no objection to the fact that the child be attached to the lineage of the adulterer who claims the child is his.

Chapter Two

Means by Which Paternity may not be Established

Topic One: Change of Paternity

Changing one's paternity is impermissible according to the unanimous opinion of scholars.⁹³ This can be delineated as follows:

1. Paternity is a matter that cannot be changed, abrogated or assigned.⁹⁴ Therefore, Islam has forbidden changing one's paternity and claiming to be belonging to other than one's real father. The Prophet (peace and blessings be upon him) was very emphatic about criminalizing the act of changing one's paternity or claiming to be the offspring of other than one's real father. The Prophet (peace and blessings be upon him) said, "He who knowingly attaches his parentage to other than his real father, Paradise will be forbidden for him [to enter]."⁹⁵ He also said, "He who attaches his lineage to one other than that of his father or ascribes himself to other than his ex-masters, the curse of Allah, the Angels and all the people are on him; Allah will not accept any of his deeds or justifications on the Day of Judgment."⁹⁶

⁹³ *Fathul Baaree*, 12/44.

⁹⁴ *Al-Mabsoot*, 17/98-99 and *Ahkaam Al-Ahkaam Sharh Umdat Al-Ahkaam*, 4/75.

⁹⁵ Already commented on.

⁹⁶ Reported by Muslim in his *Saheeh*, Book of Pilgrimage, part on the virtues of Madeenah, no. 3327, p. 575 and Book of Freeing Slaves, part on prohibiting slaves from attaching themselves to other than their real masters, no. 3794, p. 657.

An-Nawawee writes, "This is express evidence as to the emphatic prohibition of changing one's paternity or loyalty, for such an act is a clear indication of denial of favour and a salient harm to the rights of inheritance, loyalty, lineage, and the like. Moreover, this [act] entails the severance of blood relations and disobedience [to parents]."⁹⁷

Abu Hurairah also narrated that the Prophet (peace and blessings be upon him) said, "Do not deny your fathers, for doing so is an act of disbelief."⁹⁸

2. The Islamic *Sharee'ah* forbids any woman from knowingly and deliberately attaching any child to other than his real father. Abu Hurairah reported that he heard the Prophet (peace and blessings be upon him) commenting on the verse of *li'aan* thus: "Any woman who falsely attaches a child to the lineage of any people, then she has no connection whatsoever with Allah, and Allah will not admit her into His Paradise; and any man who deliberately denies his child, Allah will veil Himself from him and defame him among all people [on the Day of Judgment]."⁹⁹

3. As stated in the above *hadeeth*, it is also prohibited for a father to deny paternity to his child, as it is a change of an established paternity. However, if there is a legal reason to deny paternity to a child, it is out of context here. This point will be discussed in detail when elaborating on *li'aan* which the Legislator has made a legal means of denying paternity to a child for an established cause.

⁹⁷ *Sharh Saheeh Muslim*, 9/144.

⁹⁸ Reported by Al-Bukhaaree in his *Saheeh*, Book of Inheritance, part on those who attach themselves to other than their fathers, no. 6768, p. 1167 and Muslim in his *Saheeh*, Book of Belief, part on the status of belief of those who knowingly deny their fathers, no. 218, p. 47.

⁹⁹ Reported by Abu Dawood in his *Sunan*, Book of Divorce, part on prohibition of the denial of paternity to children, no. 2263, p. 328; An-Nasaa'ee in his *Sunan*, Book of Divorce, part on prohibition of the denial of paternity to children, no. 3511, p. 489; Ibn Majah in his *Sunan*, Book of Inheritance, part on those who deny their offspring, no. 2743, p. 396; Ad-Darimee in his *Sunan*, Book of Marriage, part on those who knowingly deny their offspring, no. 2244, 2/76 and Al-Haakim in *Al-Mustadrak*, Book of Divorce; he said that it is an authentic *hadeeth* according to the conditions set by Muslim, 2/203.

4. Moreover, it is prohibited to claim paternity to a child of unknown parentage when the claimant definitely knows that he is not his child. This point will be discussed further under the topic of adoption.

5. Finally, it is prohibited to sell or give away lineage. Ibn Umar (may Allah be pleased with him) narrated that the Prophet (peace and blessings be upon him) said, "Loyalty is a relation like that of lineage which may not be sold or given away."¹⁰⁰ This indicates that lineage may not be sold or given away.

Topic Two: Adoption

Adoption means that a man takes a boy or a girl whom he knows to be not his offspring as his legal son or daughter.¹⁰¹ The adoption system was acknowledged in the pre-Islamic period and the early Islamic period. In the pre-Islamic period, a man would admire someone's strength and personality and hence adopt him as his son with the right to inherit from him like his other male offspring. The Prophet (peace and blessings be upon him) adopted Zayd bin Harithah before he was proclaimed as a Prophet. Therefore, people called him Zayd, son of Muhammad.¹⁰² However, Islam prohibited adoption. The following statements from the Qur'an and the Prophet's *Sunnah* are clear evidence to this effect:

1. Allah says, "Allah has not put for any man two hearts inside his body. Neither has He made your wives whom you divorce by *dhihaar*¹⁰³ your mothers., nor has He made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the [Right] Way. Call them (i.e. adopted sons) by [the names of] their fathers, that is more just with Allah; but if you know not their

¹⁰⁰ Reported by Al-Haakim in *Al-Mustadrak*, Book of Inheritance, part on loyalty is a relation like that of lineage; he said that this *hadeeth* is of an authentic chain of narrators, 4/341 and Al-Baihaquee in *As-Sunan Al-Kubraa* from Al-Hasan as a *mursal hadeeth*, Book of Loyalty, 10/292. Al-Albaanee said that it is an authentic *hadeeth* in *Irwaa' Al-Ghaleel*, 6/109.

¹⁰¹ *Ahkaam Al-Qur'an* by Ibn Al-Arabee, 3/1504.

¹⁰² *Al-Jaami' li Ahkaam Al-Qur'aan*, 14/19 and *Zaad Al-Ma'aad*, 5/555.

¹⁰³ *Dhihaar* is the saying of a husband to his wife, "You are to me like the back of my mother." That is, "You are unlawful for me to approach." [Translators Note]

fathers' [names, call them] your brothers in faith and your freed slaves."¹⁰⁴

The above verse emphatically prohibits adoption. No man may adopt the child of another man or attaches him to his lineage. The Qur'anic statement, "Nor has He made your adopted sons your real sons" abolished any kind of adoption or change of lineage.¹⁰⁵

2. The Prophetic tradition: "He who knowingly attaches his parentage to other than his real father, Paradise is forbidden for him [to enter]."¹⁰⁶

3. Abu Hurairah narrated that the Prophet (peace and blessings be upon him) said, "Do not deny your fathers, for doing so is an act of disbelief."¹⁰⁷

The differences between adoption and claiming paternity to a child of unknown parentage can be summed up in the following:

1. Admitting paternity to a child of unknown parentage does not establish paternity; rather it is a means towards establishing it whereas adoption is an act that establishes paternity from the first instance.

2. Paternity is realized by adoption even if the adopted child has a known father, while paternity through admission is not realized unless the child is of unknown parentage.¹⁰⁸

Topic Three: Claiming paternity to a Child Born out of Wedlock

All scholars are agreed that the adulterer who claims paternity to a child born as a result of adultery when his mother is under the legal bed of matrimony may not be given the child whom he claims to be his son or daughter; rather the child should be given to the legal owner of the matrimonial bed. This unanimous agreement has been reported by many scholars.¹⁰⁹

Ibn Abdul-Barr writes in *At-Tamheed*, "He (i.e. the Prophet has not accepted that the child born out of wedlock after the advent of Islam be

¹⁰⁴ *Surat Al-Ahzaab*: 4-5.

¹⁰⁵ *Fathul Baaree*, 12/55.

¹⁰⁶ Already commented on.

¹⁰⁷ Already commented on.

¹⁰⁸ *Islamic Jurisprudence and its Evidence*, 7/695.

¹⁰⁹ *Badaa'i' As-Sanaa'i*, 6/243; *Ash-Sharh Al-Kabeer* by Ad-Dardeer, 2/498; *Fathul Baaree*, 12-35-36 and *Kashaaf Al-Qinaa'*, 5/427.

attached to the lineage of any person who may claim paternity to the child. All Muslim scholars have unanimously agreed to this, as enjoined by the Prophet (peace and blessings be upon him)."¹¹⁰

In *Al-Mughnee* we read, "They (i.e. the scholars) have unanimously agreed that if the child is born on the bed of a man but claimed by another man, the child may not be attached to the lineage of the claimant."¹¹¹ This is supported by the following:

1. The Prophetic statement: "The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has done illegal sexual intercourse."¹¹²

This statement makes it clear that the child born on the legal matrimonial bed should be attached to the legal owner of the bed rather than to the man who claims paternity to the child as long as the matrimonial bed is already there. Therefore, the matrimonial bed is given preference over the claim of paternity even if the child is the product of an illegal relationship.

2. However, if the owner of the matrimonial bed thinks that the child is not his, he may deny paternity to him through *li'aan*.¹¹³

Chapter Three: Ruling on Proving Paternity through DNA Testing

Topic One: Genetic Relations in the Islamic *Sharee'ah*

The Islamic *Sharee'ah* has preceded modern science in acknowledging hereditary relations among family members of families and in admitting that genes run through families. The various texts of the *Sharee'ah* are clear on this scientific fact. Therefore, several important juristic provisions have been laid down with regard to hereditary relations among individuals since they have their undeniable effect on the lives of individuals and societies alike. A closer look at the texts of

¹¹⁰ Ibn Abdul Bar, 18/312.

¹¹¹ Ibn Qudaamah, 9/123.

¹¹² Already commented on.

¹¹³ *At-Tamheed*

the Holy Qur'an and the Prophet's *Sunnah* will reveal that a great consideration has been given to genes which pass from parents to offspring as a result of sexual relationship between a man and a woman, whether such relationship is legal or otherwise.

1. Allah Almighty says, "It is He Who created from water a human being and made him [a relative by] lineage and marriage; for your Lord is the Most Capable."¹¹⁴ This means that Allah made it clear for His creatures that He has created them from a kind of water which passes through parentage from one generation to another, namely by the passage of genes from father and mother to offspring.

2. Allah Almighty says, "He Who perfected everything that He created and He started the creation of man from clay, then he inculcated in him the potential to reproduce through a drop of despised fluid."¹¹⁵ This means that reproduction is achieved through the meeting of the sperm with the ova (both are fluids) for the continuation of the human race.¹¹⁶

3. Abu Hurairah (may Allah be pleased with him) narrated, "A man said to the Prophet (peace and blessings be upon him), 'My wife gave birth to a black boy.' The Prophet asked him, 'Do you have camels?' The man replied, 'Yes.' The Prophet asked him, 'What is their colour?' The man replied, 'Red.' The Prophet again asked him, "Is there a grey one among them?" The man replied, 'Yes.' The Prophet then asked, 'Whence comes that?' The man replied, 'Maybe it is because of heredity.' The Prophet said, 'Maybe your [latest] son has his colour because of heredity.'" In another version by Al-Bukhaaree and Muslim we read, "He did not permit him to deny the boy's parentage."¹¹⁷ This means that the Prophet (peace and blessings be upon him) explained to the man that the human genes are interrelated and that they are passed from

¹¹⁴ *Surat Al-Furqaan*, 25:54.

¹¹⁵ *Surat As-Sajdah*, 32:7-8.

¹¹⁶ *Al-Jaami' li Ahkaam Al-Qur'an*, 12/109 and *Fathul Qadeer*, 3/476-477.

¹¹⁷ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on suggestions of denying paternity to a boy, no. 5305, p. 948 as well as in the Book of Adhering to the Qur'an and *Sunnah*, part on setting comparisons between a known origin and unknown one as explained by the Prophet (peace and blessings be upon him) to the questioner, no. 7314, p. 1259 and *Saheeh Muslim*, Book of *Li'aan*, no. 3766, p. 652.

fathers to children and the grandchildren. Some traits or colours found in children and grandchildren may be traced back to their ancestors in spite of the very long time interval between the former and the latter.

4. The story of Hilaal bin Umayyah who accused his wife of committing adultery with Shareek bin Sahmaa' who was the maternal brother of Al-Baraa' bin Maalik. In fact, he was the first man to use *li'aan*¹¹⁸ in Islam. The Prophet (peace and blessings be upon him) said, "Watch her; if she delivers a white-complexioned child with dark hair and bright eyes, he must be the son of Hilaal bin Umayyah; and if she delivers a black-eyed child with big hips and fat shins then it is Shareek bin Sahmaa's child."¹¹⁹ The above *hadeeth* gives consideration to the genes that are passed from parents to offspring. The Prophet (peace and blessings be upon him) ruled that the newborn is the product of the man to whom he bears resemblance in complexion and other characteristics. Had genetic relations not been important in determining who belongs to whom, they would not have been relied on in the identification of lineage.

5. The Prophet (peace and blessings be upon him) felt satisfied for what Mujazziz Al-Mudlijee said when he saw the feet of both Usaamah and his father Zayd and commented, "These feet belong to each other."¹²⁰ Here the Prophet (peace and blessings be upon him) accepted the decision of the *qaa'if* that the feet of both Usaamah and his father Zayd are similar to each other, which clearly indicates that genes pass from parents to offspring.

6. Anas (may Allah be pleased with him) narrated that the Prophet (peace and blessings be upon him) said, "... As for the resemblance of the child to its parents: If a man has sexual intercourse with his wife and gets discharge first, the child will resemble the father, and if the woman gets discharge first, the child will resemble her."¹²¹

¹¹⁸ An oath taken by both the husband and the wife, when the husband accuses his wife of adultery and she denies it. Couples who make *li'aan* are automatically and irrevocably divorced and can never remarry. [Translator's Note]

¹¹⁹ Reported by Muslim, Book of *Li'aan*, no. 3757, p. 650.

¹²⁰ Already commented on.

¹²¹ Reported by Al-Bukhaaree, Book of Prophets, part on the creation of Adam and his offspring, no. 3329, p. 553.

Argumentation: The above *hadeeth* proves that traits are transferred from the parents to their children. The Prophet (peace and blessings be upon him) considers the effect of first discharge (sperm or ova) on the child's resemblance to either his father or mother. This is the real meaning of genetic traits. Allah knows best.

Topic Two: Scholars' Opinions and Evidence as to Proving Paternity through DNA Testing

As has already stated, the Islamic *Sharee'ah* has amply delineated the means to be used in proving paternity. However, it does not object to using other means to prove paternity if such means do not contradict the Qur'an, the *Sunnah* and other legal rules and fundamentals. Therefore, contemporary scholars have done their best to identify whether a judge can resort to DNA testing as a modern means of prove paternity.

Conferences and symposia held for this purpose have witnessed ample discussions and revealed various juridical differences in this respect. These differences can be summed up in the following:¹²²

1st Opinion: The majority of modern jurists contend that DNA testing is a novel legal means of proving paternity. However, it comes at the bottom of the list of other legal means agreed to by jurists. Therefore, it should not be given precedence to the matrimonial bed, admission or testimony. If any of these means are available to the judge, he should not ignore them and opt for DNA testing to prove paternity because the latter means is lower in grade in comparison with the ones agreed to by jurists. The Academy of Islamic Jurisprudence of the Muslim World League adopts this opinion. The decision issued by the academy reads: "5. It is lawful to count on DNA analysis in establishing paternity in the following cases: (a) Two men litigating concerning paternity to a child of an unknown lineage, whether litigation is due to the absence of evidence, or to there being equal evidence on both litigating sides, or to both men having sexual intercourse with the mother of the child by mistake; (b) Mix-up of newborn babies in hospitals and childcare centres as well as mix-up of test tube babies and (c) Cases when children get lost

¹²² *DNA Testing and Its Legal Applications*, p. 76; *Biological Analysis of Human Genes and its Authority in Proving Paternity*, pp. 81-83 and *DNA Testing and its Effect on Legal Rulings*, p. 372.

because of accidents, disasters or wars and their families can no longer be found. DNA also helps in establishing the identity of unidentified corpses as well as war prisoners and the missing."¹²³

2nd Opinion: Some modern jurists have contended that the results of DNA testing realize and even excel the results of the methods adopted by the Islamic jurisprudence as to proving paternity. Therefore, this modern technique should be given preference to the traditional methods of proving genealogy.¹²⁴ Moreover, the DNA test result is independent evidence and should be relied on if the necessary conditions are met. It can never be compared to *qiyaafah* for it is totally different from it. The majority of modern jurists are of the opinion that it should be applied in cases of confusion, dispute and doubt as to the identity of babies, cadavers and victims of wars and disasters.¹²⁵

It seems to me that the above point of view has a precedent expressed by the Shaafi'ites with regard to the daughter of a woman who committed adultery; they gave room for the use of other techniques to prove lineage. Abu At-Tayyib At-Tabaree writes on marrying the daughter of the woman who committed adultery to the man who committed adultery with her mother, "The answer to their statement that she was created from his sperm is that we do not accept this statement. Who knows this? It is only known through revelation or *Sharee'ah* rulings. Revelation is over and *Sharee'ah* rules state that there is no lineage between him and her. Therefore, some of our advocates stated that had they proved such a lineage with certainty, they would have ruled that they are closely related. However, this cannot be ascertained."¹²⁶ Accordingly, any method that leads to certainty that the

¹²³ 7th Decision on DNA Testing, 16th Session, p. 344 and *The Use of DNA Testing in Proving Paternity: A legal Insight*, pp. 19 and 26.

¹²⁴ *Treatises on Medical Jurisprudence*, p. 269; *Biological Analysis of Human Genes*, p. 83 and *DNA Testing and its Authority*, p. 66.

¹²⁵ *DNA Testing and its Authority*, p. 66.

¹²⁶ *At-Ta'liqatul Qubraa fil Furoo'*, 1/418. In *Al-Muhadh-dhab*, 2/44: "If he commits adultery with a woman and she gives birth to a daughter, Ash-Shaafi'ee said that he should not marry her (i.e.the daughter); but if he marries her, the marriage should not be dissolved. Some of our advocates said that he did not like it because he was afraid she might have been his product. However, if it is known that she is his product, he is not permitted to marry her as the Prophet did not permit such a relationship."

girl born out of wedlock belongs to the adulterer is a legal means of proving paternity. Therefore, if science discovers any such methods, there is no objection whatsoever to using them. Hence, DNA testing which leads to uncovering the fact that a certain child certainly belongs to someone is a legal means of proving paternity.

Evidence Supporting Either Opinion

1. DNA testing is a highly accurate technique that hardly produces inaccurate results as to proving genetic relationship. Therefore, it ranks high in establishing paternity compared to other means approved by jurists like *qiyaafa* which involves a high probability of error. The recommendations of the seminar on the authority of DNA testing as to proving paternity state the following:

"1. Genetic fingerprints are unique and special patterns of genetic structure reflected in each cell of every individual of either sex. These unique patterns are not shared with any other human being at any time, and represent categorical proof of biological parentage and identity, particularly for the purposes of forensic medicine. Genetic fingerprints are approved by the majority of Islamic scholars for proving lineage whenever there is a dispute. In fact, it has a better claim to be considered as valid evidence, ahead of *qiyaafah* (tracing a person's ancestry through features and resemblance), and should be accepted as evidence in cases of dispute over the parentage of a person with unknown parentage, should other evidence be the acknowledgement of parentage of someone with unknown lineage is an indisputable right of a person, provided that it meets the conditions established in this regard. Consequently, it is not open to the acknowledging parent to go back on his claim and deny parentage. No denial of the acknowledged person's lineage by any one of the acknowledging parent's children is admissible. Nor is there any validity for the genetic fingerprints in denying such a lineage"¹²⁷

2. The Islamic *Sharee'ah* has established the legal rules that realize the interests of people and ensure a stable and dignified life for them. The Islamic *Sharee'ah* is also keen on establishing clear and stable lineages as this is the basis on which the family is built and through which relations

¹²⁷ Symposium on the Authority of DNA Test in Proving Paternity, islamset.com.

between family members can be maintained. Allah says, "It is He Who created from water a human being, and made him [a relative by] lineage and marriage; for your Lord is the Most Capable,"¹²⁸ Therefore, the Islamic *Sharee'ah* is keen on establishing paternity through any means possible even if such a means is a weak one because neglecting it will certainly result in serious harm to the individual and society.¹²⁹

Ibn Qudamah writes, "Paternity is based on likelihood; it is established by mere possibility even if no sexual intercourse is proved to have taken place; however, it cannot be denied by mere possibility."¹³⁰

Ibn Al-Qayyim also writes, "The fundamentals and rules of *Sharee'ah* and sound analogy require that resemblance is a valid means of proving paternity, for the *Sharee'ah* is keen on the stability of lineages, and therefore, it can be proved by any means even if they are of a low grade of authority."¹³¹

Therefore, as the Islamic *Sharee'ah* is keen on establishing clear paternity and as DNA testing is an accurate technique of establishing the same with no or rare errors, it is then a valid authority on proving paternity with the same degree of reliability as are the other means approved by jurists which are more prone to errors than is the DNA testing.

3. Evidence is anything that makes the truth clear; this is not specifically derived from testimony. Ibn Al-Qayyim discusses this idea thus: "In general, evidence is anything that makes the truth clear. Those who have restricted it to the testimonies of one, two or four witnesses have not given the term its proper meaning. Evidence, as mentioned in the Qur'an, does not only mean the two witnesses but also any proof whether individual or collective. Moreover, the Prophet's statement, 'The burden of evidence is with the claimant'¹³² means that the claimant

¹²⁸ *Surat Al-Furqaan*, 25:54.

¹²⁹ *Al-Furooq*, 3/203 and 4/104 and *The Encyclopedia of Jurisprudence*, 12/48.

¹³⁰ *Al-Mughnee*, 11/155.

¹³¹ *At-Turuq Al-Hukmiyyah*, 222.

¹³² Reported by Ad-Daraqutnee in his *Sunan*, Book of Judgments and Rulings, part on the recanting woman, 4/218; Al-Baihaqee in *As-Sunan Al-Kubraa*, 8/123; it is narrated by Amr bin Shu'aib from his father from his grandmother. Al-Albanee said, "They reported it through a weak chain of narrators. However, the said *hadeeth* is supported

should support his claim with the proper evidence in order for it to be acceptable. The two witnesses are a type of evidence, but other types might be stronger like the context of situation that signifies the truthfulness of the claimant. Ibn Maajah and other *hadeeth* collectors reported that Jaabir bin Abdullah (peace and blessings be upon him) said, "I told the Prophet (peace and blessings be upon him) that I wanted to travel to Khaibar. He asked me to pass by his agent and take fifteen *wasq*¹³³ of wheat. He said, 'If he asks for a proof, just touch his clavicle.'¹³⁴ Thus a sign given as a proof stands as strong as the testimony of a witness. The Legislator has given proofs and signs full consideration. A Review of the sources of the *Sharee'ah* will reveal that this type of evidence is used in several cases."¹³⁵

4. The Islamic *Sharee'ah* has approved the use of speculative evidence in different rulings including substantiation because setting things right and protecting people's lives and property require the acceptance of speculative evidence while taking the necessary precautions and meeting all the conditions which give preponderance to truthfulness over lies.¹³⁶ Besides, Allah the Almighty has not set definitive evidence for all legal matters; rather, He made some other evidence speculative with the aim of making it easy for people to find different solutions for their problems.¹³⁷

Al-Izz bin Abdus-Salaam writes, "Acting on the strength of speculative evidence is applicable to different rules of the *Sharee'ah* because such evidence is mostly true and rarely false. Had this type of evidence been neglected for fear some of its rare falseness might

by a version narrated by Ibn Abbaas through an authentic chain of narrators and another version narrated by Ibn Umar through a good chain of narrators. See *Irwaa' Al-Ghaleel*, 8/279.

¹³³ *Wasq* (plural: *awsaaq*) is a measure equal to 60 *saa'*, which is approximately 135 kg. [Translator's Note]

¹³⁴ Reported by Abu Dawood in his *Sunan*, Book of Justice, part on agencies, p. 521, no. 3632 and Al-Baihaquee in *As-Sunan Al-Kubraa*, Book of Agencies, part on attorneys in claiming rights, 6/80. Ibn Al-Qayyim said that the *hadeeth* is narrated by Ibn Maajah and others but I did not find it in *Sunan Ibn Maajah*.

¹³⁵ *At-Turuq Al-Hukmiyyah*, p. 12.

¹³⁶ *Methods of Legal Substantiation*, p. 27 and *Means of Substantiation*, 742.

¹³⁷ *Irshaad Al-Fuhoor ilaa Tahqeeq Al-Haq min Ilm Al-Usool*, p. 273.

materialise, many interests would have been suspended lest a little harm might materialise. This is contrary to Allah's wisdom behind legislation."¹³⁸

Al-Qaraafee writes, "Note: No testimony may be given unless with knowledge, though uncertain, for certainty requires unequivocal evidence, which is not the actual case. A person may deliver testimony based on weak evidence in many forms. What is really meant is that knowledge of the thing testified to can be acquired. Therefore, testifying to the fact that someone has received the due debt from another one is a probability that might be true or false. Testimony in this case can be borne through the principle of *istishaab* (presumption of existence or non-existence of facts) which stands for weak speculation.. The same rule applies to the probable payment of the value of a bought item, the receiving of the inheritance though the inheritor might have sold it and the lease with the probable payment of the rent though release might have taken place later on; all being based on the principle of *istishaab*. In general, all these forms constitute weak speculation. Only few cases are based on certain knowledge including the acknowledgement testimony for it is a testimony to the event that have taken place in the past, which remains valid in spite of the passage of time. Another case of testimony with knowledge is the endowment decided upon by a judge which may otherwise be based on speculative evidence. For example, if one testifies that a certain house is an endowment based on a judgment passed by a judge. All these cases are based on speculative evidence, for knowledge is related to the original event rather than to its continuation or discontinuation. Here lies the difference between what is known to be speculative and what is known to be definitive. Included in this case is the use of proofs that lead to certainty."¹³⁹

Ash-Shaatibee writes, "Interests and harms that are related to worldly affairs are based on likelihood. If it is likely to acquire an interest, then it is the interest that is based on prevailing customs. However, if the other side is more likely, then it is the harm that is based

¹³⁸ *Qawaa'id Al-Ahkaam*, 2/50.

¹³⁹ *Al-Furooq*, 4/4/56-57.

on prevailing customs. Therefore, the act related to two sides is ascribed to either side.”¹⁴⁰

5. The Muslim Nation, including jurists, have accepted novel means to establish identity which have proven to be feasible scientifically and practically, like accepting the results of fingerprinting and written signatures. This also applies to the photograph which is obtained by the reflection of rays on the identity card and which is acceptable to official agencies as proof of identity. No scholar or jurist has objected to any of these means; rather, they have used them just as others have. This is a type of practical consensus which has a certain influence on the establishment of legal rules. This also applies to DNA testing which is used to establish and prove paternity for children of unknown parentage.¹⁴¹

The Preponderant Opinion

It is noted that the advocates of the first opinion contend that there is ample evidence that DNA testing may be used to prove paternity but the legal means agreed to by jurists should be given preference to the use of DNA testing.

The advocates of the second opinion agree with the advocates of the first opinion, namely that evidence is clear as to the permissibility of relying on DNA testing to establish paternity but it should be given preference to the other means as it is more accurate and stronger than the means based on likelihood or speculation.

Upon deliberating on the above opinions and the evidence the brought forward in support of the use of DNA testing in proving paternity, and given that the difference among the two sides is limited to preference of either means to the other, it seems to me that DNA testing stands side by side with the other means of proving paternity because the evidence supporting the use of DNA testing is accepted by both parties. Indeed, DNA testing is stronger than *qiyaafah*, lot casting, claims of paternity to a child born as a result of adultery if he is born out of

¹⁴⁰ *Al-Muwafaqaat*, 2/26.

¹⁴¹ *Discretionary Research on Medical Jurisprudence*, pp. 264 and 268 and *Biological Analysis of Human Genes and its Authority in Substantiation*, p. 82.

wedlock; especially that scholars have differed as to their authority and reliability as means of proving paternity.

As for the matrimonial bed, admission and testimony, DNA testing should be given preference to them in certain cases defined by a decision issued by the Academy of Islamic Jurisprudence. These cases include the following:

a. Two men litigating concerning paternity to a child of an unknown lineage, whether such litigation is due to the absence of evidence or to there being equal evidence on both litigating sides, or to both men having sexual intercourse with the mother of the child by mistake.

b. Mix-up of newborn babies in hospitals and childcare centres as well as mix-up of test tube babies.

c. Cases when children get lost because of accidents, disasters or wars and their families can no longer be found. DNA testing also helps in establishing the identity of unidentified corpses as well as war prisoners and the missing.

The application of DNA testing in these cases is supported by two things:

1. Giving preference to DNA testing does not violate the consensus of establishing paternity through means of the matrimonial bed, admission or testimony. All that is meant is that we have discovered a new means by which paternity can be established but which does not abolish the application of other legal means.

2. The results of DNA testing are 98-100% accurate as agreed by the majority of experts whereas testimony, admission and the matrimonial bed are constitute only speculative evidence which the *Sharee'ah* has used for the purpose of protecting lineages and establishing clear genealogy.

Ibn Al-Qayyim writes, "The Legislator is keen on identifying paternity in any way possible. No severance of lineage may be ruled unless it is impossible to prove it. Therefore, paternity is proved by means of the matrimonial bed and other means by which the belonging of the product of animals may not be established."¹⁴²

Topic Three: DNA Testing Application Conditions

¹⁴² *At-Turuq Al-Hukmiyyah*, 222.

I. Legal Conditions

Muslim jurists who advocate the application of DNA testing in proving paternity unanimously agree that certain conditions should be met to ensure that the results of DNA testing are highly accurate and that such results are not used for improper purposes. They have also been keen on the fact that these conditions comply with the principles and rules of the Islamic *Sharee'ah* since DNA testing is a novel case that needs to be looked into as to its positive and negative effects and as to its agreement or disagreement with the fundamental rules of the Islamic *Sharee'ah*. As a result, numerous varied conditions have been laid down. However, it will suffice to list the most important conditions from the legal and technical points of view.

a. Legal Conditions:

1. DNA testing should be used, when necessary, to prove a doubted paternity rather than a certain one based on the rule of realizing a public interest and preventing harm. Therefore, it is not permissible to use DNA testing for the purpose of confirming definite lineage as such an act would, in most cases, disrupt confidence among husbands and wives and spread suspicions in society.

2. The result of DNA testing should not be opposed by a clear discrepancy. For example, if the result of DNA testing is rationally or physically impossible like concluding that a 60 years old man being the son of a 20 years old man, it means that it is an erring and unreliable result that should be rejected.

3. Orders for DNA testing should be issued by judges or officials having authority from the ruler so that manipulation of such a technology would not be the rule. Hence, results of DNA testing presented as a proof would be considered invalid if not ordered by the pertinent authority.¹⁴³

In this regard, the Academy of Islamic Jurisprudence has recommended the following:

¹⁴³ *Use of DNA Testing in Proving Paternity: A Legal View*, p. 32; *DNA Testing and its Effect on Juristic Provisions*, pp. 49-50 and *Jurisprudence of Contemporary Medical Issues*, pp. 263 and 369.

a. Countries should prevent the making of DNA examinations except by judicial ruling and that the examinations be performed in laboratories affiliated to the concerned bodies. Countries must also prevent the private sector from performing DNA tests because it usually seeks profit, and this may lead to major risks.

b. A committee made up of specialized scholars, doctors, and administrators should be formed in each country to carry out DNA testing. The task of the committee is to supervise and endorse the results of DNA tests.

c. The concerned authorities should take the necessary procedures and mechanisms with a view to preventing deceit and contamination that DNA samples may be exposed to in the concerned laboratories in order to guarantee the accuracy of the results. In addition, the number of genes used in examinations is to be in proportion to that which is already needed for the required tests according to the specialists in that field in order to avoid suspicion [about transgressing in using extra genes].¹⁴⁴

4. DNA technicians should have sufficient expertise to conduct DNA tests and decide on their results. They should be of outstanding knowledge and high accuracy so that no adverse implications may result and no loss of rights may be incurred.¹⁴⁵

5. DNA technicians should meet the following conditions: sanity, legal age, legal capacity, honesty, accuracy and integrity. If one condition or more is violated, the test result should not be accepted.¹⁴⁶

6. The result should be reliable and certain; otherwise, it is invalid and unreliable.

7. The judgment based on DNA testing result should be issued by a judge and no one else because issuing judgments is the sole authority of the judge.

b. Technical Conditions

1. DNA testing laboratories should be owned and controlled by the state.

¹⁴⁴ 7th Resolution, 16th Session, p. 345.

¹⁴⁵ *DNA testing and its Effect on Juristic Rulings*, p. 51.

¹⁴⁶ *Discretionary Research on Medical Jurisprudence*, p. 265.

2. Laboratories should be equipped with the best and latest technological means to the highest standards and specifications.

3. All DNA analysis steps should be documented beginning with sampling and ending with the results in order that the samples are kept intact and the results are accurate. These documents should be filed in order to refer to them when necessary.¹⁴⁷

4. DNA testing should be performed by at least two recognized laboratories, and all necessary precautions should be taken to ensure double-blind results are obtained.¹⁴⁸

¹⁴⁷ *DNA Testing and its Effect on Juristic Rulings*, p. 50; *DNA Testing and its Authority*, p. 65 and Recommendations of the Symposium on the Authority of DNA Test in Proving Paternity on the webpage islamset.com

¹⁴⁸ Recommendations of the Workshop of the Symposium on the Authority of DNA Testing to Prove Paternity, islamset.com.

Part Two: Denial of Paternity through DNA Testing

Chapter One: *Li'aan*

Topic One: Definition of *Li'aan*

I. Linguistic Definition

The Arabic word "*li'aan*" is derived from the infinitive "*la'n*" which means condemnation and cursing. Cursing by Allah means condemnation and deprivation of His mercy while cursing by creatures means swearing and calling each other names. *Li'aan* is a shared act between two parties like quarell and dispute. It is said that the judge performs *li'aan* between the couple when he rules that they should resort to *li'aan* according to the legal way.¹⁴⁹

II. Technical Definition

The legal term "*li'aan*" has several definitions according to scholars, including the following:

1. Specific words used by the husband who is forced to defame his wife who blemishes his honour or to deny paternity to a child.¹⁵⁰

2. Testmonies affirmed by oaths by the couple associated with cursing by husband and supplication for inflicting wrath by the wife which stands equal to the punishment of defamation on the part of the husband and the punishment of adultery on the part of the wife.¹⁵¹

The latter definition represents the statements given by many scholars; it may be the most appropriate and clearest definition indicating the legal meaning of *li'aan*, and Allah knows best.

Topic Two: Legality of Using *Li'aan*

If paternity to a person is defined by any of the legal means of establishing paternity, the said paternity acquires legal grounds , and hence it cannot be denied except through *li'aan* so that lineages become stable and protected against disruption and tampering. It is so because the Legislator is keen on establishing paternity, a fact which requires adding to the means of establishing paternity and attaching children to their parents for the mere possibility of being their fathers. Therefore,

¹⁴⁹ *Lisaan Al-Arab*, 13/387.

¹⁵⁰ *Mughnee Al-Muhtaj*, 3/367.

¹⁵¹ *Badaa'i' As-Sanaa'i'*, 3/241-242; *Mu'een Al-Hukaam*, 103 and *Al-Mubdi'*, 8/73.

denial of paternity should be restricted in accordance with the interests established by the Islamic *Sharee'ah* which protects the five necessities, including protection of posterity to which lineages are related.¹⁵²

Allah has enjoined the application of *li'aan* between the husband and the wife when there is need for it provided that its conditions and restrictions are observed.

The evidence to the legality of *li'aan* can be found in the Qur'an, *Sunnah*, the consensus of scholars and sound reasoning:

In the Qur'an we read: "And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth. And the fifth [testimony] [should be] the invoking of the Curse of Allah on him if he be of those who tell a lie [against her]. But it shall avert the punishment [of stoning to death] from her, if she bears witness four times by Allah, that he (i.e. her husband) is telling a lie. And the fifth [testimony] should be that the Wrath of Allah be upon her if he [her husband] speaks the truth."¹⁵³

In the Prophet's *Sunnah*, several *hadeeths* have established the doctrine of *li'aan*. These are as follows:

1. Ibn Umar (may Allah be pleased with him) narrated that a man performed *li'aan* with his wife at the time of the Prophet (peace and blessings be upon him) and the Prophet (peace and blessings be upon him) got them separated [by divorce] and decided that the child belonged mother.¹⁵⁴

2. Sahl bin Sa'd Al-Saa'idee narrated that Sahl bin Sa'd that 'Uwaimir came to 'Asim bin 'Adi who was the chief of Bani Ajlaan and said, "What do you say about a man who has found another man with his wife? Should he kill him whereupon you would kill him (i.e. the husband), or what should he do? Please ask Allah's Apostle about this matter on my behalf." Asim then went to the Prophet and said, "O

¹⁵² *Al-Ikhtiyaar*, 3/167; *Sharh Saheeh Muslim*, 10/134 and *Fathul Baaree*, 9/444.

¹⁵³ *Surat An-Noor*: 6-9.

¹⁵⁴ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on attaching a child to a lineage through *li'aan*, no. 5315, p. 950 and Muslim in his *Saheeh*, Book of *Li'aan*, no. 3752, p. 649.

Allah's Apostle!" [And asked him that question] but Allah's Apostle disliked the question. When 'Uwaimir asked 'Aasim [about the Prophet's answer], 'Asim replied that Allah's Apostle disliked such questions and considered it shameful. Uwaimir then said, "By Allah, I will not give up asking unless I ask Allah's Apostle about it." Uwaimir came [to the Prophet] and said, "O Allah's Apostle! A man has found another man with his wife! Should he kill him whereupon you would kill him [in *qisaas*] or what should he do?" Allah's Apostle said, "Allah has revealed regarding you and your wife's case in the Qur'an. Go and bring her." So Allah's Apostle ordered them to perform the measures of *mulaa'annah* according to what Allah had mentioned in His Book. So 'Uwaimir did *mulaa'annah* with her and said, "O Allah's Apostle! If I kept her I would oppress her." So 'Uwaimir divorced her and so divorce became a tradition after them for those who happened to be involved in a case of *mulaa'annah*. Allah's Apostle then said, "Look! If she (i.e. Uwaimir's wife) delivers a black child with deep black large eyes, big hips and fat legs, then I will be of the opinion that 'Uwaimir has spoken the truth; but if she delivers a red child looking like a *wahra* (a short red animal) then we will consider that 'Uwaimir has told a lie against her." Later on she delivered a child carrying the qualities which Allah's Apostle had mentioned as a proof for 'Uwaimir's claim; therefore the child was ascribed to its mother henceforth.¹⁵⁵

As for the consensus of scholars, more than one scholar have stated the legality of *li'aan*:

An-Nawawee writes, "Scholars have stated that the *li'aan* is legislated to protect lineages and maintain husbands' honour clean. Scholars have unanimously agreed that the *li'aan* is valid."¹⁵⁶

Ibn Rushd says, "As long as the matrimonial bed is the means that leads to the establishment of paternity, people are in need of a means

¹⁵⁵ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on those who permitted pronunciation of divorce three times, no. 5259, p. 939 and Muslim in his *Saheeh*, Book of *Li'aan*, no. 3743, pp. 647-648.

¹⁵⁶ *Sharh Saheeh Muslim*, 10/119.

through which they can deny such paternity if they are certain that they are not the fathers of any of their children. This means is *li'aan*."¹⁵⁷

Ad-Dimashqee writes, "They (i.e. scholars) have unanimously agreed that the one who defames his wife, accuses her of committing adultery or denies that she is pregnant from him but she accuses him of lying without him having any evidence and he is consequently subjected to the application of *hadd* against him, he may resort to *li'aan*."¹⁵⁸

With regard to reasoning, it can be argued as follows:

1. Through *li'aan*, Allah has given deliverance to husbands to protect them against blemishing their honour and indulging in unwarranted acts and to get rid from a false relationship to the children born on their matrimonial beds."¹⁵⁹

2. When a wife blemishes the matrimonial bed, the husband has the right to accuse her of adultery in order to cleanse his honour and deny paternity to the child born to him. Therefore, *li'aan* is a proof through which he can substantiate his accusations.¹⁶⁰

Topic Three: Paternity Denied through *Li'aan*

Scholars have differed as to what should be denied through *li'aan*, is it paternity to the foetus or that of the child. Three opinions have been given in this respect, as follows:

1st Opinion: *Li'aan* invalidates paternity to the foetus if it is performed while the wife is pregnant, and hence the foetus's lineage is severed from the husband. However, if *li'aan* is performed after giving birth to the child, the child's lineage is severed from the husband. This means that *li'aan* is a means of invalidating paternity whether it is performed during pregnancy or after the birth of the child. This is the

¹⁵⁷ *Bidayat Al-Mujtahid*, 2/118.

¹⁵⁸ *Rahmatul Ummah fi Ikhtilaaf Al-A'immah*, 428.

¹⁵⁹ *Al-Qabas*, 15/121.

¹⁶⁰ *Al-Mughnee*, 11/122.

opinion adopted by the Maalikites and the Shafi'ites and is a point of view adopted by some Hanbalites.¹⁶¹

2nd Opinion: *Li'aan* invalidates paternity to the child if performed while the wife is pregnant, and hence the lineage of the foetus is severed from the husband. However, if *li'aan* is performed after birth, paternity to the child is not invalidated and he remains attached to the husband. The *li'aan*, in this case, is meant to drop the punishment of defamation of the wife only. This is the opinion adopted by Ibn Hazm.¹⁶²

3rd Opinion: There is no way to deny paternity to the foetus. This is the Hanafites' point of view and the doctrine adopted by the Hanbalites.¹⁶³

Evidence and Argumentation

1. The evidence supporting the third opinion states that the pregnancy might be false. *Li'aan* is an accusation by the husband against his wife which entails the same punishment applied to the accusation of any other woman of adultery. Therefore, the said punishment may not be applied when there is an element of doubt.¹⁶⁴

However, it is argued that modern technologies are capable of identifying whether the pregnancy is false or true. Some very accurate X-rays and laboratory tests can differentiate between false and true pregnancies. Therefore, the doubt related to false pregnancy is out of question at the present time.

2. The evidence supporting the second opinion includes the following:

a. The Prophetic statement: "'The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has had illegal sexual intercourse."¹⁶⁵

¹⁶¹ *At-Tamheed*, 15/164; *Sharh Az-Zarqaanee*, 4/193; *Al-Muntaqaa*, 4/72 and 75; *Al-Haawee*, 11/92; *Mughnee Al-Muhtaj*, 3/380-381, *Al-Mughnee*, 11/161, *Al-Insaaf*, 9/255 and *Zaad Al-Ma'aad*, 5/398.

¹⁶² *Al-Muhallaa*, 10/144.

¹⁶³ *Al-Mabsoot*, 7/44-45; *Majma' Al-Anhur*, 1/460 and *Al-Insaaf*, 9/255.

¹⁶⁴ *Al-Mabsoot*, 7/45.

¹⁶⁵ Already commented on.

Argumentation: The Prophet (peace and blessings be upon him) made it clear that the child is for the bed (i.e. belongs to the husband). Therefore, a child born on the bed of the husband is his own unless he denies to be his father in the manner detailed by the Prophet or unless he is certain without any trace of doubt that the child born on his bed is not his own. The Prophet (peace and blessings be upon him) invalidated paternity to a child while the wife was pregnant through *li'aan*. Therefore, any *li'aan* performed after the birth of the child does not invalidate paternity to the child.¹⁶⁶

However, it is argued that the Prophet (peace and blessings be upon him) ruled that the child was for the bed when the owner of the bed claimed to be the father of the child. He also invalidated paternity to the child when the owner of the bed denied being the father of the child. Therefore, the two rulings are applicable whether in the state of pregnancy or after birth. Such a formal difference has no meaning whatsoever.¹⁶⁷

b. Sahl bin Sa'd narrated that Uwaymir Al-Ajlaanee performed *mulaa'annah*¹⁶⁸ with his wife in front of the Prophet (peace and blessings be upon him) while she was pregnant. Therefore, the boy was called after his mother. As such, It was ruled that he should inherit from her and she from him."¹⁶⁹

Argumentation: Uwaymir's wife was pregnant when he performed *li'aan* and, therefore, the Prophet (peace and blessings be upon him) attached the child to the lineage of his mother. This rule remained valid afterwards and, therefore, there is no effect on paternity to the child if *li'aan* is performed after his birth.¹⁷⁰

However, it is argued that denial of paternity to the child is one result of *li'aan*. Accusation by the husband is meant to deny paternity to the child he claims not to be his own. Therefore, invalidation of paternity should be effected in order to realize the objective of *li'aan*.

¹⁶⁶ *Al-Muhallaa*, 10/147.

¹⁶⁷ *Zaad Al-Ma'aad*, 5/399.

¹⁶⁸ This is a synonym of *li'aan*. [Translator's Note]

¹⁶⁹ Reported by Muslim in his *Saheeh*, Book of *Li'aan*, p. 641.

¹⁷⁰ *Al-Muhallaa*, 10/147.

This is supported by the text of the *hadeeth* that the Prophet (peace and blessings be upon him) separated between the husband and the wife who were involved in a case of *li'aan*, invalidated paternity to the child and attached him to the lineage of the wife.¹⁷¹

3. The evidence supporting the first opinion includes the following:

a. Allah says, "And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth."¹⁷²

Argumentation: Allah has legislated *li'aan* without differentiating between performing it during the state of pregnancy or the state of birth. This indicates that the outcome of *li'aan* is applicable in both cases.¹⁷³

b. The *hadeeth* narrated by Sahl bin Sa'd that 'Uwaimir came to 'Asim bin 'Adi who was the chief of Bani Ajlaan and said, "What do you say about a man who has found another man with his wife? Should he kill him whereupon you would kill him (i.e. the husband), or what should he do? Please ask Allah's Apostle about this matter on my behalf." Asim then went to the Prophet and said, "O Allah's Apostle!" [And asked him that question], but Allah's Apostle disliked the question. When 'Uwaimir asked 'Asim [about the Prophet's answer], 'Asim replied that Allah's Apostle disliked such questions and considered it shameful. Uwaimir then said, "By Allah, I will not give up asking unless I ask Allah's Apostle about it." Uwaimir came [to the Prophet] and said, "O Allah's Apostle! A man has found another man with his wife! Should he kill him whereupon you would kill him [in *qisaas*] or what should he do?" Allah's Apostle said, "Allah has revealed regarding you and your wife's case in the Qur'an. Go and bring her." So Allah's Apostle ordered them to perform the measures of *mulaa'anah* according to what Allah had mentioned in His Book. So 'Uwaimir did *mula'ana* with her and said, "O Allah's Apostle! If I kept her I would oppress her." So 'Uwaimir divorced her and so divorce became a tradition after them for those who

¹⁷¹ *Badaa'i' As-Sanaa'i'*, 3/246. The *hadeeth* is already commented on.

¹⁷² *Surat An-Noor*: 24:6.

¹⁷³ *Al-Muntaqaa*, 4/75.

happened to be involved in a case of *mulaa'anah*. Allah's Apostle then said, "Look! If she (i.e. Uwaimir's wife) delivers a black child with deep black large eyes, big hips and fat legs, then I will be of the opinion that 'Uwaimir has spoken the truth; but if she delivers a red child looking like a *wahra* (short red animal) then we will consider that 'Uwaimir has told a lie against her." Later on she delivered a child carrying the qualities which Allah's Apostle had mentioned as a proof for 'Uwaimir's claim; therefore the child was ascribed to its mother henceforth.¹⁷⁴

Argumentation: The statement, "Look! If she (i.e. Uwaimir's wife) delivers" is very clear that the woman was pregnant.

Ibn Hajar writes, "It is taken as evidence that *li'aan* invalidates paternity to the foetus contrary to the contention of Abu Haneefah and Ahmad because the statement: 'Look! If she delivers...' is clear that the woman was pregnant and that the child was attached to the lineage of his mother."¹⁷⁵

3. Ibn Umar (may Allah be pleased with him) narrated that a man performed *li'aan* with his wife at the time of the Prophet (peace and blessings be upon him). The Prophet got them separated [by divorce] and attached the child to the lineage of the mother.¹⁷⁶

Argumentation: Attaching the child to the lineage of his mother is evidence that the child was born at the time of *li'aan* and this is other evidence that *li'aan* invalidates paternity to the child whether he is born or is still a foetus.

However, it is argued that no legal rulings may be applied to the foetus before it is born. Supposing that the Prophet (peace and blessings be upon him) invalidated paternity to the child born to Hilaal, he did so because he had already known through revelation that the foetus was there and because Hilaal was explicit about the fact that his wife

¹⁷⁴ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on those who permitted pronouncement of divorce three times, no. 5259, p. 939 and Muslim in his *Saheeh*, Book of *Li'aan*, no. 3743, pp. 647-648.

¹⁷⁵ *Fathul Baaree*, 9/463.

¹⁷⁶ Already commented on.

committed adultery.¹⁷⁷ Do not you see that he said, "If he is born ..." which is something only known through revelation, and we have no means to know that.

4. *Li'aan* has been legislated to protect the husband from the punishment of defamation and to protect the wife from the punishment of adultery; there is no difference in this case whether she pregnant or not.¹⁷⁸

The Preponderant Opinion: After deliberating on the statements of scholars and the evidence supporting each opinion, it seems to me, and Allah knows best, that the first opinion is the preponderant one, namely that the effect of *li'aan* as to the invalidation of paternity covers the foetus and the born baby. The evidence cited by advocates of this opinion is stronger than that cited by other scholars.

Chapter Two: Ruling on Denial of Paternity Based on the Pretext of Coitus Interruptus and Resemblance to other than Parents

Topic One: Coitus Interruptus ('Azl)

I. Definition of Coitus Interruptus:

The Arabic word "'azl" means to put aside and isolate from something. Moreover, a husband who isolates himself from his wife means that he does not like to have a child from her.¹⁷⁹

Technically speaking, the term "'azl" signifies the state of having sexual intercourse with one's wife but when the husband is just about to the stage of orgasm, he ejaculates outside the vagina.¹⁸⁰ The purpose

¹⁷⁷ *Majma' Al-Anhor*, 1/460. Hilaal expressly defamed his wife as reported by Al-Bukhaaree, Book of Divorce, part on the man starting *li'aan*, no. 5307, p. 948 and Muslim, Book of *Li'aan*, no. 3757, p. 650.

¹⁷⁸ *Fathul Baaree*, 9/463.

¹⁷⁹ *Lisaan Al-Arab*, 11/440.

¹⁸⁰ *Sharh Saheeh Muslim*, 10/9. In *Al-Qabas*, 15/536, Ibn Al-Arabee writes, "All scholars agree that it is permissible even though some scholars disliked it, especially as related to slave-girls. As for a free wife, Maalik is of the opinion that the husband should not isolate from his wife except with her permission because he considers that she has the right of having sexual intercourse with her husband all the period of the marriage

of coitus interruptus is to prevent pregnancy by keeping the husband's sperm isolated from the ova of the wife during sexual intercourse by ejaculating outside the vagina.

II. Ruling on the Denial of Paternity on the Pretext of Coitus Interruptus

Scholars have expressed two different opinions as to the ruling on the denial of paternity on the pretext of coitus interruptus¹⁸¹ as follows:

1. If the wife gives birth to a child even though her husband was practising coitus interruptus, the child is considered to be his own. The husband has no right to deny paternity to the child. This is the opinion of the Maalikites and the authentic ruling adopted by the Shaafi'ites and Hanbalites.¹⁸²

Ibn Daqeeq Al-Eid states that the husband's paternity to the child is the rule adopted by the majority of scholars.¹⁸³

2. The master may deny paternity to the child born to him from his slave-girl. Though he may admit that he has had sexual intercourse with her, he is not forced to admit paternity to the child. Rather, he may deny paternity to the child whether he admits having sexual intercourse with his slave-girl or not. A slave girl's child is not attached to the master's lineage unless he admits that the child is his. This is the opinion adopted by the Hanafites.¹⁸⁴

contract. See also *Al-Mughnee*, 10/228. The evidence that isolation is permissible is the *hadeeth* narrated by Jaabir, "We used to practise 'azl while the Qur'an was revealed (during the days when the Holy Prophet was alive)." This *hadeeth* as reported by Al-Bukhaaree and Muslim. He also said, "We used to practise coitus interruptus at the time of the Prophet (peace and blessings be upon him) and the Prophet knew of it but he did not forbid us to do so." Reported by Muslim, Book of Marriage, part on the ruling on 'azl (coitus interruptus), no. 3561, p. 611.

¹⁸¹ Coitus interrupts (Arabic 'azl) means withdrawing the male sexual organ before emission of semen to avoid conception. [Translator's Note]

¹⁸² *Al-Istidhkaar*, 18/362; *Adh-Dhakheerah*, 4/301; *Sharh Al-Khurashi*, 4/127; *Sharh Az-Zarkaneeh*, 4/192; *Al-Muhadh-dhab*, 2/123 and 125, *Mughnee Al-Muhtaj*, 3/374; *Al-Mughnee*, 10/230, 11/130 and 159; *Al-Mubdi'*, 8/101-102; *Al-Insaaf*, 9/264, *Kashaaf Al-Qinaa'*, 5/409 and *Sharh Muntaha Al-Iraadaat*, 3/214.

¹⁸³ *Ihkaam Al-Ahkaam Sharh Umdat Al-Ahkaam*, 4/74.

¹⁸⁴ *Sharh Ma'aani Al-Aathaar*, 3/117; *Al-Mabsoot*, 17/99 and *Badaa'i' As-Sanaa'i'*, 6/255.

In *Badaa'i' As-Sanaa'i'* we read, "Paternity can be denied by mere denial in the case of a child born to a slave girl."¹⁸⁵

Therefore, the master may deny paternity to his slave-girl's child even if he has not practised coitus interruptus. Hence, if he can deny paternity to the child even practising coitus interruptus, then he, a fortiori, can deny paternity to the child without resorting to coitus interruptus.

Evidence and Argumentation

1. Evidence Supporting the Second Opinion:

a. Ibn Abbaas (may Allah be pleased with them) used to have sexual intercourse with his slave-girl. She got pregnant. He claimed that the child was not his own because he was having sexual intercourse with her in a way that he did not intend to make her pregnant.¹⁸⁶

b. Khaarijah bin Zayd reported that his father was practising coitus interruptus with his Persian slave girl. She got pregnant but he denied to be the father of the foetus. He said, "I did not want to have a child from you; I only wanted to enjoy myself." He got her whipped and then set her and the child born to her free.¹⁸⁷

Argumentation: The above two narrations indicate that both Ibn Abbaas and Zayd were practising coitus interruptus during sexual intercourse with their slave-girls, and therefore they denied to be the fathers of the children born to their slave-girls. The the statement, "I did not want a child from you" means that they were practising coitus interruptus towards the end of sexual intercourse.¹⁸⁸ Their acts are evidence that paternity to a child may be denied if the master practises coitus interruptus with his slave-girl. Had both of them been unpermitted to deny paternity to the children as a result of practising coitus interruptus, they would not have done so.

¹⁸⁵ Al-Kaasaanee, 6/255.

¹⁸⁶ Reported by At-Tahaawee, *Sharh Ma'aanee Al-Aathaar*, 3/116.

¹⁸⁷ Reported by At-Tahaawee, *Sharh Ma'aanee Al-Aathaar*, 3/116.

¹⁸⁸ *Al-Mabsoot*, 17/99. In *Sharh Ma'aanee Al-Aathaar*, 3/117, At-Tahaawee reported on the authority of Sa'eed bin Al-Musayyib that a slave-girl of Zayd bin Thaabit gave birth to a child. Zayd said that the child was not his own and that he used to observe coitus interruptus ('*azl*) while having intercourse with her.

However, it is argued that no authority may be given to the act or statement of any person if such an act or statement contradicts the Prophet's statements. The advocates of the first opinion cite several authentic *hadeeths* that do not give the husband or even the master of a slave-girl the right to deny paternity to the child born to his wife or slave-girl. The narrations cited above are not as strong as the authentic *hadeeths* reported from the Prophet (peace and blessings be upon him).

2. Evidence Supporting the First Opinion:

a. Abu Sa'eed Al-Khudree (may Allah be pleased with him) narrated, "the Prophet (peace and blessings be upon him) was asked about coitus interruptus. The Prophet replied, 'You are not forbidden to do that. No soul which Allah has destined to exist will surely come into existence.'"¹⁸⁹

Argumentation: Any soul which Allah has destined to be created will certainly be created. Therefore, coitus interruptus will not prevent a child from being created by Allah nor will ejaculation inside the vagina lead to pregnancy; for only Allah, the One and the Omnipotent has complete control in such matters.¹⁹⁰ Therefore, coitus interruptus is not a legitimate reason for denying paternity to the child because though it is practised, pregnancy may still take place.

b. Jaabir (may Allah be pleased with him) reported, "A man came to the Prophet (peace and blessings be upon him) and said, 'I have a slave-girl who is our servant and she carries water for us and I have sexual intercourse with her, but I do not like her to get pregnant.' The Prophet (peace and blessings be upon him) replied, 'Practise coitus interruptus with her, but what is decreed for her will come to her.' The man stayed [for some time] and then came and said, 'the girl has become pregnant.' The Prophet (peace and blessings be upon him) then said, 'I told you that was decreed for her would come to her.'"¹⁹¹

¹⁸⁹ Reported by Al-Bukhaaree, Book of Sales, part on selling slaves, no. 2229, p. 355 and Muslim, Book of Marriage, part on the ruling on coitus interruptus ('*azl*'), no. 3544, p. 609. Muslim's version reads thus: "It does not matter if you do not do it, for every soul that is to be born up to the Day of Resurrection will be born.."

¹⁹⁰ *At-Tamheed*, 15/543. See also *Sharh Saheeh Muslim*, 10/10.

¹⁹¹ Reported by Muslim, Book of Marriage, part on the ruling on coitus interruptus ('*azl*'), no. 3556, p. 611.

Argumentation: The above *hadeeth* is evidence that paternity to the child is established in spite of practising coitus interruptus because if the child is destined to be created, no one can prevent it from being created. Therefore, paternity cannot be denied for the mere practise of coitus interruptus.¹⁹²

c. Umar bin Al-Khattaab (may Allah be pleased with him) said, "Why do some people practise coitus interruptus when having sexual intercourse with their slave-girls and then let them go? No slave-girl who comes to me claiming that her master has had sexual intercourse with her but I will attach her child to her master whether he has practised coitus interruptus or left off from intercourse with her."¹⁹³

Argumentation: Umar's statement is clear that practising coitus interruptus does not give the husband or master the right to deny paternity to the child.

However, it is argued that Zayd bin Thaabit and Abdullah bin Abbaas differed with Umar and that the statements of both parties carry equal weight. Therefore, the statements of different parties need to be deliberated on to reach a sound judgment.

In refutation of this, it can be said that the statements of different parties do not carry the same weight, as the statement conforming with the Qur'an and the Prophet's *Sunnah* is the sound one. Indeed, it is Umar's judgment that conforms with the texts of the above *hadeeths*. Therefore, it should be given preference to the statements of both Ibn Abbaas and Zayd; and Allah knows best.

4. Paternity is something related to the actual act of sexual intercourse. Therefore, ejaculation is not to be given consideration, as is the case with all rulings.¹⁹⁴

5. Sperm may act on the ova without the husband's knowledge. Sometimes, ejaculation may take place inside the vagina without being felt by the husband.¹⁹⁵

¹⁹² *Sharh Saheeh Muslim*, 10/13.

¹⁹³ Reported by Maalik in *Al-Muwatta'*, Book of Justice, part on judging on slave-girls, no. 1489, 18/357 and At-Tahhaawee in *Sharh Ma'aanee Al-Aathaar*, 3/114. In *Irwaa' Al-Ghaleel*, 7/190, Al-Albaanee considered it an authentic *hadeeth*.

¹⁹⁴ *Mughnee Al-Muhtaj*, 3/374 and *Al-Mughnee*, 10/230.

The Preponderant Opinion: After reviewing the statements of scholars and the evidence and arguments given above, it seems to me that the first opinion is the preponderant one because the evidence supporting it is stronger than the one given by the advocates of the second opinion; and Allah knows best.

Based on this argumentation, it can be said that the husband may not deny paternity to the child if his wife is taking contraceptive pills or using other means to impede pregnancy like intrauterine devices. Moreover, the husband may not deny paternity to the child if he uses condoms. All rulings on coitus interruptus apply here. As Allah has destined the creation of souls, there is no need to use contraceptives to stop pregnancy, and consequently the rule of the matrimonial bed is the one applicable to all these cases.

Topic II: Resemblance to other than Parents

1. Definition: The Arabic word “*shabah*” means resemblance. The proverb goes thus: “A chip off the old block”. Therefore, it can be said that the child resembles his father, namely that he has some of his characteristics.¹⁹⁶

The technical meaning of the term is identical to that of the linguistic one, namely two persons having some common characteristics. The point of discussion here is that when the child does not resemble in complexion any of his or her parents.

As has already been discussed, contrary to the contention of the majority of scholars, the Hanafites do not consider *qiyaafah* to be a means of establishing paternity. Their arguments and evidence have already been mentioned; however, it has been proved that the opinion of the majority of scholars is the preponderant one. Therefore, there is no room for this issue in the Hanafite school of jurisprudence because they do not consider *qiyaafah*, which is, according to them, based on conjecture, a legal means of establishing paternity.

A case in point here is when the wife gives birth to a child who has no similarity in complexion or features to either his mother or his father

¹⁹⁵ *Sharh Az-Zarqaanee*, 4/127; *Al-Mughnee*, 10/231 and 11/159 and *Sharh Muntahaa Al-Iraadaat*, 3/214.

¹⁹⁶ *Lisaan Al-Arab*, 13/503 and *Al-Misbaah Al-Muneer*, p. 358.

or both of them, can the husband deny to be the father of the child depending on the difference in complexion or features?

This point has triggered a difference of opinion among scholars, as follows:

1st Opinion: Paternity to the child may not be denied by the husband based on the difference in complexion even though the child might be similar in complexion to any other person. This is the opinion adopted by the Maalikites¹⁹⁷ and some Shaafi'ites¹⁹⁸ and Hanbalites.¹⁹⁹

2nd Opinion: Paternity to the child may be denied. This is the apparent view adopted by Ahmad and some other Shaafi'ites.²⁰⁰

Evidence and Argumentation

1. The evidence supporting the second point of view relies on the Prophet's statement, "Watch her; if she delivers a white-complexioned child with dark hair and bright eyes, he must be the son of Hilaal bin Umayyah; and if she delivers a black-eyed child with big hips and fat shins then it is Shareek bin Sahmaa's child." Later she delivered a child of that description. So the Prophet said, "If the case was not settled by Allah's Law, I would punish her severely."²⁰¹

Argumentation: The Prophet (peace and blessings be upon him) ruled that the child is for the man to whom he has resemblance in physical build and complexion. Hence, he considered resemblance as evidence of paternity and lack of resemblance as evidence of the right to deny paternity. The statement, "If the case was not settled by Allah's Law, I would punish her severely" is a clear proof that it was only the rules enjoined in the Book of Allah which prevented him from punishing her. Therefore, when there is nothing that prevents it, it should be done for there is something that requires it to be done.²⁰²

This view was objected to as follows:

¹⁹⁷ *Sharh Al-Khurashee*, 4/127 and *Sharh Az-Zarqaanee*, 4/192.

¹⁹⁸ *Al-Muhadh-dh.ab*, 2/123 and *Mughnee Al-Muhtaaaj*, 3/374.

¹⁹⁹ *Al-Mughnee*, 11/158.

²⁰⁰ *Al-Mughnee*, 11/159 and *Al-Muhadh-dhab*, 2/123.

²⁰¹ Reported by Al-Bukhaaree, Book of Exegesis, part on "She will be protected from punishment", no. 4747, p. 828 and Muslim, Book of *Li'aan*, no. 3757, p. 650.

²⁰² *Al-Muhadh-dhab*, 2/123 and *Al-Mughnee*, 8/373 and 11/159.

a. The above *hadeeth* is evidence that the husband can deny paternity to the child because he has already involved himself in *li'aan* which entails denial of paternity and thus the resemblance supports his claim and makes it credible.²⁰³

b. On the other hand, this ruling is given in a case where the rule of the matrimonial bed is inapplicable and the child's lineage is severed from the husband. Therefore, this ruling cannot be applied when the matrimonial bed still holds, which entails that the husband's paternity to the child should be the rule.²⁰⁴

2. The evidence supporting the first point of view can be summed up in the following:

a. Abu Hurairah (may Allah be pleased with him) narrated, "A man said to the Prophet (peace and blessings be upon him), 'My wife gave birth to a black boy.' The Prophet asked him, 'Do you have camels?' The man replied, 'Yes.' The Prophet asked him, 'What is their colour?' The man replied, 'Red.' The Prophet again asked him, "Is there a grey one among them?" The man replied, 'Yes.' The Prophet then asked, 'Whence comes that?' The man said, ' Maybe it is because of heredity.' The Prophet then said, 'I think the same happened to your son.'" In another version by Al-Bukhaaree, "Maybe your [latest] son has his colour because of heredity."²⁰⁵

Argumentation: The Prophet did not consider the difference of resemblance and colour as evidence to the denial of paternity. He gave an example to the inquirer proving that differences of colour among camels in spite of the fact that they are born to the same male camel can

²⁰³ *Al-Mughnee*, 11/159.

²⁰⁴ *Al-Mughnee*, 11/159.

²⁰⁵ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on suggestions of denying paternity to a child, no. 5305, p. 948 as well as Book of Adhering to the Qur'an and *Sunnah*, part on setting comparisons between a known origin and unknown one as explained by the Prophet (peace and blessings be upon him) to the questioner, no. 7314, p. 1259 and *Saheeh Muslim*, Book of *Li'aan*, no. 3766, p. 652.

occur.²⁰⁶ This is clear evidence that similarity or dissimilarity does not give the right to deny paternity to the child.²⁰⁷

2. The *hadeeth* reported in the two authentic *hadeeth* books²⁰⁸ on the authority of A'ishah (may Allah be pleased with her) who said, "Sa'd bin Abee Waqqaas and Abd bin Zam'ah disputed over a boy. Sa'd said, 'O Allah's Messenger! This boy is my brother's son and he has taken a promise from me that I will take him.' Abd bin 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 Prophet (peace and blessings be upon him) looked at the boy and found a clear resemblance between him and Utbah; then he said, 'The boy is for you. O Abd bin Zam'ah.'²⁰⁹ Then the Prophet said, "The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has had illegal sexual intercourse." The Prophet told his wife Sawdah bint Zam'ah to screen herself from that boy.

Argumentation: The Prophet (peace and blessings be upon him) saw a clear similarity between the boy and Utbah, but he ignored such similarity and enacted the rule of the matrimonial bed. This is clear evidence that similarity is not to be considered evidence to establish paternity.

Ibn Al-Qayyim writes, "This Prophetic ruling is strong evidence that paternity is established by the means of the matrimonial bed, that a slave-girl becomes a bed by having sexual intercourse with her, that if

²⁰⁶ *Ma'aalim As-Sunan by Al-Khattaabee*, 3/171 and *Ihkaam Al-Ahkaam Sharh Umdat Al-Ahkaam*, 4/69.

²⁰⁷ *Al-Mughnee*, 11/159.

²⁰⁸ Already commented on.

²⁰⁹ The statement, "He is yours" is mentioned in a narration by Al-Bukhaaree in his *Saheeh*, Book of Battles, part on the Prophet's stay in Makkah during the time of the conquest of Makkah, no. 4303, p. 728, thus: "He is yours; he is your brother, O Abd ibn Zam'ah, as he is born on the bed [of your father]." This means that he is your brother. Ibn Al-Qayyim writes, "A yet more invalid objection is the statement that he made him a slave of Abd based on the letter '*lam*' which signifies ownership." He added that this narration is false. See *Zaad Al-Ma'aad*, 5/413-414 and Ibn Al-Qayyim's *Tahdheeb on Sunan Abu Dawood*, 3/180.

resemblance exists when the matrimonial bed exists too, the matrimonial bed is given preference to resemblance.”²¹⁰

However, it is argued that the Prophet (peace and blessings be upon him) gave effect to resemblance because he ordered Sawdah to screen herself from the boy.

Yet it is said that the instructions to Sawdah to screen herself from the boy are meant as a precaution for a worldly interest rather than for establishing a legal ruling because of the suspicion that resulted from the clear resemblance to Utbah.²¹¹

However, if resemblance to both men and the two proofs are given effect, the matrimonial bed will then be the evidence to paternity and the resemblance will be the evidence to denial of paternity. Therefore, The Prophet (peace and blessings be upon him) gave effect to the ruling of the matrimonial bed because it is stronger and gave effect to the resemblance to Utbah with respect to consanguinity with Sawdah. This is the best and clearest ruling. There is nothing that impedes establishing paternity by relying on one aspect and neglecting the other one.²¹²

3. All people are the children of Adam and Eve, but their complexions and features are different. Had they not been different in colour from their parents, they would have had the same complexion and characteristics.²¹³

4. The evidence based on resemblance is weak, whereas the evidence of being born on the matrimonial bed is strong. Therefore, it is not appropriate to drop the strong evidence and accept the weak one.²¹⁴

The Preponderant Opinion: After pondering on the differences among the scholars and the evidence supporting the views of each party, it becomes clear that the second point of view is weak while the first one is strong. Hence, resemblance is not a reliable means of denial of paternity. A man whose wife gives birth to a baby with different

²¹⁰ *Zaad Al-Ma'aad*, 5/410.

²¹¹ *Ihkaam Al-Ahkaam*, 4/71 and *Zaad Al-Ma'aad*, 5/414. In *Ihkaam Al-Ahkaam*, Ibn Daqeeq Al-Eid said. "The Maalikites call it the 'ruling between two rulings'.

²¹² *Zaad Al-Ma'aad*, 5/414.

²¹³ *Al-Mughnee*, 11/158.

²¹⁴ *Al-Mughnee*, 11/158.

complexion or features or with physical resemblance to someone else may not deny paternity to the said child.

Moreover, the first opinion is supported by the following:

a. Had the difference of complexion or features been a legal means of denial of paternity, *li'aan* would not have been an effective means of denial of paternity and resemblance, or lack of resemblance would have been sufficient to admit or deny paternity to the child. This indicates that resemblance of the child to other than his parents is unreliable. Ibn Abbaas (may Allah be pleased with him) narrated, "Those involved in a case of *li'aan* were mentioned before Allah's Apostle. 'Aasim bin Adi said something about that and then left. Later on a man from his tribe came to him and told him that he had found a man with his wife. On that 'Aasim said, 'I have not been put to task except for what I have said [about *li'aan*].' 'Aasim took the man to Allah's Apostle and he told him of the state in which he found his wife. The man was pale, thin and lank-haired, while the other man whom he had found with his wife was brown, fat with thick calves and curly hair. Allah's Apostle said, 'O Allah! Reveal the truth.' Then the lady delivered a child resembling the man whom her husband had mentioned he had found with her. So Allah's Apostle ordered them to carry out *li'aan*." A man from that gathering said to Ibn 'Abbas, "Was she the same lady regarding whom Allah's Apostle said, 'If I were to stone to death someone without witnesses, I would have stoned this lady?'" Ibn 'Abbas replied, "No, that was another lady who, though being a Muslim, used to arouse suspicion because of her outright misbehaviour."²¹⁵

b. As has already been stated, according to the art of judging people's parentage by studying their features (*qiyaafah*), paternity is proved by resemblances provided that no stronger mean is available. As long as this condition is applicable to establishing paternity, it is more applicable to denial of paternity. In the case of denial of paternity, it is a presumption and is superceded by evidence stronger than resemblance, namely the bed of matrimony, and Allah knows best.

²¹⁵ Already Commented on.

Chapter Three

Denial of Paternity through DNA Testing

Topic One: Jurists' Views and Evidence on Denial of Paternity through DNA Testing

Scholars and specialized researchers have differed with regard to the issue of denial of paternity through DNA testing. Some contemporary researchers²¹⁶ have summed up the differences related to denial of paternity through DNA testing without resorting to *li'aan* as follows:

1st Opinion: Legal paternity established by the matrimonial bed (*firaash*) cannot be denied except by *li'aan*; DNA testing may not be given preference to *li'aan*. This is the established ruling issued by the Academy of Islamic Jurisprudence in its 16th session held in Makkah during the period 21-26.10.1422 AH (2001 AD). The ruling states: "It is legally impermissible to rely on DNA testing to deny paternity to a child, and it may not be given preference to *li'aan*."

2nd Opinion: It is sufficient to use DNA testing without resorting to *li'aan* if the husband is certain that the foetus is not his.

3rd Opinion: The child's paternity may not be denied through *li'aan* if DNA testing traces paternity to the child to the husband even if he uses *li'aan*. Paternity can be denied through *li'aan* only if the DNA test confirms the claim of the husband, and hence DNA testing is considered complementary evidence.

4th Opinion: There is no need to perform *li'aan* if it is definitely proved by DNA testing that the foetus or the child is not the husband's, and hence paternity to the child can be denied. However, the wife has the right to request the use of *li'aan* to invalidate the *hadd* punishment for the mere doubt that she might have got pregnant as a result of a suspicious sexual intercourse. However, if it is proved through DNA testing that the child is the husband's, he is then subject to the *hadd* of defamation.²¹⁷

²¹⁶ *DNA Testing and its Effect on Juristic Rulings*, pp. 442-444; *DNA Testing and its Authority*, pp. 66-68 and *DNA Test and its Legal Applications*, pp. 80-81.

²¹⁷ *Academy of Islamic Jurisprudence Resolutions*, pp. 343-344.

Upon consideration of the above opinions, the differences can be summed up as follows:

1. Paternity may not be denied through DNA testing.
2. Paternity may be denied through DNA testing.

It seems to me that the opinion advocating denial of paternity through DNA testing is consistent with the opinion quoted by Al-Maawardee from As-Shaafi'ee: "If it is definitely known that the child is not the husband's, his paternity may be denied without the need to resort to *li'aan*."²¹⁸

Evidence and Argumentation

1. The second opinion is supported by the Qur'anic statement: "For those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth."²¹⁹

Argumentation: The above Qur'anic statement signifies that the husband has the right to use *li'aan* to deny paternity to the child if it is impossible to find someone to support his accusation of his wife. As science has achieved remarkable developments in this field, the husband is not left without support; the witness has become available and it is now possible to deny paternity through DNA testing. The above Qur'anic statement does not give any indication that denial of paternity is restricted to *li'aan* and, therefore, DNA testing can be used to deny paternity to the child.²²⁰

However, it is argued that DNA testing can be considered a proof but not a testimony, and the above Qur'anic statement does not mention the word "evidence" but rather the word "witnesses", an indication that the DNA testing is not a kind of witness in any way whatsoever.²²¹

2. The first opinion is supported by the following:

a. The Qur'anic statement: " For those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be

²¹⁸ *Al-Haawee*, 11/159.

²¹⁹ *Surat An-Noor*, 24:6.

²²⁰ *DNA Testing and its Legal Applications*, p. 81.

²²¹ *DNA Testing and its Effect on Juristic Rulings*, p. 445.

four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth."²²²

Argumentation: If the husband has no witnesses other than himself, he can resort to *li'aan*. Accepting DNA testing as a means of denial of paternity is illegitimate because it is something contrary to the provisions of the Qur'an. This is a clear indication that it is utterly illegitimate.²²³

b. The Prophetic statement: "He who adds anything to our religion which is not of it he will have it rejected."²²⁴

Argumentation: The above *hadeeth* is a clear proof that any issue for which no textual proof is provided is invalid, and that DNA testing has no textual proof to support it, and hence it cannot be used as a way to deny paternity.

c. The *hadeeth* reported in the two authentic *hadeeth* books on the authority of Aa'ishah (may Allah be pleased with her): "Sa'd bin Abee Waqqaas and Abd bin Zam'ah disputed over a boy. Sa'd said, 'O Allah's Messenger! This boy is my brother's son and he has taken a promise from me that I will take him.' Abd bin 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 Prophet (peace and blessings be upon him) looked at the boy and found a clear resemblance between him and Utbah. He then said, 'The boy is for you. O Abd bin Zam'ah.' Then he added, 'The child is for the bed (i.e. the man on whose bed he was born) and stones (disappointment and deprivation) for the one who has had illegal sexual intercourse.' The Prophet told his wife Sawdah bint Zam'ah to screen herself from that boy. So, the boy did not see her until he died."²²⁵

Argumentation: The Prophet (peace and blessings be upon him) did not consider the clear resemblance, which depends on genetic characteristics, as a means of proving paternity and confirmed the

²²² *Surat An-Noor*, 24:6.

²²³ *DNA Testing and its Authority*, p. 68

²²⁴ Reported by Al-Bukhaaree in his *Saheeh*, Book of Reconciliation, part on if parties agree to an unjust reconciliation, the said reconciliation is revocable, no. 2697, p. 440 and Muslim in his *Saheeh*, Book of Justice, part on revocation of invalid judgments and things invented in religion, no. 4492, p. 762.

²²⁵ Already commented on.

original ruling that the child is for the bed. Therefore, paternity may not be denied except through *li'aan*.²²⁶

d. The story of Hilaal bin Umayyah who accused his wife of committing adultery with Shareek bin Sahmaa', who was the maternal brother of Al-Baraa' bin Maalik. He was the first man to perform *li'aan* in Islam. The Prophet (peace and blessings be upon him) said, "Watch her; if she delivers a black-eyed child with big hips and fat shins then it is Shareek bin Sahmaa's child..²²⁷

Argumentation: If the husband denies paternity to a child born on his bed to his wife, nothing contrary to a legal ruling, i.e. *li'aan*, may be accepted. Therefore, the Prophet (peace and blessings be upon him) did not consider resemblance between the male adulterer and the child. The proof of resemblance which the Prophet (peace and blessings be upon him) did not consider relies on genetic characteristics, i.e. it is similar to DNA testing. However, it does not stand to the original ruling revealed in the Qur'an, i.e. *li'aan*.²²⁸

e. The only legal way for denying paternity is *li'aan*. If the wife admits the husband's accusation of adultery, such confirmation by the wife will be of no use as to the denial of paternity because the child is for the bed and cannot be denied except through *li'aan*. This means that the denial of paternity is limited to *li'aan*.²²⁹

f. The *hadd* of adultery against the wife cannot be proved through DNA testing; there should be clear evidence. So, how can we give preference to DNA testing over *li'aan* when we cannot give it preference to the *hadd* punishment?²³⁰

g. *Li'aan* dispenses with DNA testing and Muslims had no difficulty whatsoever in this regard. In fact, they Islam has regulated the process of *li'aan* and Muslim scholars have laid down controls and conditions that guarantee attainment of the prospected interests from the doctrine

²²⁶ DNA Testing and its Authority, p. 69.

²²⁷ Already commented on.

²²⁸ DNA Testing and its Authority, pp 69-70.

²²⁹ DNA Testing and its Authority, p. 70.

²³⁰ DNA Testing and its Authority, p. 70.

of *li'aan*. Therefore, people were in no need of DNA testing to deny paternity to children which Islam has protected and carefully cared for.

The Preponderant Opinion: Upon pondering over the differences among the scholars with regard to this issue and the evidence given by each party, it seems to me that the first opinion is the preponderant one, namely that paternity may not be denied through DNA testing as the evidence supporting this opinion is stronger and as the objections to the evidence given by the advocates of the second opinion is justified; and Allah knows best.

Topic Two: Ruling on Performing DNA Testing before Involvement in *Li'aan* for Denial of Paternity

Allah Almighty has clearly established the ruling on the husband who accuses his wife of adultery without having the necessary witnesses: "For those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth."²³¹ This is a general ruling that covers all those who accuse their wives of adultery. In this particular case, they are required to perform *li'aan* if they fail to provide four witnesses.²³²

However, if the husband accuses his wife of adultery and wishes to deny paternity to the child, what is the ruling on performing DNA testing and delaying the performance of *li'aan*. Some sources cite two cases handled by two different courts representing a difference in opinion with regard to this issue:

1. A man filed a case requesting to perform *li'aan* to deny paternity to a girl born on his bed before the General Court in Riyadh.²³³ The judge referred the couple with the girl to the concerned authority to perform DNA testing. The results of the test confirmed paternity to the husband to the girl which made the husband decline to perform *li'aan* and eliminated all doubts that were haunting him. Moreover, the test helped the wife and her family get over the embarrassing situation

²³¹ *Surat An-Noor*, 24:6.

²³² *Al-Jaami' li Ahkaam Al-Qur'an*, 12/185; *Badaa'i' As-Sanaa'i'*, 3/239 and *Al-Mughnee*, 11/136.

²³³ The case was filed before Judge Sheikh Abdul Azeez bin Ibraheem Al-Qaasim.

caused by the bad thoughts the husband had about his wife. Consequently, a great public interest which the *Sharee'ah* is keen to achieve was attained.²³⁴

2. A similar case was filed before North Cairo Court and the judge did not accept the wife's request to perform DNA testing before performing *li'aan*. The court insisted on the couple to perform *li'aan* instead of performing DNA testing. The court was of the opinion that the divine rules may not be postponed in favour of probable assumptions.²³⁵

Therefore, the juristic difference as to performing the DNA testing can be presented as follows:

1. The DNA test can be performed before performing *li'aan*. The judge should use this advanced technology to check the validity of the claim and to avoid resorting *li'aan* as much as possible for the Legislator has encouraged the couple to avoid dissolution of the family.²³⁶

2. The DNA test may not be performed before performing *li'aan*. Opening this way for people would eventually lead to an innovation in religion and giving legitimacy to something which has not been permitted by Allah in the Qur'an or the Prophet's *Sunnah*.²³⁷

Evidence and Argumentation

I. The evidence supporting the second opinion can be summed up as follows:

a. It is narrated that Uwaymir Al-Ajlaanee came [to the Prophet] and said, "O Allah's Apostle! A man has found another man with his wife! Should he kill him whereupon you would kill him [in *qisaas*] or what should he do?"²³⁸

Argumentation: The Prophet (peace and blessings be upon him) did not delay performing *li'aan* even for one night and even though he is

²³⁴ *DNA Testing and its Authority*, p. 73 and *DNA Testing and its Effect on Juristic Rulings*, pp. 497-498.

²³⁵ *DNA Testing and its Effect on Juristic Rulings*, pp. 511-512.

²³⁶ *DNA Testing and Its Legitimate Use in Proving Paternity and Crimes*, pp. 44-45; *Jurisprudence of Modern Medical Issues*, p. 355 and *Modern Medical Developments from a Juristic Perspective*, p. 232.

²³⁷ *DNA Testing and its Effect on Juristic Rulings*, pp. 498 and 511-512.

²³⁸ *Saheeh Muslim*, Book of *Li'aan*, no. 3743, pp. 647-648.

the most merciful to his nation, he did not offer the couple reconciliation. The case had been filed before the Prophet (peace and blessings be upon him) before revelation came down and the husband seeking *li'aan* insisted on performing it. Therefore, *li'aan* was a must as ordered by the Prophet (peace and blessings be upon him).²³⁹

b. Ibn Umar (may Allah be pleased with him) narrated that the Prophet (peace and blessings be upon him) said to the couple involved in *li'aan*, "You will account for your statements before Allah for one of you is a liar and you (i.e. the husband) cannot take anything from her. The husband said, 'I want my money.' The Prophet replied, 'You do not have any right to take it. If you are truthful in your claim against her, the money you paid is then for the sexual intercourse you have had with her, and if you are a liar, you have no right whatsoever to claim it.'"²⁴⁰

Argumentation: *Li'aan* is the legitimate means of denying paternity irrespective of the fact that either one of the couple is a liar.²⁴¹ The result of the DNA test specifies the liar and hence it is contrary to the text of the *hadeeth* on the couple involved in *li'aan* and consequently supercedes *li'aan* which has been legislated by Allah.

However, it is argued that it is not certain when the statement of the Prophet (peace and blessings be upon him) "You will account for your statements before Allah for one of you is a liar" was said by the Prophet. Did he say it before performing the *li'aan* or after doing it because the context gives the likelihood of both cases? Scholars differed as to the timing of the statement. Some of them contended that it was said after completing the process of *li'aan* and that the liar need to repent to Allah. However, others argued that it was said before performing *li'aan*, an opinion that is more justified because the Prophet (peace and blessings be upon him) wished to advise them before they got involved in committing a sin.²⁴² Therefore, performing the DNA test before

²³⁹ *DNA Testing and its Effect on Juristic Rulings*, pp. 499-500.

²⁴⁰ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on the gift given by a husband to a divorced lady whose dower has not been fixed, no. 5312, p. 950; and Muslim in his *Saheeh*, Book of *Li'aan*, no. 3748, p. 649.

²⁴¹ *Sharh Saheeh Muslim*, 10/126.

²⁴² *Sharh Saheeh Muslim*, 10/126 and *Fathul Baaree*, 9/458.

performing *li'aan* will have its effect on avoiding lying and engaging in the testimonies and oaths of *li'aan*. It gives the couple more time to think the case over because the liar will know that he will be defamed and this may prevent him from resorting to *li'aan*. This is supported by the *hadeeth* narrated by Ibn Abbaas that Hilaal bin Umayyah accused his wife of adultery. While delivering his testimony, the Prophet (peace and blessings be upon him) said, "Allah knows that one of you is a liar. Would you not repent?"²⁴³ It is clear from this *hadeeth* that the Prophet (peace and blessings be upon him) uttered these words while the couple were performing *li'aan* and not after completing the process of *li'aan*.²⁴⁴

3. Performing DNA testing before resorting to *li'aan* will lead to delaying the process of *li'aan* and hence the *Sharee'ah* provisions will be neglected and perhaps cancelled. Therefore, it is not permissible to delay the process of *li'aan* which is established by the Qur'an, the *Sunnah* and the consensus of scholars in preference to a novel scientific proof which is not as strong and justifiable as *li'aan*. The purpose of *li'aan* is to avoid the application of the *hadd* of adultery and deny paternity to the child, whereas the purpose of the DNA test is to identify the genetic characteristics that relate the child to his parents.²⁴⁵

However, it is argued that the result of the DNA test and its validity and credibility are subject to the judge's estimation, and that such a result does not necessarily cancel the process of *li'aan*. What cancels the process of *li'aan* is the effect resulting in superceding it based on the result of the DNA test or otherwise. The ultimate end here is that the identification of the relationship between the husband and the child through the DNA test will remove any doubts and prove the credibility of either party before *li'aan* is performed.

4. If the husband appears before the judge and denies paternity to the child, he has actually accused his wife of adultery although he has not done it expressly. As such he is protected from being punished for defaming his wife by performing *li'aan*. If we accept to delay the

²⁴³ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on the man is the one who begins the process of *li'aan*, no. 5307, p. 948.

²⁴⁴ *Fathul Baaree*, 9/446.

²⁴⁵ *DNA Testing and its Effect on Juristic Rulings*, p. 498.

process of *li'aan* in preference to the DNA test and the result appears to be supporting the wife, we will delay the application of the defamation punishment and forfeit a divine right, namely Allah's right of punishment for the defamation of the wife.²⁴⁶

Howeve, it is argued that if the husband denies paternity to a child born to him, he is not necessarily committing the offense of defamation by the mere statement of denial of paternity because it is probable that the child is not his own, for the child might be the product of a suspicious sexual intercourse or may belong to a previous husband, if any.²⁴⁷

The claim that one of Allah's rights is forfeited, namely the defamation punishment, can be refuted by the fact that the rights of Allah are based on forgiveness and pardoning, for Allah does not stand in need of his rights, and based on the fact that the rights of creatures are only established if claimed by the offended party provided that no doubts are involved, for the application of *hadd* punishments may be prevented as a result of an element of doubt.

5. The legal rule "Prevention of harms is given preference to realization of interests." Accepting the result of DNA testing before performing *li'aan* entails a lot of harm if the result comes in favour of the husband. These harms include:

- a. The judge has become certain that the wife has committed adultery and that the child is illegitimate.
- b. The husband's argument and evidence against his wife have become stronger, while before the appearance of the DNA test result, he had no evidence against her.
- c. The wife might confess before the judge based on the DNA test report for fear of defamation. Thus, the reason for confession is the biological analysis.
- d. The judge has put himself in an undesired situation: either he has to complete the process of *li'aan* upon the request of the husband who has gained stronger evidence against his wife or stop the process of

²⁴⁶ *DNA Testing and its Effect on Juristic Rulings*, pp. 500-501.

²⁴⁷ *Ma'aalim As-Sunan*, 3/171 and *Fathul Baaree*, 9/443.

li'aan. If he effects the process of *li'aan*, what he would do with the wife who had been proved to have committed adultery?

e. If the DNA test result has proved that the child is illegitimate, and if the child knows of this fact, he will resent his mother and hatred will prevail among the family members as a result of a medical report.²⁴⁸

However, it can be argued as follows:

a. If the result of DNA test comes in favour of the wife, it will make her side stronger. Therefore, it is not justified to prevent performing DNA testing for the mere assumption that the husband's claim might be given more strength.

b. The wife's confession should not be considered final as the usual practice in establishing legal *hudoos* states that confession of committing adultery should be rendered four times provided that the doubts that prevent the application of the *hadd* should not be available.

c. The statement that the judge put himself in an undesired situation is not right because he is keen on solving the problem before either one becomes the subject of legal punishment.

d. The allegation that the child will resent his mother and hatred will prevail among family members when the child knows of the crime committed by his mother is not definite. This can also be said with regard to *li'aan* because the child will be attached to his mother after performing the *li'aan* process, as established by the *hadeeths*. Perhaps the child might think that his mother's commission of adultery was the reason that made the husband resort to *li'aan* and dissolve the marriage, and hence hate her, a case which Islamic *Sharee'ah* has not considered to be a potential harm.

II. The evidence supporting the first opinion can be summed up as follows:

1. Abu Hurairah (may Allah be pleased with him) narrated, "A man said to the Prophet (peace and blessings be upon him), 'My wife gave birth to a black boy.' The Prophet asked him, 'Do you have camels?' The man replied, 'Yes.' The Prophet asked him, 'What is their colour?' The man replied, 'Red.' The Prophet again asked him, "Is there a grey one among them?" The man replied, 'Yes.' The Prophet then asked, 'Whence

²⁴⁸ *DNA Testing and its Effect on Juristic Rulings*, pp. 502, 505 and 507.

comes that?' The man replied, 'Maybe it is because of heredity.' The Prophet then said, 'Maybe your [latest] son has his colour because of heredity.'" In another version by Al-Bukhaaree and Muslim, "He did not permit him to deny the boy's parentage."²⁴⁹

Argumentation: The man suspected paternity to his boy and wanted to deny paternity to him. However, the Prophet's example convinced him. Had the postponement of *li'aan* been illegitimate, the Prophet (peace and blessings be upon him) would have instructed the man to resort to it. This is a clear proof that delaying *li'aan* for a good reason is legitimate; there is no doubt that it is a good reason to consider any case fully before judging it.

However, it is argued that the man was merely asking for clarification because he doubted paternity to the child. He did not mean to accuse his wife. Moreover, accusation by mere suggestion is not a cause for applying the *hadd* of defamation. Only express false accusation of adultery entails the application of the punishment against the husband.²⁵⁰

Yet it can be replied that the man's apparent statement denoted clear doubt and the Prophet's answer indicated that the man had accused his wife in a way that purported defamation. However, as his question was likely to mean other than accusation, the Prophet (peace and blessings be upon him) did not apply the *hadd* of defamation against him.²⁵¹

2. When the verses on *li'aan* were revealed, the Prophet (peace and blessings be upon him) recited them to the husband and advised him to fear Allah; he told him that the punishment he might have in this life is far easier than that of the Day of Judgment. However, the man insisted on accusing his wife of adultery by stating that he did not lie in his claim. Moreover, the Prophet (peace and blessings be upon him) admonished the wife but she insisted on calling her husband a liar.

²⁴⁹ Reported by Al-Bukhaaree in his *Saheeh*, Book of Divorce, part on suggestions of denying paternity to a boy, # 5305, p. 948 as well as Book of Adhering to the Qur'an and *Sunnah*, part on setting comparisons between a known origin and unknown one as explained by the Prophet (peace and blessings be upon him) to the questioner, # 7314, p. 1259 and *Saheeh Muslim*, Book of *Li'aan*, # 3766, p. 652.

²⁵⁰ *Fathul Baaree*, 9/444.

²⁵¹ *Al-Umm*, 5/132 and *Fathul Baaree*, 9/442.

Therefore, the Prophet (peace and blessings be upon him) eventually asked them to perform *li'aan*.²⁵²

Argumentation: As it is clear, the husband and the wife were advised and admonished by the Prophet (peace and blessings be upon him). This expressly indicates that the Prophet (peace and blessings be upon him) delayed the process of *li'aan*. Jurists have admitted that it is desirable to advise the husband and the wife before starting the process of *li'aan*.²⁵³ According to the majority of scholars, the couple should be advised after delivering the fourth testimony of *li'aan*.²⁵⁴ This is supported by the *hadeeth* narrated by Ibn Abbaass that the Prophet (peace and blessings be upon him) said to Hilaal before giving the fifth testimony of *li'aan*, "O Hilaal! Fear Allah for this is the time of testimony that brings you punishment from Allah." Moreover, before the wife gave her fifth testimony, the Prophet (peace and blessings be upon him) said the same words to her.²⁵⁵

Had such advice been of no use to the couple, even if the *li'aan* is delayed, it would have been considered absurd to do so. Of course, *Sharee'ah* rules are not subject to any absurdity in anyway whatsoever.

However, it is objected that the said piece of advice was meant to counsel the couple rather than delay the process of *li'aan*. Delaying the process of *li'aan* and failing to present it before the judge is the responsibility of the husband, which if delayed will be considered invalid.²⁵⁶

Yet it can be said that there is a difference between failing to present the request of *li'aan* before the judge and delaying the process of *li'aan* after presenting the case before the judge. What is controversial here is the issue after presenting the case of *li'aan* before the judge and not before that. Therefore, the assumptions related to the case before filing it before the judge are out of context here.

²⁵² *Saheeh Muslim*, Book of *Li'aan*, no. 3746, p. 648.

²⁵³ *Laws of Legal Provisions*, p. 270; *Sharh Saheeh Muslim*, 10/175 and *Mughnee Al-Muhtaaaj*, 3/378.

²⁵⁴ *Al-Mughnee*, 11/179.

²⁵⁵ Reported by Abu Dawood in his *Sunan*, Book of Divorce, part on *li'aan*, no. 2256, p. 327. *Sheikh Al-Albaanee* classifies it as 'authentic' in *Irwa' Al-Ghaleel*, 7/186.

²⁵⁶ *DNA Testing and its Effect on Juristic Rulings*, p. 500.

The Preponderant Opinion: After pondering on the views of scholars and the evidence and arguments presented by each party, it seems to me that the preponderant opinion is the first one, namely that the DNA test can be performed before denying paternity to the child through *li'aan*. This view is based on the fact that the evidence presented by the advocates of the first opinion is stronger than that presented by the advocates of the second opinion and the fact that the evidence presented by the supporters of the second opinion are subject to controversy. What makes the first opinion stronger than the second one is that delaying the process of *li'aan* does not render it invalid. On the contrary, *li'aan* remains effective even if the case does not involve a pregnancy or a child. Some husbands may resort to *li'aan* with the purpose of dissolving their marriages and eliminating any shame that might have been attached to them.

Allah is the Highest and is the one who knows best.

Conclusions and Recommendations

All praise belongs to Allah, by whose bliss all good things are perfected, for enabling me to complete researching this important topic which has recently been a subject of ample controversy among researchers with regard to its use and effect in the field of establishing and denying paternity. I hope this paper will add to the knowledge about related legal provisions, especially that our present time scholars have pinpointed the importance of using novel discoveries and have been keen on highlighting the perfection and comprehensiveness of the *Sharee'ah* rules which encompass all aspects of the daily life of people. I also hope that this paper has contained things right more than things wrong and that it will be of use and benefit for all those who wish to know about this important issue.

I should say that my journey through this paper and my in-depth search of sources and literature has yielded the following conclusions:

1. The revolutionary DNA test is concerned with the reading of the genes which identify the separate identity of each person. This test is expected to help scientists discover the human structure and identify the human traits with more accuracy. It also helps in the treatment of different medical and genetic disorders as well as in identifying and exposing criminals.

2. Muslim communities need to be prepared to deal with new discoveries, establish general and specific frameworks and prepare human resources to deal with these discoveries at the legal, medical and technological levels.

3. The results of DNA testing are highly accurate especially as related to the determination of paternity.

4. The DNA test is a huge responsibility which requires a great deal of honesty. DNA testing laboratories need to clarify test protocols to judges, and judges need to inquire about anything unclear with regard to the DNA test itself as well as its procedures and means in order to ensure that accurate results are reached.

5. Islam, both as related to intents and provisions, has given the issue of paternity great importance with the purpose of maintaining lives of individuals, families and communities stable to the maximum degree possible.

6. Jurists have unanimously agreed that paternity is proved by four ways: the legal matrimonial bed, claiming paternity to a child of unknown parentage, testimony, and testimony based on knowledge in the public domain. However, they have differed as to confirming it by reading of signs of similarities to parents (*qiyaafah*) and lot-casting.

7. Established paternity may not be changed or transferred, paternity may not be established by adoption, and paternity may not be established by

claiming paternity to a child born as a result of adultery on the matrimonial bed. The Islamic *Sharee'ah* has emphatically prohibited these acts according to the Holy Qur'an and the Prophet's *Sunnah*.

8. The *Sharee'ah* provisions contained in the Holy Qur'an and the Prophet's *Sunnah* have proven that Islam has preceded and excelled other laws in establishing hereditary relations among human beings.

9. DNA testing is a strong means of establishing paternity provided that certain legal and technical rules are set for enforcing it. It should be given preference to the art of judging people's parentage by studying their features and lot casting and sometimes to the matrimonial bed in certain cases, as ruled by the Academy of Islamic Jurisprudence.

10. The Islamic *Sharee'ah* established stringent rules on the denial of paternity after it has been confirmed. Only one way can be applied to deny paternity, namely *li'aan* (accusation and denial of adultery between a husband and a wife).

11. Using condoms or other contraceptive devices or drugs do not give the husband the legal right to deny paternity as long as the matrimonial bed is there.

12. Although the Islamic *Sharee'ah* permits establishing paternity through the identification of physical similarities, which is the way used by the person who has the knowledge of the art of judging people's parentage by studying their features (*qaa'if*), it does not permit using it in denying paternity based on dissimilarity of complexion.

13. Paternity may not be denied based on DNA testing results contrary to confirmation of paternity, for *li'aan* is sufficient for the denial of paternity and eliminates the need for such a test. This is in line with the intents of the Islamic *Sharee'ah* which tries to limit, as much as possible, the ways of denial of paternity in order to maintain the stability of families and lineages.

14. A judge may request the performance of DNA testing before *li'aan* is performed for the purpose of eliminating suspicion from the mind of the husband and removing any embarrassment that may be caused to the wife and for the purpose of eliminating the need for *li'aan* and maintaining the matrimonial life of the couple.

15. Colleges of *Sharee'ah* and specialized juristic research centres should give due attention to the new products of science and cope with such products in accordance with the fundamentals and intents of the *Sharee'ah*. They should also study all matters related to these products from the juristic point of view and use the views of jurists and the evidence they have presented so that these products can be comprehensively studied from the legal and medical points of view.

Allah knows best, and may Allah's peace and blessings be upon our Prophet Muhammad, his family and companions.