
THE USE OF DNA TO NAIL MALE ENJOYER OF SEX: A CONTEMPORARY ANALYSIS FROM ISLAMIC LEGAL PERSPECTIVE

PROF. DR. SAYED SIKANDAR SHAH HANEEF

DEPARTMENT OF FIQH AND USUL AL-FIQH

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

zahids1@hotmail.com

ABSTRACT: The issue of using DNA technology to determine the paternity of a child is a controversial issue in Islamic law. Although vast majority of legal scholars acquiesce its use as a means of connecting unidentifiable children or dead bodies to their legal parents, they oppose its use to nail the male enjoyer of the illicit sex. Consequently, the child born out of wedlock is a liability on the female partner in terms of raising and supporting financially. The classic logic for such a lopsided application of child's paternity was that in the case of female partner, it is easy to ascertain that such a child is her biological progeny but this cannot be proved in the case of her male partner. Consequently, this kind of approach not only has triggered the culture of baby dumping normally by naïve but sexually active female believers but has also financially burdened child welfare organizations, to say the least in terms of larger implications for society. This paper, however, argues that in the age of technology invoking the conventional wisdom of non-traceability of male partner in a sexual act no longer holds true. Accordingly, since in Islam, illicit sex is a heinous crime, biological connection of ill-conceived babies to male partners, among others, goes a long way in saving public money for more worthy and pressing societal causes and in curbing promiscuity among Muslims in a given society.

KEYWORDS: *DNA, male partner, child legitimacy, biological connection*

INTRODUCTION

The births of children out of wedlock have been an aged old human problem since the dawn of human civilization. Traditionally, western legal system integrated these children into their social fabric either on the principle of 'presumption of paternity' or 'ex parte' judgment in favor of a woman who had sworn that her bastard child belongs to a certain accused. With the advancement of medical technology and genetic sciences, DNA test of paternity emerged as the most accurate means of resolving paternity claims/disputes and thus creating a new concept of paternity, namely bifurcation of paternity into biological and legal parenthood. Accordingly, any unsafe sex resulting in pregnancy in the sexually liberal cultures will hold both the parties in the sex, responsible – one to provide the needed care and the other to bear for the child's financial expenses.

As to what is the Islamic response to this development in the context of alarming increase in the number of children born either out of illicit sex¹ whether prostitution or love relationships, or due to non-fulfilment of Islamic requirement of six months gestation period from the date of marriage contract within the lawful wedlock. Modern Islamic legal scholarship is divided on this issue. Some agree with the idea of dualistic concept of parenthood but within the parameters of the Shari`ah but others oppose it.

In the pages that follow, I will briefly outline classical Islamic law position on methods of establishing and negating paternity, DNA method and modern juristic debate on its admissibility with a final note on Islamic justification for attaching biological paternity of illegitimate child to the male party in a sexual liaison.

THE STANDARDS OF CHILD`S LEGITIMACY IN ISLAMIC LAW

Islam law identifies four criteria for the legitimacy of paternity. They are: 1) the existence of a valid marriage; 2) *bona fide* coitus with a woman mistaken to be one`s wife; 3) contracting an irregular marriage such as the one done during the state of *ihram*- thinking it to be proper; and 4) marrying a woman in good faith but whose marriage was prohibited *ab initio*. The reason is that: the first situation is factually in accordance with the law of *al-waladu li al-firash* (the child is to the marriage bed, and to the adulterer the stone' (h) as proclaimed by the Prophet, and in all other situations there is a semblance of legitimacy of sexual intercourse in the thinking of the partners in question (Naji, 156).

Under normal circumstances, therefore, the legitimacy of the child born in Islam is settled by the above standards set by substantive Islamic law. However, in the case of dispute, procedural law of Islam identifies the following methods by which the matter can be disposed judicially:

1-The existence of marriage (*firash*). This is a method which serves as a legal presumption regarding the legitimacy of a child either on the basis of documentary proof of the marriage between a man and woman or their reputation (*shuhrah*) to be living in a lawful relationship together in a locality. But this presumption will only hold true if: i) the coitus is possible between the couple according to Ibn Taymiyyah; ii) the husband is capable of coitus; iii) the child is born within the minimum period of gestation which is six months from the date of marriage

¹ Describing the situation in Malaysia, National Registration Department Director-general Datuk Alwi Ibrahim said last year (2009) alone, 52,982 children of the 510,462 births registered were born out of wedlock. See *Malaysia: Births out of wedlock alarming*, New Straits Time, March 11, 2011, <http://news.asiaone.com/News/AsiaOne+News/Malaysia/Story/A1Story20110321-269221.html#sthash.0BPSQU2J.dpuf>.

contract(Naji:158-162). However, in the event of a divorce the jurists still attributed the child to the ex-husband even if born within two years according to Hanafiyyah, four years according to Shafi`yyah and Hanabilah and five years according to Malikiyyah from the date of divorce, provided the wife had not admitted the end of her post-divorce waiting period(`iddah). Similar assumption applies in the case of a widow (ibid: 165-182).

2-Claiming the paternity of a child(*istilhaq*). If any man claims that a certain child belongs to him will be held to be so provided: i) he is mentally sound; ii) the child can factually be his; iii) the child is of unknown lineage; iv) he does not reveal that the child is the product of his adultery (biological); and v) no other person contests his claim(Naji: 194-207).

3- Witnesses` testimony. Testimony by witnesses are the most reliable mode of proof in Islamic law provided they fulfill the legal requirements set by the jurists, the most essential among them are: i) number- two male witnesses according to majority, one male and two female according to Hanafiyyah, one female according to Hanabilah- as the Prophet declared the testimony of a single mid-wife as sufficient evidence for proving paternity; ii) uprightness of character(*adl*) as an indication the witnesses` credibility(Naji: 209-213).

4- Physiognomy (*qiyafah*). This was resorted to when the paternity of a child was contested because there was no evidence of *firash* nor testimony by witnesses. A physiognomic as an expert in tracing the resemblance of physical features between a father and a child was called to resolve the case. Majority² accepted this as mode of proof whereas Hanafiyyah³ opposed it(Naji: 214-231).

5- Lot casting(*qur`ah*). This is resorted to when the claimants of a child of unknown paternity produce convincing evidence of equal standard to prove their claims, then the judge will cast lot between them. Caliph Ali is claimed to have decided a case on this basis among three people who claimed to have equal share over the paternity of a child in consequence of their illicit intercourse with a woman during her single period of purity. However, this is another mode

² The main argument by majority is the hadith by Aishah. Sayyidina Aisha (RA) narrated that the Prophet (PBUH) came to me one day with smiling, happy face. He said, "Do you see that a MUJAZZAZ (an adept in understanding Physical Features) observed the feet of ZaydibnHarithah and UsamahibnZayd and informed that these are feet belonging to a common string." [Bukhari 3731, Muslim 1459].

³ The main reason for the Hanafiyyah is the hadith by Abu Hurairah. Abū Hurairah narrated, "A man said to the Prophet (ṣallallāhu`alayhiwa-sallam), '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.' [Sahih Muslim: No: 1500].

of proof according to minority but majority opposed it by equating it to gambling (for details. See Najji: 238-243; Alwani, 66-77, Sujimon: 2010, 1-14).

DNA TEST OF PATERNITY

By the 1940s, scientists were confident that DNA (deoxyribonucleic acid) is the genetic material that is passed on from parents to offsprings and functions as the chemical blueprint of life. It has the structure of a double helix as discovered through X-ray crystallography by James Watson and Francis Crick in 1953 with the help of Maurice Wilkins and Rosalind Franklin (Gaensslen, A. Harris, Lee; 243).

DNA consists of two long strands held together by hydrogen bonds. The strands are twisted to form the helical structure. Each strand is made up of groups of nucleotides. Each nucleotide contains a nitrogenous base, a ribose sugar and a phosphate molecule. All nucleotides have a common ribose sugar and phosphate molecule. They only differ in the type of base they are attached to. The four types of bases found in DNA are adenine, thymine, cytosine and guanine. They are commonly abbreviated to A, T, C and G. It has been mentioned before that the two strands are held together by hydrogen bonds. These bonds are formed between the bases of each nucleotide in each strand. Bonds can only be formed between adenine in one of the strands and thymine on the other strand in the same position, and between cytosine in one of the strands and guanine on the other strand. A bonds with T and C bonds with G only. They are said to be complementary to each other and known as base pairs. The DNA strands are packed into chromosomes and are found in the nucleus of everybody cell (Gaensslen, A. Harris, Lee; 244).

Each species have a specific number of chromosomes in their body cells. Humans have 46 chromosomes that are paired together. This means humans have 23 pairs of chromosomes. The sex chromosomes are one of them and they are involved in determining human gender. Males have the genotype (genetic content) of XY meaning the X chromosome and the Y-chromosome while females have the genotype XX. (Gaensslen, A. Harris, Lee; 243). No two individual's DNA are the same except for identical twins because they come from the same fertilized eggs. All the 46 chromosomes are found in the nucleus of each of human body cells except in the gametes where only half is present and haemoglobin where none is present. The reason why humans have them is because the necessary proteins and enzymes that are needed for vital metabolic reactions to occur in human body are coded for the DNA found in these chromosomes. Amino acids constitute these proteins and enzymes. There are 20 amino acids found in nature. The sequence of bases in the DNA determines the sequence of amino acids in the protein with each amino acid being coded for by a group of three bases. This is known as the genetic code. A group of three bases is referred to as a codon. More than one codon codes for one amino acid. This is referred to as degeneracy of the genetic code (Gaensslen, A. Harris, Lee; 246-248).

Humans inherit half of their chromosomes from their mother and the other half from their father. In paternity tests, a sample of DNA can be taken from an individual and compared to his mother or father to see any similarity using the process of RFLP (restriction fragment length

polymorphism analysis and the Southern Blot technique or PCR (polymerase-chain reaction) and Dot Blot analysis. Another way of determining the biological mother of an individual is to analyze mtDNA (mitochondrial DNA) that is found in mitochondria of cells and passed on directly from the mother. It is accurate because the mtDNA does not undergo random mutation as rapid as nuclear DNA. Y-chromosome analysis can also be used to identify the father of a male individual. PCR is usually used in this case. (Thieman, Palladino; 202). As such clinical DNA test of paternity has developed into a lucrative commercial enterprise in the West as it is regarded conclusive in proving or negating paternity.

THE POSITION IN MODERN ISLAMIC LAW

Genetic test of paternity, while being acquiesced as means of connecting unidentifiable children or dead bodies to their legal parents, its evidentiary value as an independent and separate method for proving and negating paternity⁴ is a contested issue among the contemporary jurists.

For establishing paternity, majority⁵ of the jurists opposes it while minority⁶ supports it. The main arguments by opponents is that criterion to determine paternity is a matter within the province of Shari`ah and not science because: 1) God has prescribed *shahadah*, *iqrar* as the *shar`i* methods and the Prophet designated *firash* as the primary method for proving paternity. They cannot be overridden by other means. 2) The Prophet specifically overruled resemblance in term of physical features 'biogenetic matching' as a basis for kinship. This happened in three instances. For example, in the case of a man from Fazarah who denied his child's paternity on account of being of dark color, the Prophet ruled by saying ' his color is because of heredity-*irqhnaz`*). Moreover, he made the same point in the case of Hilal. In this case, after the application of *li`an*(oath of condemnation) between the complainant (about wife`s infidelity) and his wife, he stated that watch out if his wife delivered a curly- hair of dark skin child, then it would belong to Shuraik(the accused). Once his prediction came true, he commented ' had it not been solved by God, I would have ruled otherwise. 'Lastly, his decision in favour of Abd ibn Zam`ah by attaching the paternity of the to his as the owner of *firash* in spite of the child`s physical resemblance to `utbah who was to have fathered it (a counter- claim by Sa`d) .3)

⁴ Some representatives are: al-Ashqar:2001; al-Khayyat:2002; al-Wasil:2002; Zuhaili:2004;; al-Qaradaghi:2006; al-Ka`bi:2006; Samad 2007; Sufian:2007; Sha`ban:2008; Sa`id:2008; Najji:2010).

⁵ For instance, the Islamic Jurisprudence Council of the Islamic World League (Organization of Islamic countries) in Makkah in its 16th session (21-26/10/1422 Hijra/5-10 January 2002 held that Deoxyribonucleic acid(DNA) fingerprinting may be used in proving paternity provided that its procedures are secure and does not overrule other Shari`ah modes of proof. However, it is not allowed for negating paternity in lieu of *li`an*(the oath of condemnation sworn in the case of husband`s allegation of adultery against his wife). Neither should it be used to negate or affirm legally proven paternity. However, it is admissible to prove the lineage of the children of unknown paternity and identification purpose of bodies in the case of massive destruction human life on account of natural or manmade disasters

⁶ This position is advocated by Hilali:2001, Ra`fat `Uthman, 2002 and some others by way of implications. See. al-Ka`bi, pp.374-376.

`Umar connected the paternity of a child to two men claimed to have had sex with the child's mother during the same *tuhr*(purity). 4) lastly, DNA test of paternity in addition to its amenability to technical errors is also susceptible to fabrication, thus is not definitive in its accuracy to establish paternity(Samad: 724-733; Najji: 66-228; Sha`ban: 459-460).

The proponents, on the other hand argued that: firstly, methods of proof in Islamic law partaking in the domain of means (*wasal*) are not restricted to traditional methods of proof and evidence but extendible to include other emerging sure means of discovering facts such as scientific evidences like DNA testing. According to Ibn Qayyim 'Evidence (*al-bayyinah*) as an umbrella term stands for all that which manifests the truth and disclose it. Anyone who restricts it to two eyewitnesses or four of them or one of such witnesses does not do justice to the true signification of the term. The Holy Qur`an never uses the word *bayyinaht*o mean two witnesses alone. The Qur`anic connotations of the word *bayyinah* therefore, are *hujjah* (proof),*dalil* (evidence) and *burhan* [clear proof](Turuq:13).⁷ Secondly, practically, other methods of fact detection/finding was given recognition both by the Qur`an and the Sunnah. For instance, the Qur`anic account about Yusuf and his accuser is an episode which provides the shari` base for dependence on material evidences proffered by experts. In that incident Yusuf's struggle to escape and the resultant tearing of his shirt from the back and the opinion of a wise man(*washahidashahidum min ahliha/* and bore testimony a person(from among her kinsfolk) - that it was a sign of truthfulness of Yusuf's claim(Yusuf :2-27;al-Qurtubi: 1966), Vol.9, pp.172-173)is held to constitute an authority in favor of admissibility of the opinion by a skilled person, such as DNA forensic expert. The Prophet also specifically approved expert testimony as a credible proof of paternity when he expressed joy and delight about Mujzaz`s physiognomic resemblance between Zaid and Usmah. Following this precedent, `Umar used to ascribe the paternity of illegitimate children of pre-Islamic era to their claimants on the basis of physiognomic`s opinion. Rationally, if paternity can be established by testimony of a mid-wife, or on mere claim of it (*istilhaq*) without verifying their truth, or an opinion by a physiognomist, biological means of relating children to their parents which is more reliable and accurate cannot be said to be untrue(Samad: 718-724; Najji: 64-228;Sha`ban: 459-460 . Said:70).

However, the opponents disagreed, by saying: 1) the methods of proving *nasab* are restrictive, namely fixed by the Shari`ah and not open-ended to be dictated by science particularly the unequivocal among them, namely *firash*, *shahadah* and *iqrar*. They refuted the interpretation of *bayyinah* as a general name for evidence as contended by Ibn Qayyim by maintaining that *bayyinah* means *shahadah* as Prophet explained when he ordered Hilal ibn Umayyah ' to

⁷ He further has argued , 'God sent His messenger to establish justice among mankind. Justice in the estimation of God stands so prominent that maintaining the needed equilibrium between what is in the heavens and in the earth depends upon it. Henceforth whatever establishes justice and upholds it can be considered an integral to the revealed Shari `ah. To assume that God as the All-knowing ,the All-just and the Supreme Adjudicator when specifying some ways for establishing justice, overrules the possibility of other emerging more reliable and stronger ways to establish justice, will be a negation of His all attributes as such.',Turuq,p.15.

produce *bayyinah* or had would be on your back'(Sha`ban:459; Haneef:220). 2) Even as a *qarinah* its evidentiary weight is not conclusive as it still rests on probabilities and is tainted with doubts and obscurity i.e., DNA testing yields 99.9% positive result in population of ten million people of a particular locality- is not definitive(Naji:101). 3) the admissibility of physgnomist` opinion is again *ultra virus* of the Prophet`s decision in the case of Hilal as it laid down the rule that ` biological matching` has no validity in Islam(Naji:221).

The supporters, however, counter argued by advancing the view that: firstly, it is true that the Shari`ah has prescribed *firash* , *shahadah* and *iqrar* as the primary methods of establishing paternity but the rulings of Shari`ah on such matters do not partake in *ta`abbudi* domain so as not to be amenable to human rational articulation. As a *matter of fact* these methods themselves do not yield positive knowledge about the lineage as no one is allowed to witness the act of coitus from which the pregnancy and child birth results- certainty is not forthcoming. Hence, the Shari`ah sufficed for the proof of paternity on legal presumption of marriage-bed and other methods which they may not truly reveal the truth. DNA testing, on the other hand, can unveil the truth about paternity as a form of scientific eye which is more definitive than traditional modes as detailed in the classical *fiqh*. Accordingly, it is more capable of solving the paternity issue in comparison to speculative proofs of *firahs*, *shahadah* and *iqrar* and even has to be given priority over the latter in cases of conflict(Hilali: 240; Samad:732; Sufian:347-362).

Secondly, in the cases which occurred during the time of the Prophet, there are indications that biological reason(genetic) is an important element in determining paternity(lend support more to our stand). For instance, in the case of the man from Fazarah, the Prophet in spite of physical non-resemblance of the child rejected the skepticism of his father about his legitimacy as physical resemblance genetically will not be shared by all the offsprings as we know it today (al-Bar:153). Similarly, in the case of Hilal, the Prophet`s comment, ' had it not been solved by God, I would have ruled otherwise' underlines as to how significant genetic is in determining paternity (Naji: 223). Likewise, in the case of Abd ibn Zam`ah in spite of according the boy`s custody to him, the Prophet still ordered Sawdah bint Zam`ah to veil herself from the boy because according to Sa`d, he was fathered by his brother, thus was a stranger to Sawdah. This means that the Prophet pointed to the significance of genetic in deciding paternity.

Nonetheless, the opponents dismiss all these arguments as fictitious, particularly, to them in all the incidents, the Prophet has reiterated the overriding principle of " al-waladu li al-firash", licit sexual relationship supersedes all other means of determining paternity and once established cannot be questioned. The logic is that stability of marriage and matrimonial harmony as the overriding objective of marriage in Islam will be in jeopardy if the paternity the child born within it is doubted(Shabana, 231).

The debate also rages among the jurists on using DNA to negate paternity. This is known as test of exclusion in law. It is a settled principle in the classical Shari`ah that once a child`s paternity is proven, it cannot be negated unless a husband reasonably believes that the child that his wife has begotten is illegitimate. If this be the case, in the absence of conclusive proof, he can negate it by *li`an* only. This law was laid down in the Qur`anic verse which provides: "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 God that he is one of those who

speak the truth. And the fifth (testimony) (should be) the invoking of the Curse of God 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 God, that he (her husband) is telling a lie. And the fifth (testimony) should be that the Wrath of God be upon her if he (her husband) speaks the truth."⁸

This ruling for first time was applied in the paternity case of Hilal ibn Umayyah as we noted above. Accordingly, the majority of the contemporary jurists, contend that this is the only Shari` way to exclude a child conceived during the subsistence of one`s marriage. However, with the availability of DNA testing and its successful use to negate 50 paternity cases in Columbia in 1997, the resort to it also became a moot point among the Shari`ah scholars. Vast majority reject it but some scholars approve its use.

The main arguments by the majority are: first, DNA in terms of evidentiary weight is similar to physiognomis` finding (speculative and open to suspicion), thus is unacceptable to override *firash* which is conclusive and definitive. Secondly, *li`an* does not merely involve the question of negating paternity but also has the effect of irrevocably ending the marriage and fending off qazaf penalty against the husband etc. Hence, DNA test even if it can negate paternity is not a *shari`* means of disposing such ethico-moral issues interwoven with *li`an*. Lastly, the *ratio legis* of *li`an* is to deter people from rash in hurling charge of infidelity against their wives. Nevertheless, it may be resorted to ascertain the veracity of husband`s accusation so as to avoid unnecessary frequent recourse to *li`an*. (*al-Qaradaghi: 365, Naji: 310; Sufian:371; Ka`bi: 447:*).

The supporters, on the other hand, argued that the process of *li`an* is subject to the mandatory condition of non- availability of proof in the form of the testimony by four witnesses

⁸ Al-Nur: 6-9. The incident occasioning the revelation of this ruling was the case of Uwaymir. Yahya related to me from Malik from IbnShihab that Sahlibn Sad as-Saidi told him that Uwaymir al-Ajlani came to AsimibnAdi al-Ansari and said to him, "Asim! What do you think a man who finds another man with his wife should do? Should he kill him and then be killed himself, or what should .he do? Asim! ask the Messenger of Allah, may Allah bless him and grant him peace, about that for me." Asim asked the Messenger of Allah, may Allah bless him and grant him peace, about it. The Messenger of Allah, may Allah bless him and grant him peace, was revolted by the questions and reproved them until what he heard from the Messenger of Allah, may Allah bless him and grant him peace. was intolerable for Asim. When Asim returned to his people, Uwaymir came to him and said, " Asim! what did the Messenger of Allah, may Allah bless him and grant him peace, say to you?" Asim said to Uwaymir, "You didn't bring me any good. The Messenger of Allah, may Allah bless him and grant him peace, was revolted by the question which I asked him." Uwaymir said, "By Allah! I will not stop until I ask him about it!" Uwaymir stood up and went to the Messenger of Allah, may Allah bless him and grant him peace, in the middle of the people and said, "Messenger of Allah! What do you think a man who finds another man with his wife should do? Should he kill him and then be killed himself, or what should he do?" The Messenger of Allah, may Allah bless him and grant him peace, said, "Something has been sent down about you and your wife, so go and bring her." Sahl continued, "They mutually cursed one another in the presence of the Messenger, may Allah bless him and grant him peace, and I was present with the people. When they finished cursing each other, Uwaymir said, 'I shall have lied about her, Messenger of Allah, if I keep her,' and pronounced the divorce three times before the Messenger of Allah, may Allah bless him and grant him peace, ordered him to do it." (Sahih Muslim: 800).

regarding the allegation of adultery by the husband against his wife. DNA test of pregnancy (or paternity) as a form of conclusive *qarinah* performs the same role as testimony by eye witnesses which can circumvent the recourse to *li`an*. Its admissibility does not override the law of *li`an* similar to non-fulfillment of legal stipulation in waiving a crime punishable by *hadd*(*Najj*: 313; *Sufian*:375; *Ka`bi*: 446).

However, the opponents counter argued that DNA test of paternity no matter how convincing, cannot substitute the testimony of four eye witnesses to serve a bar to *li`an*(*Najj*: 316) and if allowed it is tantamount to flouting the prohibition against intrusion into people`s private lives. The supporters, however, countered by saying that DNA is of more probative value than the testimony of the eyewitnesses and sufficient to negate the paternity of the child to the father in the case of *li`an* (*Sufian*:378). However, its larger ethico-religious implications are not considered seriously by the proponents.

DNA TEST TO CONNECT AN ILLEGITIMATE CHILD TO THE ZANI

The issue of tracing paternity of the ill-conceived pregnancies and births is the most contentious issue in Islamic jurisprudence. There are about four divergent views on this among the classical jurists. 1) Majority refute its attachment to the father (biological) in all circumstances based on the Prophetic tradition that the child belongs to the owner of marital bed (husband) and to the adulterer is nothing but the stone (metaphorically implies disappointment/deprivation). But he/she is the illegitimate child of the woman party in the illicit sexual intercourse based on the *Ghamidiyyah* case as we referred before; 2) it can be connected to the father provided that he claims it and the female party is still single (*Ibn Taymiyyah*); 3) it can be connected to the father if claims provided that it is the child of a mistress and not a whore/prostitute (*Ibadiyyah*); and 4) it can be attached to the father if he gets married with his lover after becoming pregnant from him but before the birth of the child (*Abu Hanifah*). Their main argument is a report by *Ibn Abbas* about the legitimacy of marriage between a *zani* and *maznibihah* (*Najj*: 268; *Alwani*:81-85).

The above controversy points to two schools of opinion on the issue: opponents and supporters. The opponents in vehemently rejecting it reasoned: 1) hadith of the Prophet on *firash* which requires licit intercourse as the *shar`i* cause for paternity. 2) the Prophet also outlawed the pre-Islamic practice of assigning paternity of the bastards to their biological fathers. 3) He also practically connected the paternity of the concubine`s child to the *Abd Zum`ah*`s father and not to *Sa`d*`s brother (*Utbah*) who was his biological father. 4) Logically, paternity is a *na`mah* and *sharaf* (kind of social prestige), and the fornicator should not be entitled to such privileges. Hence, such a child will be connected to the female sex partner on the authority of the case of the woman from *Ghamidiyyah* (*Najj*: 262; *Alwani*: 110-113; *Sufian*: 217-219).

However, supporters disagreed with the majority but on different grounds. For instance, to *Ibn Taymiyyah* and *Ibn Qayyim*, such a child will be connected to the *zani* if he claims that he

has fathered him provided that the zaniyah is unmarried. The reasons are: 1) it will not override the principle of *firash*. The reason according to Ibn Qayyim is that *firash* if exists, it takes precedence over the claim by a third party. But if the fornicator claims his child from zina with a unmarried woman, since the latter is not tied to someone by marriage, the child's paternity can safely be attached to him (Ibn Qayyim, 4: 164); 2) the case of Abd Zum`ah is an authority to indicate that genetic relatedness can be regarded as a ground for kinship- Prophet forbade Sawdah from uncovering her `awrah to `Utbah's biological child. 3) If the child born out of doubtful marriage is connected to the man, the same rule should be the case here. 4) the child born out of illicit sexual intercourse is a human whose well-being should not be neglected on account of the crime committed by the male sex offender (Najji: 265-267).

Contextualizing the above juristic views to solve the problem of widespread births of illegitimate children, may on positive note offer a partial solution if we go by conditional proposition made by ibn Taymiyyah and Abu Hanifah under the juridical principle of *istilhaq* (attaching). However, the question is: What if there is no *istilhaq* nor the adulterer is prepared to marry his pregnant lover? The answer to this in the classical fiqh is in the negative. The next question is: Can we go biological and give recognition to biological fatherhood in this instance only? Again to vast majority the answer is a big 'NO'. Nevertheless, some modern writers like Hilali, Bayumi and Sufian seem to argue in the affirmative by maintaining that if Umar connected the pre-Islamic bastards to their fathers and some classical jurists also attempted to find some other ways like *istilhaq* and legalization by marriage to reduce the socio-economic burden which ensue from the problem of abandoned illegitimate children. Today DNA test of paternity to trace the biological father such children provide a new way to find the appropriate avenues to cater for their needs on top of sending a strong message to the brute luster that crime does not pay. The classical notion that it will enhance the social esteem of the male sex offender is flawed as the contrary is true, i.e. not connecting these children to them enhances their self-esteem and is favourable to them-something which they do not deserve (Sufian: 238-235; Alwani: 110-120; Hilali: 387).

I believe, in the absence of enforcement of Islamic punishment on the male party (li al-`ahir al-hajar) or even *jaldah* according to some interpretation of the hadith (al-waldu li al-firash wa li al-`ahir al-hajar) or other exemplary and deterrent *ta`azir* penalties, to ignore the significance of biological connection of the male adulterers or fornicators is in effect rewarding them for their heinous sins which they perpetrate unabated. It is tantamount to hiding and protecting sex offenders but punishing the society by burdening them to care for the outcome of their despicable acts- the stigmatize illegitimate children. The contention that declaring them as biological fathers encourage sexual immorality (*zina*) does not hold true as this measure helps in combating sex crimes and obscenity. Neither it amounts to annulment of shari criterion of legitimacy as biological connection is not equal to legal relatedness in the Islamic view of lineage, i.e., they are not legitimized but regarded as illegitimate but biologically fathered by known individuals who are bound to bear the burden of their maintenance by way of punishment and not by way of legitimate kinship from which other rights like custody and parental care will follow.

The above proposition is juristically justified as classical jurist do recognize biological parenthood in few instances. For instance, unlike the Shafi'i, other jurists have favored biological

relatedness either for reason of child's welfare or moral ground of higher order. For instance, Hanafi sanctioned legitimization of ill-conceived child through subsequent marriage between the lovers and Ibn Taymiyyah achieved such an objective through *istilhaq* of the child by the fornicator. Majority accepted genetic relatedness by prohibiting the marriage between a man and his biological daughter. To top it all, the fact that all the jurists attach illegitimate child to the female party to the sex is a clear proof of division of paternity into biological and legal.

In light of the above, it can be concluded that:

- 1- Question of paternity in Islamic law is primarily legal before it can be regarded as biological. The reason is that begetting a child is part of parental behaviour, as such it has to be legal before it is biologically feasible. The reason is that sexual purity is a non-negotiable core principle and the only outlet through which it can be gratified is through lawful marriage. Accordingly, genetic method should not replace legal means of establishing paternity as a general rule.
- 2- However, to accept genetic test in the case of illegitimate children with the purpose of not legitimizing them but bringing to book the male party who has violated mandatory Islamic code of sexual morality, has become instrumental for the birth of illegitimate children and has been a privy to the subsequent dumping of such babies around the rubbish tips, is rational and in line with spirit of Islamic Shari`ah and its jurisprudence. Justice as the cardinal principle of the Shari`ah demands that he should be made to pay for this heinous crime. In my humble submission, an adulterer/fornicator who has the audacity to degrade himself to commit *zina in fact* has fallen back to pre-Islamic jahiliyyah, thus he has to *istilhaq* by compulsion (*iqrar bi al-ikrah*) the fruit of what he has cultivated. Accordingly, he should be made to support the child not by way of *nafaqah* but by way of *gharamah* and *daman* for which he is criminally responsible. Because in the absence of *hadd* of zina and efficacious *ta`zir* in our time, there is no other ways that such rotten lots could be deterred and reprimanded. In this way, the orphanages and government's resources could be directed to care only for the *laqit* of non illicit sex origin.

CONCLUSION

In light of the foregoing discussion and moving beyond the polemics as to whether DNA is real/definitive or fictitious/ speculative (*qat`i or zanni*), we have to address the issue from the macro-perspective, namely, legitimate relatedness and not biological relatedness is the standard by which the legitimacy of paternity is decided in Islamic law. That is why the Prophet declared that *al-waladu li al-firash*. Accordingly, it is of paramount importance to properly understand as to why *firash* and not *wat`* is *sabab* (legal reason) for establishing the legitimacy of *nasab*. Thus, the validity of *firash* as the standard of child legitimacy cannot be questioned in the case of law Muslims who stays away from morally degrading behaviors such romancing with women other than their wives. It is these people who should be benefitting from the law of *al-waladu li al-firash*. Turning to biology to ascertain whether their child is from them would be *ultra vires* of the Prophetic declaration and the purpose of Shari`ah for preservation of human honor

and dignity. In the case of disputed paternity, however, DNA test can be more accurate than the finding of an expert on resemblance of physical features, lot-casting and even attaching a child's paternity to someone by a mere claim (*istilhaq*).

Nevertheless, to biologically link the illegitimate children to the male enjoyer of the sex, is a separate issue to which most text writers have failed to contemplate. This paper, however argues that it finds its legislative foundation on the principle of *istilhaq* as propounded by Hanafiyyah. In the absence of *istilhaq* which is more often the case in our time, DNA test of paternity does the miracle of uncovering the ugly face of the male party to the sex who preys upon naive and simple minded female friend in the name of lover (boyfriend and girlfriend) and then upon impregnating her leaves her to fend for herself and the ill-gotten conception for the whole of her life in consequence of momentary love which she had enjoyed with her partner. The stand by supporters of DNA test of paternity and their juristic argumentation go a long way in substantiating this proposition.

REFERENCES

- Samad Abd al. Husni Mahmud. Al-Basmah al-Warathiyyah wa Mada Hujjituha fi al-Ithabt. Iskandariyyah: Dar al-Fikr al-Jami`i.2007.
- Hilali Sa`d al-Din Mis`ad. Al-Basmah al-Warathiyyahwa `Ilqaatuha al-Shar`iyyah. Kuwait: Majlis al-Nashr al-`Ilmi.2001.
- Ibn Qayyim, Muhammad ibn Abu Bakr, Zad al-Ma`ad. Beirut: Mu`assasat al-Risalah, n.d.
- Al-Ka`bi Khalifah Ali. Al-Basmah al-WarathiyyahwaAtharuha `ala al-Ahkam al-Fiqhiyyah. Jordan: Dar al-Nafa`is.2006.
- Buraq`ah Sufian. Al-NasabwamadaTa`thir al-Mustajiddat al-`Ilmayyah fi Ithbatihi. Riyad: Dar Kunuz Eshbelia.2007.
- Mutawalli Mahmud `Ayish. Damanat al-`Adalah fi al-Qada al-Islami. Beirut: Dar al-Kutub al-`Ilmiyyah.2003.
- Alwani Ibrahim. MadaMashru`iyyatTansibWalad al-Zina fi Daw`l al-Ahkam al-`Ammah li al-Nasab. Dar al-Kitab al-Qanuni.2009.
- Naji Anas Hassan Muhammad. Al-Basmah al-WarathiyyahwaMadaMashru`iyyatiha fi IthabtwaNafyi al-Nasab. Iskandariyyah: Dar al-Jami`ah al-Jadidah,2010.
- Sha`ban Khalid Muhammad. Mas`uliyat al-Tibb al-Shar`i. Iskandariyyah: Dar al-Fikr al-Jami`i.2008.
- Sa`id Muhammad Shahim Ali. Al-Basmah al-WarathiyyahwaAtharuha `alaAhkam al-Li`an. Iskandariyyah: Dar al-Jami`ah al-Jadidah.2008.
- Al-Qaradaghi Ali Muhayy al-Din. Al-Basmah al-Warathiyyah min Manzur al-Islami. Mecca: Fiqh Academy,2002.
- Malaysia: Births out of wedlock alarming,New Straits Time, March 11, 2011, <http://news.asiaone.com/News/AsiaOne+News/Malaysia/Story/A1Story20110321-269221.html#sthash.0BPSQU2J.dpuf>.
-& al-Muhammadi Ali Yusuf. Fiqh al-Qadaya al-Tibbiyyah al-Mu`asirah, Beirut: Dar al-Basha`ir al-Islamiyyah. 2006.
- Mohamad Sujimon. The Problems of the Illegitimate Child in the Sunni Schools of Law.Kuala Lumpur: IIUM Press, 2010.
- Gaensslen R.E.et al. Introduction to Forensic Science and Criminalistics, Library of Congress,2008.
- Thieman William J. and Michael A. Palladino, Introduction to Biotechnology, San Francisco: Pearson, 2009.