

# **Assessment of the application of DNA evidence in context of Islamic Criminal Law**

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### **Abstract**

*Islamic Criminal Law demonstrates very stringent adherence to the conventional forms of evidential presentation in criminal trials. Since the birth of the religion over 1400 years ago, forensic science has made breakthrough advancements in what can be used to evidence facts and conclusions. This is especially true for criminal trials and legal systems around the world have moved to adopt such evidences and incorporate them within their System of Criminal Justice. Islamic Criminal Law has not been seen to embrace these developments. This paper attempts to assess, in context of existing Islamic jurisprudence, if DNA evidence can be used in criminal trials, within the confines of Islamic Law.*

## Introduction

Today, DNA evidence is the ultimate opportunity a criminal lawyer would use to secure conviction for a criminal offence. If DNA analysis could be carried out on all probative samples, then the identification of real suspects or exclusion of individuals would undoubtedly accelerate the criminal investigation.<sup>1</sup> However, use of evidence sources by forensic science is under strong debate within the context of Islamic criminal law, thus the objective of this research paper is to analyse the usage of DNA evidence within the categories specified above.

Islamic Law looks at the issue of evidence in two different jurisdictions due to the different outcomes which the use of evidence may result in. These two jurisdictions are namely, civil and criminal law. Evidence falls in various forms namely, documentary evidence, oral evidence, and expert evidence. Expert evidence can also be further divided into categories, one of which is forensic evidence. This would be the main area of focus for the purposes of this paper.

### A. Principles of Islamic Jurisprudence regarding law of evidence in criminal law

Islamic criminal law is divided into three main categories into which different punishments are articulated with reference to each offence. The first category is *Hadd* which means ‘fixed’ or ‘limited’ on literal interpretation. This originates from The Quran. The second category of punishment is known as *Tazir* and it is recognised under various state legislations such as the Pakistan Penal Code. Mainly, this is a discretionary offence. Finally, the third offence is known as *Qisas* which operates on the principles of retributive justice.<sup>2</sup>

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<sup>1</sup> Khan M. I. M, ‘The forensic DNA evidence in criminal investigations’ (*The Patriot*, 26 May 2015) < <http://dailythepatriot.com/the-forensic-dna-evidence-in-criminal-investigations/>> accessed 2 February 2018.

<sup>2</sup> ‘An eye for an eye’.

Islamic rules of evidence appear to be quite similar to those stated above. Evidence can either be, a confession by the offender, a solemn oath taken by the plaintiff, or a testimony given by the plaintiff. The evidence required for a conviction differs from one offence to another.

The *Hadd* evidential requirements can be seen through the provisions of the Quran. It specifically mentions that in order to prove an offence of adultery (*Zina*), the accuser must bring forward four sane male witnesses of high moral probity, as evidence. If the accuser fails to produce them, the law will deem him guilty of false accusation of adultery (*Qadhf*)<sup>3</sup>. However, the question primarily arises whether these evidential requirements cater to the offence of *zina-bil-jabr*? As we shall see later on, an offence of *Zina-bil-jabr* is liable under the category of *Tazir* and therefore all evidential requirements are the same for state offence.

On the other hand, a victim of homicide need only produce the testimony of two witnesses.

## 1. Form of evidence admissible in Islamic Civil Law

Unlike Islamic Criminal law, civil law is not categorized in any form of divisions. In any Islamic court, the form of evidence which is admissible in order to prove an offense of *Zina-bil-jabar* or Homicide, is mainly testimonial. To give evidence before an Islamic court the witnesses must possess the quality of *adala*, i.e. to be a Muslim of the highest moral probity. This appears to be in line with the best evidence rule which is to produce the best evidence possible.

In most cases the testimony of two adult witnesses was required, although in cases involving property the testimony of one witness and the oath of the plaintiff was considered sufficient. Documentary evidence played little part in proceedings before the court in the early days of Islam, despite the verse in Qur'an which enjoins Muslims to record debts in writing.<sup>4</sup>

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<sup>3</sup> Al-Quran Chapter 24 verse 4-5.

<sup>4</sup> Chapter 11 verse 282.

In Islamic legal theory the most important form of evidence was not a written document but the testimony of a witness. Islamic jurists distrusted documents because they could be tampered with or could be forged. For this reason, the jurists accepted only two legal means of proof: the testimony of a witness, a confession and an oath. The reluctance of the jurists to accept written documents as evidence brought them in conflict both with the Qur'an, which enjoins the writing down of the contents of a contract, and with general legal and commercial practice, where written documents were widely used. Thus, one can see that offences liable to *Hadd* punishments do not have room for the use of circumstantial evidence such as DNA, despite the growing developments science and technology.

Islamic procedural law developed a compromise to overcome this conflict: documentary evidence was adduced from the proof through a witness.<sup>5</sup> The use of witnesses and the oath is therefore, an important part of Islamic procedural law. The person who makes a claim (the plaintiff) has to be able to prove his claim through witnesses. Confronted with a claim the defendant is required to take an oath denying the claim. If he refuses to take the oath, a judgment is given in favour of the plaintiff. Otherwise the matter will proceed to trial where the plaintiff calls his witnesses.

The *Qadi*<sup>6</sup> examines the reliability of witnesses on the basis of their moral standing and carries discretion to reject the evidence depending on the result of his inquiry. As a result, in actual legal practice, professional witnesses emerged whose moral standing and integrity had been established by a *Qadi* and whose testimony could therefore not be rejected. Their function was not unlike the functions of a notary in English law.

The second method of ensuring that the oral evidence in the forms of testimony given in court represented the truth is to require witnesses to take an oath. The oath taken by the plaintiff or the defendant has to be supported by witnesses in certain circumstances. The support of witnesses is

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<sup>5</sup> Wael Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press 2009).

<sup>6</sup> Arabic name given to a judge.

required for cases involving serious allegations such as those mentioned above.<sup>7</sup>

So far, these procedures offer little help for the ongoing question of DNA as evidence in the context of Islamic Criminal law or Civil law. It further raises questions such as whether DNA evidence holds any evidentiary value at all for Islamic law<sup>8</sup>. The questions to these answers can be assessed with the help of a comparative analysis of the country of Pakistan.

## **B. The laws of evidence in Pakistan regarding admissibility**

The correct identification of criminals and other individuals has always been one of the most important problems in criminal and civil investigations. Currently in Pakistan, there is no specific statute dealing with DNA testing while on the contrary we can find such provisions in English and American legislation. In this regard, the courts may rely on the expert evidence provision in the *Qanun-e-Shahadat*. Article 17<sup>9</sup> is used to bring forward testimony of one man or woman in criminal offences liable to Tazir.

The text of Article 164<sup>10</sup> provides specifics for any evidence being permissible where it concerns modern devices for civil law. In order to answer the question of whether the application of DNA evidence is permissible, the Quran itself answers it perfectly as it does not seem to forbid the admissibility of scientific evidence.

The provisions of Offense of Zina (Enforcement of Hudood) Ordinance, also stipulate some powers for the Court to allow DNA evidence. Thus, to some extent proves that DNA evidence is admissible as far as Pakistan Islamic Criminal Procedural law is concerned. There are

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<sup>7</sup> Rape and Homicide.

<sup>8</sup> Ashifa Ashraf, *Evidentiary Value of DNA* (2011) article 31.

<sup>9</sup> Qanun-e-Shahadat 1984.

<sup>10</sup> *ibid.*

many issues presented at trial that involve scientific knowledge or are so complicated or beyond the common knowledge of the judiciary that someone with special skill or education is required to help the judges understand the evidence or matter in issue. The most evident case is that of *Muhammad Shahid Sahil v. The State*<sup>11</sup>. In this case the petitioner had filed a suit for maintenance for the child<sup>12</sup>. The respondent alleged accusations upon the petitioner for rape as a result of which the petitioner had conceived. Both the parties were relegated to DNA testing in order to prove through conclusive evidence the paternity of the foetus.<sup>13</sup> Although it is common knowledge that when the DNA test report is produced in a trial court, it could be received as evidence summoning the expert to prove what it stipulates. This provides an opportunity to the accused to cross-examine the evidence admitted in court against him.

However, the aforementioned case had over-ruled the judgement of *Muhammad Azhar v. The State*<sup>14</sup>, in which the courts took the view that DNA tests are admissible, however, only in the form of supporting evidence, which is equally important for a husband to prove an allegation of *Zina* against his wife. He may also use it to justify his oath as taken under the prescribed manner in *Surah Al Noor*<sup>15</sup>. The DNA test also serves to determine the parentage of a child for the purposes of *Zina*. However, if one stops here one would think there is no use of DNA evidence as circumstantial evidence for offences liable to *Hadd* or *Tazir*

Previously, the offence of *Zina-bil-jabr* fell under the provisions of *Zina* punishable under the *Hudood* Laws. This position has now been amended. Offence of Rape<sup>16</sup> is now pushed back into the Pakistan Penal Code by virtue of Protection of Women's Act 2006<sup>17</sup>.

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<sup>11</sup> 2010 PLD 215 Federal Shariat Court.

<sup>12</sup> The child was born out of rape.

<sup>13</sup> The parties were directed to appear before the chemical examiner, CAME (Centre for Applied Molecular Biology) Laboratories.

<sup>14</sup> PLD 2005 Lahore 589.

<sup>15</sup> *ibid* para 18.

<sup>16</sup> *Zina-bil-jabar*.

<sup>17</sup> Section 375 and Section 376.

The application of the above provisions can be observed in *Salman Akram Khawaja v. Government of Punjab*<sup>18</sup>. It put the aforementioned debate into a neat and concise form of what may be counted as law on the admissibility of DNA tests as evidence. It quoted that the judges in *Muhammed Shahid Sahil v. The State* over-ruled the approach taken in *Muhammed Azhar* for reasons including the need for an effective justice system<sup>19</sup>.

As mentioned earlier, DNA tests are also seen as an instrument used to prove the parentage of a child. The case of *Khizer Hayat v. Additional District Judge Kabirwala*<sup>20</sup> affirms the application of Article 128 of *Qanun-e-Shahadat*. In this case, the parentage could not be proved by the use of the DNA evidence. The parentage instead was conclusive of the valid marriage which continued. Furthermore, the plaintiff remained unmarried two years after the dissolution of the marriage which led to the conclusion that the minor belonged to the defendant. The learned judges held that due to insufficient means used to derive DNA tests, any mistake committed would most likely stigmatise the minor for the rest of his life. Thus, a direction to appear for DNA examinations was not given. The defendant failed to disprove legitimacy and was thereby made to pay maintenance. From this case one can see that commission of a criminal offence can tap into claims of maintenance and parentage which fall in the civil law domain.

### **C. A need to reform the application of DNA evidence in Pakistani Courts**

Throughout this article, it appears that circumstances in which DNA testing may be used only pertain to state offences in the form of circumstantial evidence and not primary evidence. Thus, one may question whether it is about time the evidential laws governing forensics ought to reform the approach taken regarding DNA evidence.

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<sup>18</sup> PLJ 2010 SC 215.

<sup>19</sup> By effective, one may refer to a time-saving approach.

<sup>20</sup> PLD 2010 Lahore High Court 422.



Recently, the case of *Muhammad Shahid Sahil*, faced grave criticism by the Council of Islamic Ideology<sup>21</sup>. The Council is an advisory body which may recommend laws, which it deems congruent to the injunctions of Islam, to the Parliament. The Council stated that the use of DNA evidence in cases of rape is not compliant to the *Shariat*. It should therefore only be used as supporting evidence in order to prove an offence of rape or homicide. However, if grave thought is given to this proposition, it seems that the Council is oblivious to the possible consequences this ruling may have. These consequences may include stigmatising a child wrongfully where a DNA test would possibly be useful to prove parentage. It may also stigmatise the mother as well who could fall foul of bringing four witnesses to prove rape unless it was publicly committed. The mother would self-invite the punishment of false accusation<sup>22</sup>, just as it did in the case of *Muhammed Sahil*.

The council faced grave criticism by the Human Rights Commission of Pakistan, which stated in its latest statement that rape is on a sharp rise in the country and only in Lahore 113 cases of rape including 32 gang rape cases have been reported so far this year. Thus, the need for DNA testing is imperative for identify rapists and murders. This seems to be an implicit call for reform of the laws regulating the use DNA evidence in Pakistan.

In a meeting by a Women's forum, it was held that the Council had missed out in considering that identification of rapists is vital to the civil society and using DNA tests was in accordance with the modern-day society. Regarding the current functioning of CII, the participants concluded that there was a pressing need for the change in the mindset of the current members.

What, in any sane person's opinion, the Council has done is misread or misinterpreted the Quran which guides courts as to evidence being permissible since it has not in way or sort forbidden the use of modern techniques to full-fill the demands of justice. In conjunction to this, the court in *Salman Akram Khwaja* rightly pointed out that tactical delays, pre-meditation and improvements can be made if scientific and modern methods

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<sup>21</sup> Tazeem Imran, 'CII reviews ruling of DNA evidence in rap cases' *Dawn News* (Islamabad, 18 September 2013).

<sup>22</sup> *Qadhif*.

can be resorted to, for quick disposal on the complainant's arguments. But this cannot cater to offences such as *Zina* liable to *Hadd*.<sup>23</sup>

## Conclusion

From this assessment, it seems that for punishments under criminal law for the purposes of *Hadd* offences, courts are reluctant to make use of forensic evidence such as DNA evidence. Furthermore, if a woman cannot prove through DNA (since it has a slim chance to incur errors) that she has been raped, she may self-invite the offence of false accusation upon herself as previously stated.

Whereas in cases of parentage<sup>24</sup>, this offers little help to determine whether DNA evidence ought to be used as primary or secondary evidence in the cases of rape or homicide. All leading judgments only concerned the offence of adultery as opposed to rape. It may be that victims of rape may not have reported so.

The only favourable circumstance in which DNA evidence can be used is civil law. It is possible that DNA evidence could fall as a 'modern device' under Art 164 of *Qanun-e-Shahadat*. This states that evidence in the form of modern devices is admissible. DNA evidence itself has limitations as the law requires truth within the context of legal merits while science requires validated technology and unanimity among theorists to extract the truth.<sup>25</sup>

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<sup>23</sup> The *hadd* punishment is conservative and is given textualist approach. It is understandable not to use the DNA as circumstantial for it could lead to stigmatisation of a minor born out of lawful wedlock.

<sup>24</sup> Which may arise due to commission of *Tazir* offence by defendant such as *Zina-bil-jabr*, where the plaintiff may claim maintenance for the minor born out of rape.

<sup>25</sup> Khan (n 1).

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