

## DOUBLE PATERNITY DILEMMA: RESOLVING LEGAL COMPLEXITIES IN HETEROPATERNAL SUPERFECUNDATION CASES UNDER ISLAMIC LAW

Isa, Abdur-Razaq Sarumi PhD (Law)<sup>1</sup>, Adaji, Aishatu Eleojo PhD<sup>2</sup>, and Jibreel Sahban Mustapha PhD (law)<sup>3</sup>

### Abstract

*This article delves into the legal ambiguity surrounding heteropaternal superfecundation cases, a phenomenon where twins are conceived with different biological fathers. It reassesses the legal standpoint presented by classical jurists concerning the impossibility of double paternity. This belief led them to suggest legal consequences for a husband denying one of the twins. The article adopts doctrinal research methodology. It finds that the strict application of classical rulings on the subject matter may lead to a miscarriage of justice. This is because the punishment advocated by early jurists was rooted in the cause or rationale of the impossibility of double paternity. The article concludes that Islamic law highly discourages paternity denial and, therefore, recommends that resorting to imprecation/li'ān is the preferred opinion when one of the twins is denied.*

**Keywords:** heteropaternal, superfecundation, imprecation, legitimacy, firāsh

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<sup>1</sup> Corresponding author, Lecturer at Department of Common and Islamic Law, College of Law, Ifetedo - Osun State University, Nigeria, [saroommool@gmail.com](mailto:saroommool@gmail.com)

<sup>2</sup> Lecturer at Department of Public and International Law, Osun State University, Nigeria [aishatuadaji@gmail.com](mailto:aishatuadaji@gmail.com)

<sup>3</sup> Muhyideen College of Arabic and Islamic Studies, Nigeria, [mustafajibreel123@gmail.com](mailto:mustafajibreel123@gmail.com)

## Introduction

In both Shariah and Common law, the validation of a marriage holds immense significance, primarily in establishing the legitimacy of a child. This principle finds its roots in the Islamic legal axiom ‘*al-walad lil al-firāsh*’ (the child is traced to the owner of the bed, i.e., the legitimate husband).<sup>4</sup> According to this maxim, any child born within the confines of a lawful wedlock is inherently legitimate. Such a child holds an unassailable status and cannot be disowned by the father under any circumstances, barring the exceptional case of imprecation (*li’ān*).<sup>5</sup>

The classical discourse on imprecation elucidates that recognising one twin is tantamount to recognising the other; attempting to disown one twin while acknowledging the other results in a grave accusation of slander (*qadhf*), a charge with severe legal consequences.<sup>6</sup> This stringent approach was established to safeguard the lineage, one of the five fundamental necessities in Islamic law. It was rooted in the assumption that denying one twin equated to rejecting the other and acknowledging one meant acknowledging both.

However, modern scientific technology has ushered in a new era of understanding. The phenomenon of ‘Heteropaternal Superfecundation,’ wherein twins can have different biological fathers, challenges the traditional perspectives. This scientific revelation necessitates re-evaluating the traditional viewpoints of classical jurists.<sup>7</sup> While superfecundation is exceptionally rare, advancements in scientific knowledge have undeniably proven its feasibility. This revelation poses intricate questions at the intersection of jurisprudence and medicine. The classical jurists’ imposition of punishment on a presumed father who denies one twin while acknowledging the other might inadvertently lead to miscarriages of justice in light of this newfound scientific reality.<sup>8</sup>

The inconceivable notion of twins having different biological fathers in classical jurisprudence led to the enforcement of punishment for slanderous accusations (*hadd al-qadhf*) against anyone who simultaneously accepted one twin and rejected the other. However, acknowledging this scientific rarity challenges the foundation upon which these legal principles were built. Hence, the intersection of traditional legal

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<sup>4</sup> Abu al-Hasan ‘Ali Abdus-Salam, *al-Bahjah fi Sharh al-Tuhfah*, (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1998), vol.2, 588.

<sup>5</sup> Sonbol Amira al-Azhary, "Adoption in Islamic Society: A Historical Survey", *Children in the Muslim Middle East* (1995): 45-67.

<sup>6</sup> Ibn Nujaim al-Hanafī, al-Bahr al-Rāiq, and Sharh Kanz al-Daqāiq, (Beirut: Dar al-Ma’rifah, 2003), vol. 4, 134. See al-Fatāwah al-indiyyah fi Fiqh al-Imam al-‘Azam Abi Hanifah al-Nu’mān (Beirut: Dar al-Fikr, 1991) vol. 4, 133, al-Mabsūt li al-Sarakhsi, (Lebanon Dar al-Fikr, 2000), vol. 7, 85.

<sup>7</sup> Wenk, R. E., T. Houtz, M. Brooks, and F. A. Chiafari. "How frequent is heteropaternal superfecundation?." *Acta geneticae medicae et gemellologiae: twin research* 41, no. 1 (1992): 43-47.

<sup>8</sup> Mogollón, Fernanda, Andrea Casas-Vargas, Fredy Rodríguez, and William Usaquén. "Twins from different fathers: A heteropaternal superfecundation case report in Colombia." *Biomédica* 40, no. 4 (2020): 604.

frameworks and modern scientific discoveries raises complex ethical, legal, and medical dilemmas, such as paternity denial, the occurrence of superfecundation, liability of the husband for false accusation (*qadhf*) and the accused woman for adultery if the DNA results favour the husband.

### **Evolution and Conception of Heteropaternal Superfecundation**

Superfecundation is the fertilisation of two or more ova from the same cycle by sperm from separate acts of sexual intercourse, which can lead to twin babies from two separate biological fathers.<sup>9</sup> The term superfecundation is derived from fecundity, i.e., the ability to produce offspring.<sup>10</sup> Homopaternal superfecundation refers to fertilising two separate ova from the same father, leading to fraternal twins. In contrast, heteropaternal superfecundation is a form of atypical twinning where the twins are half-siblings genetically. It is distinctly rare; nevertheless, it can occur either through a complex single occurrence of sexual intercourse, separate occurrences of sexual intercourse, or through artificial insemination.<sup>11</sup>

It can be termed the fertilisation of two or more ova within the same oestrous cycle due to multiple mating acts involving different males. This phenomenon leads to foetuses born in the same litter, sharing the same age but having different fathers. This occurrence is more common in poly-ovulatory species such as sheep. Female sheep are frequently mated with multiple rams simultaneously, creating a chance for a single female to be impregnated by multiple males during the same oestrous cycle.<sup>12</sup>

In humans, it happens when a woman releases two eggs simultaneously, which are then fertilised at different times within a four-day window of opportunity. The sperm can come from the same male or other males.<sup>13</sup> If different males are involved, the genetic relatedness between the twins averages 25%, essentially making them genetically equivalent to half-siblings. These twins, known as superfecundated twins, are recognised in such cases. The occurrence of these twins is believed to be rare, yet their actual frequency remains unknown. This uncertainty arises because only

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<sup>9</sup> James, W. H. "The incidence of superfecundation and of double paternity in the general population." *Acta geneticae medicae et gemellologiae: twin research* 42, no. 3-4 (1993): 257-262.

<sup>10</sup> James, W. H. "Dizygotic twinning, marital stage and status and coital rates." *Annals of Human Biology* 8, no. 4 (1981): 371-378.

<sup>11</sup> McNamara, Helen C., Stefan C. Kane, Jeffrey M. Craig, Roger V. Short, and Mark P. Umstad. "A review of the mechanisms and evidence for typical and atypical twinning." *American journal of obstetrics and gynecology* 214, no. 2 (2016): 172-191. See also Girela, Eloy, Jose A. Lorente, J. Carlos Alvarez, Maria D. Rodrigo, Miguel Lorente, and Enrique Villanueva. "Indisputable double paternity in dizygous twins." *Fertility and sterility* 67, no. 6 (1997): 1159-1161.

<sup>12</sup> Berry, D. P., A. Bohan, A. C. O'Brien, F. C. Campion, N. McHugh, and E. Wall. "Heteropaternal superfecundation frequently occurs in multiple-bearing mob-mated sheep." *Animal Genetics* (2020).

<sup>13</sup> Wenk, Robert E., Margaret Brooks, and Terry Houtz. "Heteropaternal dizygotic twinning: evidence of human superfecundation." *Laboratory Medicine* 17, no. 9 (1986): 526-528.

distinctly identifiable pairs, often due to differences in size, appearance, or uncertainty about paternity, become documented.<sup>14</sup>

In conclusion, heteropaternal superfecundation is a fascinating and complex phenomenon that occurs when a woman conceives multiple pregnancies with different biological fathers. Advancements in DNA testing have provided definitive evidence of this occurrence, overturning previous assumptions about human reproduction. Further research is needed to fully comprehend the mechanisms behind heteropaternal superfecundation and its implications for paternity testing, legal matters, and the psychological well-being of the individuals involved.

### **Reported Cases on Heteropaternal Superfecundation**

In August 2018, the Grupo de Genética de Poblaciones e Identificación at Universidad Nacional de Colombia was tasked with investigating the paternity of a pair of male twins. The request originated from an alleged father who harboured suspicions regarding the children's parentage, prompting him to seek paternity testing. Both twins were male, born after 35 weeks of gestation, the first weighing 1,700 g and the second 2,380 g. The mother, while denying any history of blood transfusions during pregnancy, disclosed a pre-conceptual use of oral contraceptives and a familial predisposition to twins on her maternal side.

The study was conducted with the explicit, written consent of both the twins' mother and the alleged father, who also provided consent to publish the study findings. The research utilised genetic markers from the alleged father to confirm the twins' parentage. The conclusive results of the study unequivocally established that the twins had different biological fathers, shedding light on the intricate genetic complexities underlying their parentage.<sup>15</sup>

Furthermore, a groundbreaking discovery in heteropaternal superfecundated twins emerged in Hanoi, the capital city of Vietnam, marking the first documented case in the country. This revelation was reported by BBC and substantiated through a meticulous DNA analysis. The family, cognizant of distinctive physical contrasts between the twins – one exhibiting curly hair and the other possessing straight hair – prompted the undertaking of a DNA test. This analysis confirmed the twins' heteropaternal nature, revealing that different individuals biologically fathered them. This pioneering case underscores the importance of genetic investigations in elucidating complex paternity scenarios and contributes valuable insights to the scientific understanding of multifaceted familial relationships.<sup>16</sup>

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<sup>14</sup> Segal, Nancy L., Jeffrey M. Craig, and Mark P. Umstad. "Challenge to the assumed rarity of heteropaternal superfecundation: findings from a case report." *Australian Journal of Forensic Sciences* 52, no. 5 (2020): 547-552.

<sup>15</sup> Mogollón, Fernanda, Andrea Casas-Vargas, Fredy Rodríguez, and William Usaquén. "Twins from different fathers: A heteropaternal superfecundation case report in Colombia." *Biomédica* 40, no. 4 (2020): 604-608.

<sup>16</sup> Segal, Nancy L., Jeffrey M. Craig, and Mark P. Umstad. "Challenge to the assumed rarity of heteropaternal superfecundation: findings from a case report." *Australian Journal of Forensic Sciences* (2019): 1-6.

In a groundbreaking revelation, Mia Washington and her fiancé James Harrison found themselves entangled in a startling discovery. Mia confessed to being involved in an extramarital affair with another man during the period when their twins, Justin and Jordan, were conceived. Suspicion arose when the couple observed distinct facial features in the twins, prompting them to seek confirmation through a paternity test. Their quest for answers led them to Dallas DNA Lab Clear Diagnostics, where an unprecedented outcome emerged. The laboratory experts, astounded by the results, declared a staggering 99.999 per cent certainty that Justin and Jordan were fathered by different men, marking a remarkable and unprecedented revelation in the realm of genetic analysis.<sup>17</sup>

In a notable case, a Passaic County superior court judge named Sohail Mohammed discovered a complex situation in a child support case. The case involved a woman who gave birth to twins, but a paternity test revealed that the man in question was the father of only one of the girls, born in January 2013. Based on expert testimonies, Judge Mohammed ordered a hearing and explained that if a woman has multiple partners during a single menstrual cycle and her ovaries release two eggs, both eggs could be fertilised. This phenomenon, superfecundation, results in twins with different fathers, termed “heteropaternal” or “bipaternal” twins.<sup>18</sup>

Mohammed identified the case as unprecedented in New Jersey, with only a few similar cases nationwide. He discovered two more cases in the US, one in New York City and another in Denver, Colorado. Before announcing his decision, Mohammed investigated possible explanations for the rare outcome, including the lab sample’s handling, potential errors, and the test’s accuracy (99.99%). Eventually, the twins’ mother received \$28 per week in child support from one of the fathers, as ruled by Mohammed.<sup>19</sup>

### Islamic Perspectives on Paternity and Lineage

*Nasab*, derived from the Arabic root “*nasaba*,” is a noun representing family ties, blood connections, and ancestry.<sup>20</sup> It signifies the relationship between individuals within a family, tracing lineage through the paternal or maternal side. Some linguists argue that *nasab* is primarily linked to the paternal side due to the traditional belief that a child belongs to the father, although there are exceptions.<sup>21</sup>

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<sup>17</sup> <https://www.medicalnewstoday.com/articles/150463#1> accessed 8 Jul., 20.

<sup>18</sup> <https://www.theguardian.com/us-news/2015/may/08/new-jersey-woman-twins-different-fathers-child-support> accessed 13th July, 2021.

<sup>19</sup> PASSAIC COUNTY, BD OF. SOS. SERVS. EX. REL T.M V A.S. See <https://www.casemine.com/judgement/us/5914f909add7b0493499fb45> accessed 4th October 2020.

<sup>20</sup> Yahya Ibn Muhammad, *al-Ifṣāu ‘an M’ana al-Ṣihāh*, (al-Riyadh: al-Muassah al-Sa’idiyyah, 1989), 789.

<sup>21</sup> Al-Kinshāwī Abubakar Ibn Husein, *Ashal al-Masālik Sharh Irshād al-Sālik fi Fiqh al-Imām Mālik*, (Beirut: Dar al-Fikr, 1999), vol. 1, 4. See Moeinifar, Mohaddeseh, and Faezeh Azimzadeh Ardebeli, "Lineage and the Rights of Cloned Child in the Islamic Jurisprudence", *Journal of reproduction & infertility*, vol. 13, no. 4 (2012): 183. Bentlage, Björn, "Legislating

The technical definition of *nasab* in classical books aligns closely with its literal meanings, as both emphasise the conventional nature of defining *nasab*. While some contemporary Muslim jurists have attempted to provide specific technical definitions, the distinctions from classical scholars are not significant. *Nasab* is essentially defined as the lineage from the paternal side, attributing a person solely to their father. Islamic law places great importance on protecting lineage, considering it one of the five objectives of Shari'ah.<sup>22</sup> Essential principles have been established to prevent the mixing of lineages and to preserve the human race from extinction.<sup>23</sup>

Islamic law prohibits fornication and discourages activities that could lead to it, such as avoiding intermixing of blood relations. This is to prevent the loss of lineage, neglect of rights, and abandonment of parental responsibilities, which can contribute to societal vices and violence.<sup>24</sup> Allah has strictly prohibited fornication and prescribed punishments for those who commit it to achieve these goals.<sup>25</sup>

Allah (s.w.t) says to the effect:

“And they who guard their private parts, except their wives and those their right hands possess, for indeed, they will not be blamed, but whoever seeks beyond that, then those are the transgressors.”<sup>26</sup>

Furthermore, the aforementioned verse strictly confines sexual satisfaction to two lawful avenues: through a legal marriage contract and through relationships with slave women, as permitted. To give the ultimate protection for the lineage and avoid intermingling, Allah (s.w.t) has prescribed '*iddha*<sup>27</sup> and *istibra* (waiting for the purification).<sup>28</sup>

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for the Benefit of Children Born out of Wedlock", *Die Welt des Islams*, vol. 55, no. 3-4 (2015): 378-412. Abas, A., A. Mohd, and N. Mohd Yusof. "Marriage in the Absence of Wali Nasab: Procedural Difficulties in Obtaining Consent from a Wali Raja," *Pertanika Journal of Social Sciences & Humanities*, vol. 23, no. 3 (2015): 34.

<sup>22</sup> Zahid, Anowar, "Corporate Social Responsibility: Approaching it from the Objective-Of Shari'ah Perspective", *UUM COLGIS Universiti Utara Malaysia*, vol. 2, no 5 (2009): 1-17

<sup>23</sup> Auda, Jasser. *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*, (International Institute of Islamic Thought (IIIT), 2008), 67.

<sup>24</sup> Jamaludin, Zakariyah, Zawawi Abu Bakar, and Wan Ab Rahman Khudzri Wan Abdullah. "Adolescent Pregnancy: Factors and Solution in Islamic Perspective", *Advances in Natural and Applied Sciences*, vol. 7, no. 4 (2013): 373-377.

<sup>25</sup> Abu Hâmid al-Ghazâlî, *Shifu al-ghalîl fî Bayân al-Shabahi*, (Baghdad: Matba'at al-Irshâd, 1971), 231.

<sup>26</sup> Al-Mu'mineen: 5-7.

<sup>27</sup> *Iddah* (period of waiting) is the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man.[1]:472[2] Its purpose is to ensure that the male parent of any offspring produced after the cessation of a nikah (marriage) would be known. The length of iddah varies according to a number of circumstances. See Ahmad, Nehaluddin, "A Critical Appraisal of 'Triple Divorce' in Islamic Law", *International Journal of Law, Policy and the Family*, vol. 23, no. 1 (2009): 53-61.

<sup>28</sup> *Istibra* means (for men) to wait until the last trace of urine stops coming out of the penis after urinating. It is *wajib* (obligatory) to do it. See Spectorsky, Susan A., *Chapters on*

The Lawgiver forbids marrying a pregnant woman until she delivers the child, aiming to avoid ambiguity regarding the child's paternity.<sup>29</sup> This regulation is grounded in the principles of *'iddah* and *istibra*, obligatory waiting durations following divorce or widowhood. Without the enforcement of these periods, there exists the potential for a woman to enter into a new marriage while still pregnant with her former husband's child.<sup>30</sup> This could lead to the new husband unknowingly assuming responsibility for someone else's child, a practice strongly prohibited by the Prophet.

“Whoever believes in Allah and the Last Day, and then he should refrain from levying his water on someone else's child.”<sup>31</sup>

### **False Attribution of a Child**

In Islamic law, women are specifically cautioned against engaging in any reprehensible actions that might result in the mixing of lineages—according to a hadith narrated by Abu Hurairah, the Prophet (pbuh) emphasised this warning.

“Any woman who falsely attributes a man to people to whom he does not belong, has no share from Allah, and Allah will not admit her to His Paradise. Any man who denies his son while looking at him (knowing that he is indeed his son), Allah, the Mighty and Sublime, will cast him away, and disgrace him before the first and the last on the Day of Resurrection.”<sup>32</sup>

Abdullah Ibn Umar reported that the messenger of said:

“Fierce is the anger of Allah at a woman who falsely attributes a child to a people to whom he does not belong, for making him look at their nudity and share from their property.”<sup>33</sup>

Elaborating on the significance of this hadith, al-Munāwī explained that if a woman conceives a child through adultery and deceitfully attributes the child to her lawful husband, the husband remains unaware of the truth. The child, aware of the father's private matters, grows up under the father's care and responsibility. Upon the father's death, the falsely attributed child would inherit from him. Such deceitful actions,

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*Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh*, (Texas: University of Texas Press, 2010), 28.

<sup>29</sup> Al-Kāsānī Abu al-‘Ala’, *Badai’u al-Sanāi’u fi Tartīb al-Sharai’u*, (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1976), 193.

<sup>30</sup> Ali, Kecia, *Marriage and Slavery in Early Islam*, (Cambridge: University Press, 2010), 27.

<sup>31</sup> Al-Tirmidhi, Abu ‘Isa, *Sunan al-Tirmidhi*, (Beirut. Lebanon: Dar Al-fikr Library 1986), 1140.

<sup>32</sup> The chain of narration of the hadith is graded authentic (hasan) by Ibn Haja al-‘Asqalani. See

Ibn Hajar al-‘Asqalāni, *Talkhis al-Khabir*, (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1989), 172.

<sup>33</sup> Al-Haithami Nuruddin ‘Ali *Majma’u al-Zawaid wa Manba’u al-Fawaid*, (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1988), 225.

where a woman tries to undermine the natural order designed for humanity, deserve the condemnation of Allah for their treachery.<sup>34</sup>

### **Shari'ah's Inclination towards Establishing Child's Legitimacy**

As mentioned earlier, lineage occupies a significant role as one of the fundamental goals of Shari'ah, underscoring its utmost importance.<sup>35</sup> Therefore, humans have been strongly urged to undertake essential steps to fulfill this essential aim. One way to attain this objective is by forming a legitimate family through a valid marriage. While there are various advantages to marriage, the act of having children is especially significant in this context.<sup>36</sup> Having children has been conferred with a favour of marriage upon mankind by Allah (s.w.t). He says to the effect:

“And Allah has made for you from yourselves mates and has made for you from your mate’s sons and grandchildren and has provided for you from the good thing.”<sup>37</sup>

The Prophet (pbuh) has also said:

“Marry the one who is fertile and loving, for I will boast of your great numbers on the Day of Resurrection.”<sup>38</sup>

The true advantages of lineage can be achieved through the familial connection between parents and their children. Shari'ah strongly promotes the responsibilities of nurturing, safeguarding, and confirming the legitimacy of children within this family structure. Additionally, it strictly forbids fathers from dishonestly denying the paternity of their children.<sup>39</sup> The Prophet (pbuh) said:

“Any man who denies his son while looking at him (knowing that he is indeed his son), Allah, the Mighty and Sublime, will cast him away, disgrace him before the first and the last on the Day of Resurrection.”<sup>40</sup>

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<sup>34</sup> Al-Munawi Muhammad, ‘Abdul al-Rauf, *Faidh al-Qadir Sharhu al-Jami’u al-Saghir*, (Beirut: Dar alKutub al-‘Ilmiyyah, 1994), 658

<sup>35</sup> Esen, M. Fevzi, "A Statistical Framework on Identification of Maqasid Al-Shariah Variables for Socio-Economic Development Index", *Journal of Business Studies Quarterly*, vol. 7, no. 1 (2015): 107.

<sup>36</sup> Yusuf al- ‘Alim, *al-Maqasid al- ‘Ammah lil –al-Shari’at al-Islamiyyah*, (Jordan: al-Mahd al- ‘Alami lil al-Fikri al-Islami, 1994), 405.

<sup>37</sup> Al-Nahl: 72.

<sup>38</sup> Ibn Hibban Muhammad Ahmad, and *Sahih ibn Hibban bi Tartib ibn Liban*, (Beirut: Mu’assast al-Risalah, 1993), 363.

<sup>39</sup> Powers, David S., "Kadijustiz or Qadi-Justice? A Paternity Dispute from Fourteenth-Century Morocco", *Islamic Law and Society*, vol. 1, no. 3 (1994): 332-366.

<sup>40</sup> Ibid, 225.



The Prophet (pbuh) has established the legitimacy of a child and his lineage with a seemingly unconvincing proof and he never rejected it (legitimacy of a child) except with incontrovertible evidence.<sup>41</sup>

The Prophet (pbuh) was reported to have upheld resemblance to confirm the legitimacy of a child, which was not applied in refuting it (legitimacy). ‘Aisha (R.A) reported:

“One day Allah’s Apostle (pbuh) visited me looking pleased and said: ‘Aisha, don’t you see Mujazziz al-Mudliji? (He) entered my house and said Husāmah and Zaid with a rug over them covering their heads, but their feet appeared, and (he) said: these feet are related to one another.”

In another narration by ‘Aisha:

Allah’s Apostle came to me in a happy mood with his features glittering with joy, and he said, “Have you not heard what the *Qāif* has said about Zaid and Husama? He saw their feet and remarked. These belong to each other (i.e., they are father and son.).”<sup>42</sup>

In view of these narrations, the majority of Muslim jurists with the exception of the Hanafi scholars<sup>43</sup> have considered physiognomy (*qiyāfah*) as a means of establishing paternity.<sup>44</sup> The mode is known as *qiyāhfah* and could be used to establish paternity as opined by Umar, Ibn ‘Abbas and Anas (R.A). It has been reported by Ibn ‘Abdul al-Barr that no converse opinion was reported from other companions of the Prophet (pbuh).<sup>45</sup>

It was recorded that the pagans questioned the legitimacy of Usamah because he was short and had a fair complexion. The Prophet (pbuh) disapproved of this prejudice, as he dearly loved Zaid. When the Prophet (pbuh) learned about the physiognomist’s positive assessment of Zaid and his father, he was overjoyed. This deep happiness demonstrated the Prophet’s approval of physiognomy.<sup>46</sup>

Imam Al-Shafi’ stated that numerous scholars from Madinah and Makkah had informed him that they had knowledgeable individuals and judges who relied on the

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<sup>41</sup> Ishaque, Shabnam, "Islamic Principles on Adoption: Examining The Impact Of Illegitimacy And Inheritance Related Concerns In Context Of A Child's Right To An Identity", *International Journal of Law, Policy and the Family*, vol. 22, no. 3 (2008): 393-420.

<sup>42</sup> Al-Bukhari Muhammad Isma’il, *Al-Jamiu al-Musnad al-Sahih al-Mukhtasar*, (Beirut: Dar Tawqu al-Najat, 2001), 23.

<sup>43</sup> The Hanafis are of the same opinion with the Zaidis and Ibadis in refuting qiyafah as a proof to establish child’s legitimacy. See *Al-Shaukani, Muhammad Ali, Nailu al-Awtār*, (Cairo: Dar al-Hadith, 1998), 80.

<sup>44</sup> Muhammad Yusuf, *Sharhu al-Nail wa Shifāu al-‘Alil* (Oman: Wizarat al-Thaqafah wa al-Turath al-Qawmi, 1986), 170.

<sup>45</sup> Ibn ‘Abd al-Barr, *Al-istidhkar al-Jamiu li Fuqahah al-Amsar*, (Beirut: Dar al-Kutub al-Ilmiyyah, 2000), 173.

<sup>46</sup> Al-Marudi, *al-Hāwī al-Kabīr Sharhu al-Mukhtaṣar al-Muzani*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1999), 382-383.

opinions of physiognomists when delivering judgments.<sup>47</sup> Similarly, the Prophet's refusal to refute the legitimacy on the account of resemblance<sup>48</sup> has been reported by al-Bukhari and Muslim:

Abu Hurairah narrated that a Bedouin came to Allah's apostle and said: "my wife has delivered a black boy, and I suspect that he is not my child." Allah's Apostle said to him, "do you have camels?" the Bedouin answered affirmatively. The Prophet said, "what colour are they?" the Bedouin said, "they are red." The Prophet said, "are any of them grey?" he said there are grey ones among them." The Prophet said, "where do you think this colour came from?" the Bedouin said, "O Allah's Apostle! It resulted from hereditary disposition." The Prophet said, "and this (i.e., your child) has inherited his colour from his ancestors." The Prophet did not allow him to deny paternity of the child.<sup>49</sup>

The Prophet (pbuh) did not dispute the child's legitimacy; instead, he ensured that the child acknowledged his true parentage. This hadith illustrates how the Prophet (pbuh) carefully verified the child's legitimacy and connected him to his lineage to the best of his ability. It also highlights Shari'ah's preventive measures to safeguard lineage, discouraging disownment as much as possible and sternly cautioning against baseless suspicions.<sup>50</sup>

### **Principle of Precautionary Measure in Determining Legitimacy of Children**

Scholars have emphasised the vital importance of confirming a child's legitimacy. Their analysis has led to a maxim derived from the Prophet's (pbuh) rulings: "The caution exercised in asserting a child's legitimacy outweighs when he is denied." In cases of conflicting claims about a child's legitimacy, priority must be given to affirming legitimacy. This prioritisation ensures the child's safety and protects them from becoming social outcasts.<sup>51</sup>

Al-Shirāzi and Ibn Qudāmah said while explaining this maxim, "precaution that is observed when claiming child's legitimacy is not considered when disclaiming".<sup>52</sup> Thus, when a woman gives birth to a child, it is legally presumed that the child belongs to the husband.<sup>53</sup> That child is to be attributed to his father based on

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<sup>47</sup> Ibid., 317.

<sup>48</sup> Al-Baghawi, *Sharhu al-Sunnah*, (Damascus: al-Maktab al-Islamiy, 1983), 285.

<sup>49</sup> Al-Bukhari Muhammad Isma'il, *Al-Jamiu al-Musnad al-Sahih al-Mukhtasar*, (Beirut: Dar Tauqu al-Najat, 2001), 23.

<sup>50</sup> Ibn Hajar Asqalani, *Fathu al-Bā'i Sharhu Sahih al-Bukhāri*, (Beirut: Dar al-M'arifah, 1959), 366.

<sup>51</sup> Ahmad S'ad 'Ali, "*al-Takhrīj al-Fiqhī li Tansībi Awlād al-Zinā wa al-Ightiṣāb*", (Cairo: Majallah Dar al-Iftāi al-Miṣriyyah, 2012), 7.

<sup>52</sup> Al-Shirāzi Ibrahim Ali, *al-Muadhab fi Fiqh al-Imam al-Shāfi'i*, (Beirut: Dar al-Fikr, 2000), vol.2, 123.

<sup>53</sup> Ibn Qudāmah Abdullah Ibn Ahmad, *al-Kafi*, (Giza: Dar Hijr, 2008), 288.

precaution to establish the child's legitimacy, whereas the child cannot be disclaimed as a precautionary measure.<sup>54</sup>

Moreover, it has been established that when a woman gives birth to twin children and her husband disclaims one of the children while claiming paternity, the disclaimed child shall be attributed to him, considering the acknowledged one.<sup>55</sup> However, the adverse position is not applicable because "precaution that is observed when claiming child legitimacy is not considered when disclaiming.

Muslim scholars have referenced various instances to support this principle. For example, if a woman arrives from Rome with a child whose parentage is uncertain, and a Muslim man asserts paternity with conditions specified by Islamic law, the scholars have ruled that the child would be considered his offspring.<sup>56</sup> This is because the individual making the claim might have travelled to the woman's homeland, or it is possible that the woman entered a Muslim nation, where they both might have engaged in intimate relations either through marriage or under ambiguous circumstances.<sup>57</sup> Therefore, the child would be attributed to him for being within the realms of possibility and no one else claiming the child, contrary to when their meeting is impossible.<sup>58</sup>

In another scenario, if a man hailing from a Muslim country asserts paternity of a child born to a woman in Rome without confirmation of whether he has ever visited Rome or not, the child would be attributed to him, regardless of the woman's acceptance or rejection. In this context, her affirmation or negation holds no significance as long as he remains unmarried to someone else. Hence, the child would be attributed to him, irrespective of whether his visit to Rome is confirmed or not. This is because establishing the legitimacy of a child's lineage is crucial. It is plausible that he could have visited without public knowledge, or the woman might have entered that Muslim city.<sup>59</sup> Moreover, if a man's wife gives birth to a child after having spent twenty years on a journey and the husband acknowledges the child, he (the child) is to be attributed to him as long as no one claims paternity.<sup>60</sup>

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<sup>54</sup> Ibid., 289.

<sup>55</sup> In some classical books of Islamic law, when a husband acknowledges a twin child and disclaim the other, such a man would be punished for false accusation (*qadhf*) on the basis that acknowledging a twin amounts to the acknowledgement of the other one. This judgement is based on the fact that it is impossible to have twins with different father biologically. However, modern scientific technology has revealed the fallacy of this assessment by differentiating between fraternal and identical twins. This would be discussed at length in chapter four.

<sup>56</sup> Ibn al-Muflih Ibrahim Muhammad, *al-Mubdi 'I fī Sharh al-Miqnī 'i*, (Beirut: al-Maktab al-Islamiy, 1979), 310.

<sup>57</sup> Al-Rafi'iy, *Fathul al- 'Azīz Sharhul al-Wajīz*, (Beirut: Dar al-Fikr, 2000), 186-187.

<sup>58</sup> Ibid.

<sup>59</sup> Al-marudi Ali Muhammad, *al-Hāwī al-Kabīr fī Fiqh Madhab al-Shāfi 'i*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1999), 104.

<sup>60</sup> Ibid., 335.

Scholars have debated the scenario where a person denies paternity of a child after initially acknowledging it. For example, suppose a man asserts his fatherhood of an anonymously identified child based on conditions outlined by scholars and later renounces that acknowledgement. In that case, there is a divergence of opinions among scholars. According to the Shafi'i School of Law, as narrated by Ibn Abi Hurayrah, they believe that his retraction can be accepted. They draw a parallel to retracting acknowledgements concerning money, which is permissible and recognised.<sup>61</sup>

Nevertheless, a significant majority of Muslim scholars have distinguished between money and lineage, emphasising the cautious approach taken in lineage-related matters. Unlike money, lineage holds greater value. Hence, upholding the child's legitimacy through the initial acknowledgement made is crucial.<sup>62</sup> Therefore, if a child's legitimacy is confirmed through *iqrar*, it cannot be negated through disclaim, as what is proven with undeniable evidence cannot be refuted with weaker proof. For example, if a child's legitimacy is established through *bayyinah* or *firāsh*, it cannot be denied by the one who acknowledged it.<sup>63</sup>

### **Disavowing a twin and acknowledging the other**

Muslim jurists find disavowing a child born in lawful wedlock on the basis of doubt and a feeling of uncertainty reprehensible. Their efforts gave birth to a maxim revolves around the *maqāsid* of establishing the legitimacy of a child. The maxim goes thus: "The precaution that is observed when claiming child's legitimacy is not considered when disclaiming".<sup>64</sup> Thus, when a woman gives birth to a child, it is presumed that the child should be attributed to the husband.<sup>65</sup> That child is to be attributed to his father based on the precaution to establish the child's legitimacy, whereas the child cannot be disclaimed based on precautionary measures.<sup>66</sup>

Disavowing a child born by a legally married woman by her husband necessitates carrying out imprecation as agreed by Muslim jurists. However,<sup>67</sup> it has been held by some classical jurists that when a woman gives birth to twins from the same womb, and her husband acknowledges one of them while disclaiming paternity of the other, both children are legally attributed to him considering the acknowledged.<sup>68</sup>

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<sup>61</sup> Al-'Ainiy Ahmad Qasim, *al-Taj al-Mudhib li al-Ahkam al-Madhab*, (Sana: Dar a-Hikmat al-Yamaniyyah, 1993), 63-64.

<sup>62</sup> Al-Dusūqī Muhammad 'Arafat, *Hashiyat al-Dusūqī 'alā al-Sharh al-Kabir*, (Cairo: Matba'at al-Sabih, 1934), 419.

<sup>63</sup> Ibn Hajar al-Hathami, *al-Fatawa al-Kubra al-Fiqiyyah*, (Cairo: Matba'at al-Mash'ad al-Husaini, 1991), 125.

<sup>64</sup> Al-Shirāzi Ibrahim Ali, *al-Muadhab fi Fiqh al-Imam al-Shāfi'i*, (Beirut: Dar al-Fikr, 2000), vol.2, 123.

<sup>65</sup> Ibn Qudāmah Abdullah Ibn Ahmad, *al-Kafi*, (Giza: Dar Hijr, 2008), 288.

<sup>66</sup> Ibid., 289.

<sup>67</sup> Abu Bakr Muhammad ibn Abi Sahl al-Sarkhasi Al-Mabsut li-Sarkhasi, (Beirut: Dār al-Fikr li-l-Tibā'ah wa-l-Nashr wa-l-Tawzī, 2000), vol. 7,85

<sup>68</sup> Maḥmūd al-Shiddīr Al-Shahīd Al-Najāri , Al-Miḥṭāl-Barhānī, (Beirut: Dar Ihya' al-Turath al-Arabi, 1989), vol. 4, 161.

Consequently, imprecation (*li'ān*) would be carried out for the couple. On the other hand, if he denied the first and accepted the second child, both children are attributed to him, and he would be subjected to punishment (*qadhf*). This is because acknowledging one of them is tantamount to acknowledging both, as they are twins created from the same fluid.<sup>69</sup> It has been upheld that the husband's denial of the first [child] amounts to accusing her of adultery.<sup>70</sup>

It appears unconventional that some classical jurists would give a verdict that when a husband disavowed a twin and simultaneously affirmed the paternity of the other, he would be held liable for false accusation (*qadhf*) and be punished accordingly. This is because what is prescribed when a woman is accused of adultery by her husband is imprecation (*li'ān*). The rationale behind the verdict could be fathomed from Hanafi School of law; according to the School, the imprecation procedure and the prescribed punishment are mutually exclusive. Disavowing a twin indicates accusing his wife of infidelity while acknowledging the other at the same time is a clear indication of chastity.<sup>71</sup> Therefore, the husband would be punished for false accusation. Thus, both the disavowed and the acknowledged twins shall be attributed to him, i.e., considered legitimate.<sup>72</sup> This is likened to a wife is accused of infidelity by her husband, who simultaneously praises her chastity. Lian would not be carried out; rather, such a husband shall be punished for false accusation because the imprecation procedure and the prescribed punishment are mutually exclusive.<sup>73</sup>

In light of technological advancements demonstrating the possibility of twins having different biological fathers, the traditional legal interpretations formulated by classical jurists rested upon jurisprudential presumptions that now warrant reconsideration. The ruling mandating punishment for false accusations against a husband who acknowledges one twin while denying the other is rooted in the belief in the impossibility of heteropaternal superfecundation during the era of those jurists. Islamic law adheres to the established principle that a legal ruling is typically contingent upon its underlying cause or reason. Where this cause exists, the corresponding Shariah ruling is applicable. The same principle holds in situations where the cause is absent. Therefore, re-evaluating these legal tenets becomes imperative in light of contemporary scientific understanding.<sup>74</sup> While it is morally

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<sup>69</sup> Hasan al-Sheikh Hath, *al-Muntaqah fi Qadāi al-Ahwal al-Shakhsiyyah*, (Algeria: 2006), vol.1 121.

<sup>70</sup> Ibn Nujaim al-Hanafi, *al-Bahr al-Rāiq Sharh Kanz al-Daqāiq*, (Beirut: Dar al-Ma'rifah, 2003), vol. 4, 134. See *al-Fatāwah al-indiyyah fi Fiqh al-Imam al-'Azam Abi Hanifah al-Nu'man* (Beirut: Dar al-Fikr, 1991) vol. 4, 133, *al-Mabsūt li al-Sarakhsi*, (Lebanon Dar al-Fikr, 2000), vol. 7, 85.

<sup>71</sup> Al-Kāsāni Abu al-'Ala', *Badāi'u al-Sanāi'u fi Tartīb al-Sharāi'u*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1976), vol. 6, 247.

<sup>72</sup> Al-Kāsāni 'Alāu al-Dīn, *Badāi'I al-Sanāi'u fi Tartīb al-Sharāi'u* (Beirut: Dar al-Kitab al-Arabi, 1982), vol. 3, 247.

<sup>73</sup> Al-Kāsāni 'Alāu al-Dīn, *Badāi'I al-Sanāi'u fi Tartīb al-Sharāi'u* (Beirut: Dar al-Kitab al-Arabi, 1982), vol. 3, 247.

<sup>74</sup> Al-Qarafi Ahmad Idris, *Anwar al-Buruq fi Anwai al-Furuq*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998) vol. 1, 378.

objectionable for a husband to deny paternity of a child born within the confines of marriage, it is essential to recognise that legal consequences should not be imposed in instances of heteropaternal superfecundation. This stance aligns with the perspective established by classical jurists, who based their judgment on the presumption of impossibility.

Ultimately, a woman whose husband denied one of her twins would not be liable for the crime of *zina* (adultery) let alone being punished, provided she does not make a confessional statement against herself. She would also be acquitted due to the existence of doubt, as the occurrence of heteropaternal superfecundation is not an established proof for punishment. It is established in Islamic law of evidence that punishment is averted in the face of doubtful proofs.

## Conclusion

Exploring the complexities of heteropaternal superfecundation within the framework of Islamic law, this study has uncovered the possibility of twins having different biological fathers despite its exceedingly rare occurrence. The classical discourse on imprecation reveals that acknowledging one twin is inherently inseparable from accepting the other. The act of disowning one twin while affirming the existence of the other gives rise to a serious accusation of slander (*qadhif*), a charge met with stringent legal repercussions. This rigorous stance was instituted with the primary objective of preserving the integrity of lineage, a fundamental imperative in Islamic jurisprudence. It emanates from the underlying supposition that the denial of one twin implicitly implies the denial of the other, and conversely, affirming one necessitates the acknowledgement of both, reinforcing the inseparable bond between the twins in legal and social contexts.

The dedication of classical jurists to protecting the welfare of children and discouraging groundless assumptions in denying paternity is truly admirable. Their commitment to justice and fairness in matters of parentage is evident. However, a careful consideration of the complexities of human biology urges us to reconsider certain aspects of traditional legal practices. For instance, the imposition of *qadhif* punishment on a father who denies the paternity of one twin while acknowledging the other is a matter that demands a nuanced perspective. In cases where such rare occurrences are possible, avoiding hasty judgments and punishments that might not align with the biological realities is crucial.

Furthermore, in the modern era, advanced technologies like DNA profiling have become widely accessible and are often used to establish biological relationships with certainty. While these scientific methods are valuable tools, their excessive use can raise ethical concerns. Therefore, there is a need to strike a balance between the application of these technologies and respecting the privacy and dignity of individuals involved. In situations where DNA testing becomes unavoidable due to legal or social demands, it is imperative to approach the matter with utmost sensitivity. Neither spouse should face punitive consequences; the wife should not be accused of adultery, nor the husband should be subjected to *qadhif*. Instead, an alternative resolution in the form of imprecation (*li'ān*) can be considered. Imprecation allows the concerned

parties to invoke divine intervention to resolve the issue, emphasising the situation's gravity without resorting to legal punishments.