

## 'LEAN' under Iran's Law

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### ABSTRACT

Undoubtedly the legislator has been so dedicated about individuals' ancestry protection and therefore, according to the philosophy of protection and stability of family system, it has paid close attention to the issue of "Offspring Denial" and its applying methods. Damnation is one of juridical laws which results in cutting marital relationship and offspring denial. According to Koran stipulation, "Witness" is also another reason which could be referred to for offspring denial. However nowadays, forasmuch as science progression, there are ancestry denial and identification methods available, which seem to have more certainty than witnessing. This paper has covered a research on this important theme, and investigated the position of such scientific achievements related to offspring denial issue, while regularly ancestry denial methods have been restricted to "Damnation" and "Witnessing" so far.

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### Introduction

#### Prelude

Islam has always been specifically paying attention to the family foundation protection issue up to the point that, it has codified some principals and laws about ancestry proof and denial. Therefore, the legislator shall be prudent when arrives to the family zone and must avoid any action against family sustainability, and in the meantime try its best to protect and consolidate the family with its innovations and expressions. Damnation is one of those laws, which has been brought up in Islamic jurisprudence and Iran laws, for cutting marital relationship as well as offspring denial, however its aspects are ambiguous and there are disagreements about it between jurisconsults. There is not any independent discussion in Iran civil law under offspring denial issue, however it has been covered in several acts under "ancestry" title in Offspring book. On the other hand, nowadays along with scientific advancements, there are particular possibilities of using modern achievements for people's identification. Such technologies are so certain that could be sometimes even more reliable than witnessing. However Islamic jurisconsults have disagreements in using modern methods, so that some consider it as authorized and don't confine offspring denial only to damnation, while some others limit offspring denial exclusively to damnation and justify such a thing by considering modern scientific methods causing family foundation weakness and rupture. This research begins with "Damnation" meaning and its laws, and it continues with an investigation on the position of other reasons like offspring denial expertizing in jurisdiction and civil law.

### Damnation

"Damnation" here, by its original meaning in Arabic language conjugation, means "damning each other". It's a kind of religious cursing ritual being performed between husband and wife, when husband accuses his wife to adultery and claims that he himself has witnessed the adultery scene, however he has no other witnesses, or there is an offspring who has been born in his marital zone and he denies its incorporation to himself (Ebn Mnzor, No date; P.276) Damnations results in "Hadd Excretion" or "offspring denial". Husband is not allowed to subject his wife to Hadd based on doubt and he should have certainty in this, and if wife refuses confessing to adultery and there would be no witness for that either, husband's claim wouldn't be accepted and even if wife requests husband to be subjected to Hadd, it will be done, unless Damnation exists with its whole conditions, and then Hadd would be abrogated about him (tahriralvasile, 3:642)

### Damnation Circumstances

It was asked from Imam Reza about Damnation circumstances, and he answered:

"Imam sits back to Mecca with the husband at his right and the wife and offspring at his left hand side. Then the husband stands up and swears for four times to God with the glory word of it, that he is honest in what he attributes to the wife. After that, Imam addresses him and says:" You man, beware from God, because God's curse is so much harsh and difficult," then man says : "God's curses to me, if I am a liar in what I attribute to this woman," then the woman stands up and swears for four times to the glory word, Allah, and says: "This man is lying in what he attributes to me," then Imam addresses to her and says:" You woman,

beware from God because God's anger is intense," and the woman says : "God's anger to me, if this man is sincere about what he says and accuses me to," now if woman doesn't accept the Damnation, she will be stoned, and it will be done from her back side and not from her front side because beating and stoning shouldn't reach her face and her genital organs but her other body parts, and meanwhile pregnant women won't be stoned. But if the woman accepts Damnation she won't be subjected to Hadd, and there will be separation between them forever (manlayahzaroholfaqih, 5:238)

### **Damnation Effects**

Whenever damnation comes off with its whole conditions and rituals, it will have effects as below:

1. Matrimony will be rescinded. The legislator has construed this cancellation as subtraction. (Act 1052 , civil law)
2. Renewed marriage between couples who have separated through Damnation will be forbidden forever. Act 1052 says: "Separation happened by damnation leads to eternal unlawfulness."
3. The offspring related to damnation doesn't relate to husband and any paternal relatives; however its relation to mother and maternal relatives won't be eliminated. Also there would be no inheritance between the offspring and the damner. Act 882 of civil law says: "After Damnation, husband and wife don't inherit from each other. Also the offspring who relates to Damnation because of the father refusal doesn't inherit from father, nor does the father from him/her. However the offspring inherits from mother and her relatives, as the mother and her relatives inherit from her too. (Emami, & Safai, 1996; P.57)
4. The one who performs damnation doesn't spend to the offspring, however in precaution cases like below, he behaves with the offspring like his children: Not paying Zakat (Alms-tax) to him, proving intimacy between this offspring and other children of himself, not enforcing retaliation between the offspring and the damner, and impossibility of witnessing between these two (the denied offspring and the damner father) for each other (mousaviahomeyni, 2:325; <http://www.blestfamily.com/show-article.php?aid=187>)

### **Damnation Reasons**

There are two reasons for damnation: first; attributing adultery to the woman, second; offspring denial;

#### **1. Attributing adultery**

Attributing adultery to the chaste permanent wife, who has had contiguity with husband (from back or front), along with claiming husband's observation to the adultery scene, in other words in lack of any other witness. If husband attributes adultery to the wife who is famous for this action, there will be neither Hadd necessity for him, nor Damnation. Adultery attribution is authorized only when person sees it totally obviously and doesn't just round it off based on hesitation. Woman shall be mature (from the aspect of intellect, puberty and

growth), and also not being deaf or dumb, otherwise Damnation is not proven. (mousaviahomeyni, 2:325)

#### **2. Offspring denial**

This happens when the husband denies a child who is born within his marital status, in condition of his contiguity with his wife over six up to ten past months, although he would have been silent about this issue at the child's birth time, in other stronger words, as long as not frankly or implicitly confessing the child is his – like people saying to him:" God bless this child for you," and he answers:" Amin" - before denying it. Allomatodameshghiya, 3:52; mohaghegh helli,P200)

The husband can't deny the offspring who is born in his marital status together with its incorporation to himself (like having continuity with the woman and shedding his semen into her genitals or around, somehow that it would be possible for the uterus to absorb it, while also a minimum to maximum time of six to ten months has passed from this date up to the childbirth); But if he is certain that child's incorporation is impossible with him, it is necessary to deny it with Damnation though, because otherwise the child will be incorporated to him and inheritance and intimacy orders will apply to him.(mousaviahomeyni, 2:325)

Ancestry denial is being called "offspring denial" provided that it is apparently expressed by the father in order to refuse paternity approval rule. According to Islamic jurisconsults offspring denial is possible in two ways: firstly; Damnation, and second Obvious Reason\*. Islamic jurisconsults believe that when we are in the lack of obvious reason, only Damnation could be the way to offspring denial and if obvious reason is available, there will be no need for Damnation according to Sura NOOR, verse 6.

Imami jurisconsults have expressed offspring denial based on two presumptions: first; offspring denial when paternity approval rule doesn't apply, and second; offspring denial when paternity rule applies.

#### **Clause 1 – Offspring denial in condition of not applying paternity approval rule**

Accuracy of paternity approval depends on some conditions like: proven maternal ancestry, true matrimony between man and woman, conception within marital period and childbirth in between six to ten months after contiguity. With this assumption one main basement of paternity approval doesn't come off, for example if the child is born before six months after matrimony, it will result in paternity approval cancelation and it doesn't even need judicial investigation. This child doesn't incorporate to the husband and here there is no need for Damnation. Civil Registry office also is not allowed to issue identification card for the

child with father's family name unless man and woman come together to the office and confess to be the child's parent, and then request identification card issuance (javaralkalam, 31: 224; masalek, 1:543) In this case it is assumed that marriage happened before six months from childbirth, so child is legitimate and incorporated to the man and the woman.

For a child born before six month from marriage, Imami jurisconsults believe that: it is necessary for the husband to deny the offspring because he knows it's not his child so man's confession to ancestry and incorporation of ancestry orders for the child is forbidden. This is the reputable word between Imami jurisconsults. But Sheikh Mofid and Sheikh Tousi believe that in the aforesaid situation, husband is choosy between offspring denial and confession to ancestry. However if the child is born at least after six months from marriage and paternity approval rule applies to him, husband should prove the reversal of paternity approval rule for offspring denial.

#### **Clause 2 – offspring denial in paternity approval rulesituation**

In this assumption, paternity approval rule has been applied based on appearance, while it hasn't really been applied in reality (like childbirth after one year of contiguity). Since, in this assumption one of the paternity approval rule basements (like contiguity within one year) hasn't come off, and only the couple knows it since contiguity is a hidden issue, if the couple can allege obvious reasons (like bringing four witnesses who say within last year he has been taking a trip and there has been no possibility for him to be with his wife), then there will be no need for Damnation.

According to Civil law, Act 1322, Paternity approval is one of legitimate approvals and according to Act 1323, a legitimate approval is valid unless its reverse is not proven. This Act says: "legitimate approvals are valid in all claims (even claims which are not provable by witness testimony) unless there would be reasons against it," and according to the civil law it is possible to prove the reverse of paternity approval by any reason. However according to jurisconsults based on Sura NOOR, verse 6, when there is no witness other than the man and woman, Damnation is needed for offspring denial, and in case of witness presence there is no need for Damnation. So when man has not any obvious reason for proving reverse of paternity approval, only Damnation is applicable, and if there is obvious reason, it should be alleged and there is no need for Damnation. (khomeyni.)

#### **Offspring denial by obvious reason (witness)**

According to Imami jurisconsults, if father wants to eliminate paternity approval rule by proving lack of contiguity, there is no need for DamnationEmami, & Safai, 1996; P.57; khomeii, 3: ). In this case, offspring denial results from two things: "Couple's agreement on lack of contiguity in that period of time, and proving their

remoteness from each other by obvious reason (witness) and what is considered to be an obvious reason. There is no problem on husband offspring denial by proving couple's remoteness, and according to Sura NOOR , verse 6, jurisconsults believe that offspring denial is possible only by witness (najafi, 31: 224). However there is disagreement on couple's accordance on lack of contiguity. Some of jurisconsults have said: "Right goes to the couple, as contiguity is something that only man and woman are aware of, and alleging obvious reasons on it is also impossible and obstructed; so if their agreement on lack of contiguity would be considered insufficient, then according to the paternity rule, child belongs to the husband, and so discomfiture and damage would be inevitable specially since Damnation is not possible here, because Damnation is only provided that man and woman disagree on child's ancestry and address each other as liars."

Another problem being brought up here is that although according to Sura NOOR, verse 6, some of jurisconsults, only believe in four witnesses for proving reverse of paternity approval in offspring denial, and reject other reasons. Now, are there possibilities for proving reverse of paternity approval by other reasons, or not? First of all "Expertise" nature will be studied to find the answer.

#### **Expertise Nature**

Whether the opinion of Experts is considered a witness or not, there are different points of view in jurisdictional books, as jurisconsults have introduced criteria for recognizing testimonial and its distinction from with other types, which could be utilized in recognizing "Expertise" and "Testimonial". Some jurisconsults consider witness's certainty and knowledge on an event, as being enough for testifying and so they don't believe in testimonial reliance on belief senses, and also authorize the achieved knowledge, based on anything other than senses(lankarani, ). It has been argued that testimony has a lexical and common meaning which is: "informing in the sense of suggestion and quiescence of an issue" (See more at: <http://www.farsnews.com/newstext.php?nn=13910417001226#sthash.U33F1IK6.dpuf>)and also has an expressional particular meaning to the jurisconsults and that is: "categorical informing of necessary right for others else than the governor". Not any independent nature is considered for "testimony", but only those cases in which plurality is needed, are considered as testimonial. So any news is considered as testimonial if plurality necessity is required for that. However some jurisconsults have considered witness's knowledge as observation or hearing and so they believe that having a sense of news is the separation border between testimonial and Expert opinion. They actually believe that expertise informing is based on guess, vote and Ijtihad, and they don't consider any other conditions on expertise authority. As for necessary conditions of experts, some jurisconsults have insisted on the existence of testimony conditions like plurality and justice in experts, and minimum required conditions of experts opinion authority are those cases in which the experts possess testifying conditions, and therefore according to these group of jurisconsults, experts opinion is considered to be sort of a testimony as its validity depends on qualifying in testimonial situations. There are others also who don't differentiate seeing and hearing as a specific

sense and have considered the knowledge achieved by other apparent senses like touching, smelling and tasting to be enough for testifying too. Also there is another group which has emphasized and stipulated about the necessity of testimonial conditions related to experts. (See more at: <http://www.farsnews.com/newstext.php?nn=13910417001226#sthash.U33F1IK6.dpuf>). This group has acknowledged the opinion of experts as a separated nature from testimonial, and therefore don't consider any necessity to include testimony conditions for experts, but again they haven't explained about the criterion of differentiation between testimonial and experts. Mirzaye Naeeni has considered referring to experts as something distinct from testifying and he ratiocinates that sometimes information of a tangible case is rooted in an outward sense, while sometimes it is totally based on guess which only a certain group can perceive. First type is testimony and testimonial conditions -like informer's justice and in case of judgment plurality of informers - is necessary for it. Second type is the case of referring to experts in which testimony conditions is not necessary and its documentary is wise people's biography in referring to the experts as well as lack of proof on its religious ban. Next, according to the reasons, based on which judges have become authorized to use obvious reasons, in case of pleading and dispute, plurality of experts has been considered necessary too (<http://farsnews.com/printable.php?nn=13910417001198>)

Therefore, what Seyyed Hasan Emami has said in the book, civil law explanation, which goes this way: "what is determined from Imami jurisconsults' books is that, in cases that paternity approval rule applies, offspring denial is possible only through Damnation and no other reason is accepted," (emami, 5:165) Is NOT true, because jurisconsults have validated paternity approval rule as much as a doubt and guess, and if anyhow by medication or objective witnesses it would be proved that the child couldn't be incorporated to the husband, then paternity approval rule is void. Sahebe Javaher, in his book about explanation of religions' contexts says: "When husband just denies the child from himself, the child won't be cancelled from him unless through Damnation, because it is assumed that the childbirth is possible to be related to the husband - and by possibility there is the meaning of probability here - and this rule applies for all approval rules, since the authority of all approval rules is true only if there is no knowledge against them." (mahmoudidashti, 1:119)

#### **Offspring denial from the civil law point of view**

There is no limitation for offspring denial reasoning in Iran civil law and the claim of offspring is provable not only by Damnation but also by any other reason, because the legislator puts paternity approval rule in the same level with other legal approvals and considers no reasoning limitation to prove its reverse, rather the main point is that reverse of any legal approval rule is provable by any sort of reason. (Katoziyan, 1:127)

#### **Conclusion**

According to the above subjects, offspring denial could be divided into three assumptions:

1. **Offspring denial in cases other than paternity approval rule application (childbirth before six months after marriage):** In this assumption

according to jurisconsults' opinions, there is no need for Damnation, because childbirth before six months after marriage is an obvious reason causing paternity approval rule decline.

2. **Offspring denial in conditions of paternity approval rule application, but in the lack of reasons to prove (contiguity after marriage and childbirth after one year):** Paternity approval hasn't come off in this case because apart from true marriage and couple's continuity, the childbirth shall be after six up to ten months from contiguity date, while in this assumption it happens after ten months after contiguity and one of the paternity approval rule conditions doesn't exist. However since contiguity is a hidden affair and only husband and wife know about that and also husband doesn't have any reason to prove it, the assumption is paternity approval rule applies and child is incorporated to the husband but it is necessary to the husband to deny the child. It could be probably said that Damnation philosophy is based on the same thing that when husband knows for sure that the child doesn't belong to him; he must deny it, as on the other hand he has no reason to prove the paternity either. But in using Damnation there is such a problem that although one of Damnation effects is eternal unlawfulness between the couples, probably a man still likes to continue his life with his wife, so using expertise opinion and scientific experiments is recommended, because on one hand such experiments can't result in an inadmissible relation or be the adultery proof (It is probable that the woman has used modern pregnancy methods like artificial insemination), so family basement will be still sustained and it would be more compatible for the child and the woman too, but on the other hand the child can't relate to anyone other than its real father. Nevertheless, according to Sura NOOR, verse 6, some jurisconsults believe that in this assumption, offspring denial could only be performed by testimonial, and they justify such a thing by this saying that based on some jurisconsults' opinion, nature of expertise idea is sort of testimonial and the expert is considered as sort of an informed (testifier).
3. **Offspring denial in conditions of paternity approval rule application:** Here contiguity or ejaculation is incorporated with sperm entering possibility into uterus, and childbirth is done in its legal period of time. In this assumption Damnation is not possible for offspring denial because for Damnation it is requisite that the man be sure that the child doesn't belong to him, unless he would have seen his wife's adultery with another man himself, and so performs the Damnation by attributing adultery to her, however if man would be doubtful and wants to utilize modern scientific experiments like DNA for the truth to become clear, then I believe that any man has the right to know the reality about his ancestry because there are lots of rights and tasks a father should hold and

if we incorporate the child to the husband through paternity approval rule, and forbid using modern experiments. So according to Islam which has urgent emphasizes on not spoiling any one's rights and tasks, there would be discomfitures and damages, especially while Damnation is not possible here either. Also Islam persistently referred to observing legit and unlawful, as far as even we see in jurisdictional contexts: "Don't buy theft properties, Don't deal with lechers." It even has insisted on the owner of the properties and the way they have been achieved when it comes to supplying life needs. So when Islam has such a scrutiny on all fine matters, how could be possible it wouldn't pay attention on people's ancestry which plays an important role in the individual's destiny and also the society future? For example Islam insists that in the marriage time we must pay attention to the individual's origin and ancestry, or being legitimate is the prerequisite for some jobs. In fact the purpose of Damnation rule refers to not incorporating the offspring to anyone other than its real father and providing that husband would have no reason to prove anything, this is the best way as no right of nobody will be spoiled here, and there will be no unnecessary charges to anyone. Yet, nowadays with the use of scientific experiments only ancestry denial is possible, while adultery couldn't be proved because with modern impregnation methods (like artificial inception) existing today, it is possible that pregnancy has happened through other ways. So in this case, father has the right to know about the child's ancestry and after accomplishing genetic experiments, provided that the answer is negative and also he still desires to continue living with his wife, he should deny the child and avoid Damnation too.

Unlike what some people imagine, authorizing DNA experiments doesn't lead to family system collapse, because via offering lawful solutions, these experiments could be conditioned only to certain situations, so that there would be no instant right to use them as soon as an unreasonable doubt occurs, but it's not appropriate to neglect all genetic experiment benefits for the sake of just an excuse, and then forbid it totally. Modern experiments for offspring denial have no contradiction with the religion and thetical laws. Therefore it is better that in order to observe justice as well as avoid vote conflicts, the legislator modifies the rules related to ancestry denial, and stipulate the possibility and conditions of using scientific experiments like DNA in law, and puts scientific reasons at the same level near to other ancestry denial and even proof of claim reasons.

#### REFERENCES

- 1- Ameli, Z. (1996). *masalek al afham el al tanqih Sharaye al islam*, 7<sup>th</sup> volume 1<sup>st</sup> ed. Qom: Islamic Institution
- 2- Ebn Mnzor, M. No date. *Lesanol Arab Vol.3 1st Edition* Kabire publication.,
- 3- Emami, A, & Safai, H, 1996, *Family Law*, 5<sup>nd</sup> edition, Tehran: Mizan
- 4- Emami, S.H. 1964. *Civil law*, Vol.5, 4<sup>nd</sup> edition, Tehran: Islamieh publication.
- 5- Fazellankarani, M. (1999). *the global informing center, doctors and patients' orders, artificial insemination*, [Online] Available: <http://www.lankarani.com/far/bok/view.php?ntx=054005> (Nov 28, 2012)
- 6- Helli, JY. No date. *Biography Jurists Vol.2 Unwarranted Alrazavyeh Almaktbeh Le ehya Alasar Aljafaryh unique*
- 7- HorAmeli, M. (1993). *Vasaeil Al Shia El Al Tahsil Masael Al Sharia*. Qom: Ahlo Albeit institute
- 8- Mahmoodi Dashti, A. 1994. *Evidence to prove claim 1st edition*. Qum: Bagheri publication.
- 9- Makaremshirazi, N. *Informing base, artificial insemination*, [Online] Available: <http://persian.makarem.ir/estefat/?it=&sid=2765&sw>
- 10- Maki, M, *Allomatodameshghiya*, Vol.3,
- 11- Mohaqeq Helli, Abolqasem, *Sharayeolislam 1425 Fi Masaelehalalvalharam*, Vol.3 3<sup>rd</sup> edition, Tehran: esteqlql
- 12- Musavi khomeyni, R, *Tahrirolvasileh*, Vol.3 2<sup>nd</sup> edition Najaf: Adab Publication Company
- 13- Najafi, M. H. 1982. *Golden words in explaining Islamic rules*, Vol.31, 2<sup>nd</sup> edition, Tehran: Islamieh publication.
- 14- <http://farsnews.com/printable.php?nn=13910417001198>
- 15- <http://www.farsnews.com/newstext.php?nn=13910417001226#sthash.U33F1IK6.dpuf>
- 16- <http://www.farsnews.com/newstext.php?nn=13910417001226#sthash.U33F1IK6.dpuf>
- 17- <http://www.blestfamily.com/show-article.php?aid=187>