The Judge's Authority in Adopting the Results of Medical Expertise in Establishing Parentage

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Abstract:

This study addresses a matter of significant importance concerning the extent of judicial authority in family law cases, specifically the judge's discretion in relying on medical expertise to establish paternity. Although DNA testing (genetic fingerprinting) is considered highly accurate and its evidentiary value nearly indisputable, judicial decisions—whether by a family judge or a criminal judge—are grounded in the principle of judicial conviction. In criminal matters, this principle manifests as the judge's personal conviction, and DNA evidence, despite its scientific and technical foundation, falls within the scope of this principle. As such, it may serve as conclusive scientific proof, not ordinarily subject to dispute, particularly in cases where traditional means of proof fail to establish or negate paternity. Nevertheless, the judge is not legally bound to adopt the findings of medical expertise. However, should the judge choose to disregard such findings, a reasoned justification is required.

Keywords: medical expertise, genetic fingerprinting, family court judge,

personal conviction, establishment of child paternity, conclus

1. INTRODUCTION

The study of the judge's authority in adopting the results of medical expertise in matters of establishing parentage has been the subject of debate among scholars, especially after the amendment of the Algerian Family Code in 1984. However, the Algerian legislator has aligned with the position of Arab and Islamic countries by permitting the use of scientific methods to establish parentage. Article 40, paragraph 2, of the amended Family Code (Ordinance No. 05-02 dated February 27, 2005) stipulates: "The judge may resort to scientific methods to establish parentage."

Yet, the issue arises: Are the results of scientific expertise binding on the judge, or can the **judge disregard them?**

To answer this question, the following points must be examined:

Section One: Genetic Fingerprinting

This section will address the importance of genetic fingerprinting and its uses in establishing parentage.

Subsection 1: The Importance of Genetic Fingerprinting

There is no doubt that genetic fingerprinting refers to the genetic structure-related to genes, i.e., hereditary factors-that indicate the identity of each individual. Scientifically, it is a highly accurate method that facilitates forensic medicine and can be obtained from any human cell, such as blood, saliva, semen, hair, etc. It is one of the outcomes of genetics, a relatively new science that emerged at the beginning of the century and remains, in some countries, a branch of anatomy in medical schools.

The issue of genetic fingerprinting and its probative value is a contemporary topic on which modern jurists have disagreed, particularly regarding the fields in which it is considered fully or partially conclusive evidence.

Genetic fingerprinting has become widely used in Western countries in various fields and has been accepted by several European courts. Its use has recently spread to Arab and Islamic countries, especially in criminal matters to identify perpetrators, though there is still hesitancy regarding its use in parentage cases. Therefore, it is crucial for judges to understand the reality and probative value of genetic fingerprinting in establishing lineage and identifying criminals.

Evidence derived from genetic fingerprinting is considered among the strongest forms of proof, as it has significant power to confirm or refute accusations. This is because DNA analysis is based on scientific principles that prevent errors and lead to definitive results, especially in criminal matters, as it creates a database for authorities to investigate unknown crimes [(1)].

[1]-P.D: kamel bouzidi , "Genetic fingerprinting and its implications for the establishment or denial of paternity, 20th Session of the International Islamic Fiqh Academy, Oran, September 2012, p. 11."

Subsection **2 : Cases and Fields of Benefiting from Genetic Fingerprinting in Establishing Parentage**

Contemporary jurists consider genetic fingerprinting a method for establishing parentage in general, though they differ on some specific issues. According to the resolution of the Islamic Fiqh Academy, item five, reliance on genetic fingerprinting is permissible in the following cases for establishing parentage:

1- Cases of dispute over unknown parentage in its various forms as mentioned by jurists.

2- Cases of confusion regarding newborns in hospitals, childcare centers, and similar institutions, as well as confusion regarding test-tube babies.

3- Cases of lost or mixed-up children due to accidents, disasters, or wars, where it is impossible to identify their families, or in the identification of corpses or to verify the identities of prisoners of war and the missing.

Many researchers have drawn an analogy between genetic fingerprinting and the traditional method of "Qiyafa" (physiognomy) or have considered it strong circumstantial evidence, which is accepted by the majority of jurists outside the scope of hudud (fixed punishments). The recommendation of the Symposium on Genetics and Genetic Engineering, organized by the Islamic Organization for Medical Sciences, states: "Genetic fingerprinting is, in practical terms, an almost infallible means of verifying biological parentage and identity, especially in forensic medicine. It rises to the level of strong circumstantial evidence, which most jurists accept outside hudud cases, and represents a significant modern development in the field of Qiyafa, which the majority of jurists rely upon in disputed parentage cases. Therefore, the symposium recommends its use in all cases where Qiyafa is accepted, and even more so."

Subsection 3: The Position of the Algerian Legislator

After the Algerian legislator permitted, in Article 40/2 of the Family Code, the use of scientific methods to establish parentage, Law No. 16-03 dated June 19, 2016, was enacted regarding the use of genetic fingerprinting in judicial procedures and the identification of persons [(1)] .

Article 1 : of this law specifies the rules for the use of genetic fingerprinting in judicial procedures and in identifying missing or unidentified persons.

Article 4 : of the same law states that public prosecutors, investigating judges, and trial judges are authorized to order the collection of biological samples and the

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performance of genetic analyses on them, in accordance with the provisions of the Code of Criminal Procedure and this law.

Article 5: addresses the persons from whom biological samples may be taken for genetic fingerprinting [1] :

- Persons unable to provide information about their identity due to age, accident, chronic illness, disability, psychological disorder, or mental incapacity.
- Deceased persons of unknown identity.
- Missing persons or their ascendants and descendants.
- Volunteers.

Biological samples may not be taken from a child except in the presence of one of their parents, a guardian, the person responsible for their custody, or a legal representative. If this is not possible, a representative of the competent public prosecution must be present.

Section Two : The Judge's Authority to Resort to Scientific Methods to Establish Parentage

The issue of resorting to scientific methods to establish parentage in Algerian legislation is discretionary for the judge, not mandatory. Article 40 of the Family Code grants the judge discretionary power in this regard.

The judge may reject the request to resort to scientific methods, especially when linked to valid marriage, doubtful marriage, or invalid marriage.

Subsection 1: The Case of Ordering Medical Expertise to Establish Parentage

Many cases are brought before the courts requesting the appointment of a medical expert regarding a dispute over the parentage of a child or children, whether concerning paternity or maternity, before the competent judicial authority following the necessary procedures. When deciding such cases, judges require assistance from experts in matters beyond their knowledge, so they resort to specialists-judicial experts-whose expertise is used through judicial expertise.

Information beyond the judge's scientific knowledge may clarify the case, pursuant to Article 40/2 of the Family Code and Article 126 of the Code of Civil and Administrative Procedure, which states: "The judge may, on their own initiative or at the request of one of the parties, appoint an expert or several experts from the same or different specialties."

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This is done through a preliminary judgment or judicial order to collect samples from the concerned parties, and in some cases, from relatives (ascendants, descendants, or collateral relatives such as nephews or cousins), in addition to the child in question, and to examine all of them before submitting the positive or negative result to the competent judicial authority. The judgment or order must include a set of information based on Article 128 of the Code of Civil and Administrative Procedure.

It should be noted that the competent authorities for analyzing and providing the results of genetic fingerprinting in establishing parentage are specialized state laboratories, namely the Scientific Police Laboratory in Châteauneuf, Algiers, and the National Gendarmerie Laboratory in Boushawi, Staoueli, Algiers. Other laboratories, whether state-owned or private, cannot conduct such precise examinations, which remain the exclusive domain of the state due to their specificity, confidentiality, security, and advanced technology.

Subsection 2: The Impact of the Medical Expertise Report on the Judgment

According to Article 114 of the Code of Civil and Administrative Procedure and Article 40 of the Family Code, the judge's discretionary power in this matter is broad, if not absolute, regarding the adoption of the results of medical examination, whether to fully or partially base their conviction on them, or to disregard them entirely. However, the judge must provide reasons for disregarding the expertise.

Despite the significant influence that expert reports have on judicial decisions, they are not binding on judges, as experts are considered assistants to justice, appointed by courts or judicial councils to shed light on certain aspects of disputes. The judge may rely on or disregard their input.

Medical reports are attached to the case and may be criticized and discussed. The judge has the authority to discuss the content of the expert report, respond to objections raised by the parties, and decide on the necessity of a counter-expertise, as the assessment of evidence is entrusted to the trial judges. If the opinions of genetic fingerprinting experts conflict due to multiple experts or laboratories, the matter is also left to the trial judges, as it concerns a crucial issue-legitimate parentage.

The expert's report, after the necessary analyses, is a purely scientific report, and the judge has the right to assess its results, accept what is useful, and disregard what is incorrect. The judge is not bound by the expert's opinion, as the judge is the highest expert.

However, this approach is not always clear in practice, as these methods may not be fully understood by the judge, who may refrain from discussing them as purely technical and scientific matters. Thus, the judge's ignorance of these scientific methods and their content may be an obstacle to their adoption or rejection. Therefore, the judge cannot approve the medical report in general without analyzing and discussing its

elements, and cannot delegate their authority to the expert whom they themselves appointed.

Although the judge may be unaware of the content of medical expertise reports, which could help reveal the true parentage of the child, if these reports are subject to criticism and discussion, they can significantly influence the outcome of the judgment by revealing the truth about parentage. However, the appropriateness of the expertise remains subject to the judge's discretionary power.

Subsection 3: The Position of the Family Affairs Judge Regarding the Medical Expertise Report

According to Article 40 of the Family Code, the judge is permitted to resort to scientific methods to establish parentage, not to deny it, even though both establishment and denial of parentage can be achieved through genetic fingerprinting, which is almost infallible. However, this article provides no clear answer.

Referring to the general rules on expertise, especially Article 144 of the Code of Civil and Administrative Procedure: "The judge is not bound by the expert's opinion, but must provide reasons for disregarding the results of the expertise."

Establishing parentage is one of the most sensitive issues, as it involves attributing a child's lineage, in line with the principle established by the Supreme Court: "Establishing parentage is giving life to the child, while denying parentage is akin to killing the child."

Therefore, we believe the matter is not absolute; the judge has broad authority to order a counter-expertise if deemed necessary, but ultimately must approve the results of scientific expertise.

Several Supreme Court decisions confirm this, including the decision dated 05/03/2006, which states: "Upon reviewing the appealed decision, which adopted the challenged judgment, it appears that the trial judges did not respond to the appellant's request to attribute the child's DNA to the respondent as the father, as established by scientific expertise [(1)] ."

Another Supreme Court decision dated 10/01/2013 states: "Established parentage can only be denied through 'li'an' (mutual oath of condemnation), which is the legitimate method intended by Article 41 of the Family Code, and genetic fingerprinting may not be given precedence over 'li'an [(2)]**.**

[1]- supreme **COURT JOURNAL , THE DECISION ISSUED ON 05/03/2006**

[2] **- supreme COURT JOURNAL , THE DECISION ISSUED ON 10/01/2013**

Conclusion :

It is beyond doubt that genetic fingerprinting (DNA fingerprinting) is the genetic structure that identifies each individual and can be obtained from any human cell, such as blood, saliva, hair, etc. It is one of the outcomes of genetics and has become widely used in Western countries across various fields. Arab and Islamic countries have also begun to adopt it, albeit with some reservations in matters of lineage.

Evidence derived from genetic fingerprinting is considered among the strongest forms of proof. This is because DNA analysis is based on scientific principles that prevent errors and yield conclusive positive results, especially in criminal cases.

Contemporary jurists have recognized genetic fingerprinting as one of the methods for establishing lineage in general. This recognition was affirmed by the Islamic Fiqh Council in the following cases related to lineage: disputes over unknown paternity, suspicion about newborns in hospitals and childcare centers, and cases of lost or mixed-up children due to disasters or wars.

The Algerian legislator, in Article 40/2 of the amended Family Code, permits the use of scientific methods to establish lineage. Furthermore, Algerian law No. 16-03 dated 19/6/2016 authorizes the use of genetic fingerprinting in judicial procedures and personal identification. However, a judge may reject the request to resort to scientific methods, particularly when linked to the validity of marriage, doubtful marriage, or invalid marriage.

Referring to Article 114 of the Code of Civil and Administrative Procedure and Article 40 of the Family Code, the judge has broad discretionary power-if not absolute-in accepting the results of medical examinations, either wholly or partially, to form their conviction and base their ruling accordingly. The judge may exclude expert reports and proceed with the case without relying on them at all. The judge also has the authority to discuss the content of the expert report and respond to the defenses raised by the parties.

According to the general rules governing expert evidence, especially Article 144 of the Code of Civil and Administrative Procedure, the judge is not bound by the expert’s opinion but must provide reasons if the expert’s findings are rejected.

References :

[1] ALGERIAN FAMILY LAW ISSUED ON 09/06/1984 AVERAGE YEAR 11/05/2006 ;

[2] CIVIL AND ADMINISTRATIVE PROCEDUE CODE ;

[3] P.D: kamel bouzidi , "Genetic fingerprinting and its implications for the establishment or denial of paternity, 20th Session of the International Islamic Fiqh Academy, Oran, September 2012, p. 11." ;

[4] Official Gazette No. 05 of the year 2016 ;

[5] Supreme Court journal , the decision issued on 05/03/2006 ;

[6] Supreme Court journal , the decision issued on 10/01/2013.