

Cumhuriyet İlahiyat Dergisi - Cumhuriyet Theology Journal

ISSN: 2528-9861 e-ISSN: 2528-987X

CUID, December 2017, 21 (2): 851-882

Denial of Paternity with DNA Fingerprint Test in Islāmic Family Law*
İslām Aile Hukukunda DNA Parmak İzi Testi İle Nesebin Reddi

İbrahim Yılmaz

Doç. Dr., Nevşehir Hacı Bektaş Veli Üniversitesi, İlahiyat Fakültesi, İslam Hukuku Anabilim Dalı
Associate Professor, Nevşehir Hacı Bektaş Veli University, Faculty of Theology, Department of Islāmic Law

Nevşehir, Turkey

ibrh.yilmaz@hotmail.com

ORCID ID orcid.org/0000-0001-8912-7769

Makale Bilgisi / Article Information

Makale Türü / Article Types: Çeviri / Translated Articles

Geliş Tarihi / Received: 21 Kasım/November 2017

KAbül Tarihi / Accepted: 06 Aralık/December 2017

Yayın Tarihi / Published: 15 Aralık/December 2017

Yayın Sezonu / Pub Date Season: Aralık/December

Cilt / Volume: 21 **Sayı – Issue:** 2 **Sayfa / Pages:** 851-882.

DOI: <https://doi.org/10.18505/cuid.356846>

* This article has been published previously in Turkish: Yılmaz, İbrahim. "İslām Aile Hukukunda DNA Parmak İzi Testi İle Nesebin Reddi". *Cumhuriyet İlahiyat Dergisi-Cumhuriyet Theology Journal* 21, no. 1 (June 2017): 9-44. doi: 10.18505/cuid.288266.

Atıf/Cite as: Yılmaz, İbrahim. "Denial of Paternity with DNA Fingerprint Test in Islāmic Family Law-İslām Aile Hukukunda DNA Parmak İzi Testi İle Nesebin Reddi". *Cumhuriyet İlahiyat Dergisi-Cumhuriyet Theology Journal* 21, no. 2 (Aralık 2017): 851-. doi: 10.18505/cuid.356846.

İntihal /Plagiarism: Bu makale, en az iki hakem tarafından incelendi ve intihal içermediği teyit edildi. / This article has been reviewed by at least two referees and scanned via a plagiarism software. <http://dergipark.gov.tr/cuid>

Copyright © Published by Cumhuriyet Üniversitesi, İlahiyat Fakültesi - Cumhuriyet University, Faculty of Theology, Sivas, 58140 Turkey. All rights reserved.

For Permissions: ilahiyat.dergi@cumhuriyet.edu.tr

Denial of Paternity with DNA Fingerprint Test in Islāmic Family Law

Abstract: There are two ways to deny the lineage of a child who was born in marriage contract in classical Islāmic legal doctrine. The first is to sue in court by husband accusing his wife by adultery. In this case, both the wife and husband swear properly (*li‘ān/mulā‘ana*) in the court opened and as a result of the court, the child’s lineage falls from husband. The second is that there are certain special circumstances that are inevitable for the child to be born in marriage from husband in terms of reason and science/ medical point. In such a case, the husband has the right to sue the denial of lineage without the need for a *li‘ān/mulā‘ana* application. Nowadays (recently), with the development of science and technology DNA fingerprinting is used as a means of proof in proving the lineage and denying the lineage. Contemporary Islāmic law researchers have stood on the issue of the determination or denial of lineage with DNA fingerprint test. This study will focus only on “Denial of Lineage/Paternity by DNA Fingerprint Test in Islāmic (Family) Law”.

Keywords: Islāmic Family Law, Lineage/Paternity, Li‘ān/Mulā‘ana, DNA Fingerprint Test, Denial of Lineage.

İslām Aile Hukukunda DNA Parmak İzi Testi İle Nesebin Reddi

Öz: Klasik İslām hukuku doktrininde koca, evlilik içerisinde doğan çocuğun nesebini iki şekilde reddetme (redd-i neseb davası açma) hakkına sahiptir. Birincisi, kocanın karısını zina ile suçlayarak mahkemede redd-i neseb davası açmasıdır. Bu şekilde açılan davada, karı-koca mahkemede usulünce yeminleşir (*li‘ān/mülāane*) ve mahkeme sonucunda çocuğun nesebi kocadan düşer. İkincisi ise evlilik sürecinde çocuğun kocadan olmasını aklen ve ilmen/tıbben imkânsız kılan bazı özel durumların bulunmasıdır. Böyle bir durumda koca, *li‘ān/mülāane* uygulamasına gerek olmaksızın redd-i neseb davası açma hakkına sahiptir. Günümüzde ise bilim ve teknolojinin gelişmesine paralel olarak nesebin sübut ve nefyi/reddi ile ilgili hukuk davalarında DNA fingerprint testi de bir ispat vasıtası olarak kullanılmaktadır. Çağdaş İslām hukuku araştırmacıları da DNA fingerprint testi ile nesebin sübütü ve reddi konusu üzerinde durmuşlardır. Bu çalışmada sadece, “İslām Aile Hukukunda DNA Parmak İzi Testi İle Nesebin (Soybağının) Reddi” konusu üzerinde durulacaktır.

Anahtar Kelimeler: İslâm Aile Hukuku, Neseb/Soybağı, Nesebin Reddi, Liân/Mülââne, DNA Parmak İzi Testi.

SUMMARY

In Islāmic Law has given great importance to determine a lineage truthfully, and the right for husband to refuse the lineage of a child, who was born in marriage contract as long as the child was from somebody else.

There are two ways to deny the lineage of a child who was born in marriage contract in classical Islāmic legal doctrine. The first way is the method known/called as li'ān/mulā'ana. As a legal term the li'ān/mulā'ana is both the wife's and husband's swearing in the court opened for denial of lineage (li'ān) after the husband's blaming his wife for adultery (qazif).

The second way which makes the child's paternity impossible to husband are conditions such as knowing with certainty that the woman got pregnant from someone else before marriage contract or her giving birth after marriage contract before six months completed; realizing that the husband could not have (was not able to have) a child because of his biological and/or physiological defects (disabilities) and/or the sexual intercourse between the husband and wife is not possible. In such circumstances, the right to refuse the lineage of this child who was born in marriage contract has been legitimated to the husband without li'ān.

Nowadays (recently), with the development of science and technology, DNA fingerprinting is used as a proof in denial or approval of the lineage cases.

DNA fingerprint is defined as the genetic code transmitting from parents to children through inheritance, that signifies each individual's particular biological identity and that is possible to be known within the framework of specific scientific guidelines.

There are differences as well as similarities in the physiological structure/creation (phenotype) of each person. In the same way, each person's biological and genetic structure/characteristics (genotype) are similar to each other but there are some differences between them. As a matter of fact, it has been scientifically proven that people who look physiologically very similar are different from other people in terms of biological/genetic (genotype) characteristics such as "fingerprints, phonemes, scent marks and DNA fingerprints".

On the other hand, the determination or denial of lineage is closely related to many legal issues as inheritance, custody, marriage (marriage prohibition), hidane (right of protection and training), right of alimony, āqila, witness, etc.

That is why, in Islāmic law, in the case of a precise information, evidence or a strong possibility about the child born in a true marriage is adulterated or belongs to the pre-wedding/before the wedding, the husband has been given the right to refuse the child's lineage/surname by resorting to the li'ān or without resorting to the li'ān.

As understood from the verses (al-Nūr 24/6-9) concerning the subject, the practice of li'ān has been made legitimate for the husband who cannot prove an adulterous crime to his wife with four witnesses. Hence, if the husband accuses his wife of adultery and proves it with four witnesses or the wife confesses adultery, there is no need for li'ān application and a penalty for adultery (hadd) is imposed on a woman because the wife's adultery is certain with the witnesses and the application of li'ān is not needed.

In that case, just as it is in the evidence of adultery, also on the issue of lineage's denial, the husband should have the right to refuse the child's lineage when he claims that he did not impregnate his wife or that the child born in their marriage does not belong to him and he proves it by DNA fingerprint test without the need for li'ān application. Accordingly, if the DNA fingerprint test reveals that the child is from the husband, a slander (qazif) penalty is applied to the husband because he blamed his wife for adultery (qazif) and could not prove it. However, if the DNA fingerprint test reveals that the child is from someone else but the child's lineage cannot be attributed to husband, adultery is not applied to the woman because of the possibility that the pregnancy may be by way of rape (enforcement to sexual intercourse) or as a result of suspected sexual intercourse.

On the other hand, the application of li'ān related with the denial of lineage is an exceptional rule. The main issue is to prove with four witnesses that the child is the result of adultery. Therefore, religiously, the li'ān is not an application that must be done with worship consciousness and that makes one a sinner when abandoned. According to this, to accept the DNA fingerprint test as evidence is not to cancel the li'ān application, on the contrary, it is to abandon it because it does not need the li'ān application. Therefore, the application of the li'ān will continue to be in effect where there is no opportunity to apply DNA fingerprint testing.

As a result, on “Denial of The Lineage/Paternity by DNA Fingerprint Test in Islāmic Family Law” it is possible to say:

- 1) The Qur'an and the Sunnah, the main sources of Islām, encourage and require wisdom and practice in accordance with it. Therefore, there should not be any objection to the use of DNA fingerprint testing, which is a scientific proof, in the case of lineage denial as well as lineage approval.
- 2) As a matter of fact, the general rule expressed by Shāfiī jurist al-Maverdī (d. 450/1058) about matter of lineage’s denial “If the scientific facts indicate that the child is not from the husband, the child's lineage is rejected without the need for the li‘ān application” (Māverdī, *al-Hāwī al-kabīr*, 9: 159), shows that the means of modern/scientific proof such as DNA fingerprint testing will be accepted in the matter of lineage’s denial in Islāmic law.
- 3) Therefore, in accordance with the provision of the verse: “Call them (your adopted children) with the name of their fathers. This is more righteous and just in the sight of Allah” (al-Ahzab 33/5), in order to ensure the identification of lineage truthfully, the husband must have the right to refuse the lineage of a child who is proven, by a DNA fingerprint test, not to belong to him without the need for a li‘ān application.

INTRODUCTION: THE CURRENCY OF THE TOPIC

As birth, whether within or out of wedlock, is regarded as absolute evidence in Islāmic law, the maternal lineage¹ of the child becomes certain². As a matter of

¹ For proving lineage and the issues related with lineage in Islāmic Law see. *al-Mawsūa al-fiqhiyya*, “Nasab”, Wizāra al-‘Awqāf wa al-Shuūn al-Islāmiyya al-Quwayt, vol. 40 (Quwayt, 2001), 231-256; İbrahim Kafi Dönmez, “Nesep”, *Türkiye Diyanet Vakfı İslām Ansiklopedisi*, vol. 32 (Ankara: TDV Pub., 2006), 573-576.

² Alā al-Dīn Abū Bakr al-Qāsānī, *Badāiū‘ al-šanāi fī tertīb al-sharāi*, ed. Ali Muhammed Muawwad (Bairut: Dār al-kütüb al-‘ilmiyye, 2003), 8: 466, 492; Ömer Nasuhi Bilmen, *Hukuku İslāmiyye ve İstilahātü Fikhiyye Kamusu* (İstanbul: Bilmen Basım ve Yay., 1985), 2: 398-399; Wahba al-Zuhaylī, *al-Fiqh al-‘islāmī wa ‘adillatuhū* (Dimashq: Dār al-fikr, 1989), 7: 675; Yasin bin Nāsır bin Muḥammad al-Khatīb, *Thubūt al-nasab: dirāsa mukārana* (Jeddah: Dār al-Bayān al-‘Arabī, 1987), 22.

fact, the woman who gives birth to the child does not have the right to deny paternity.³ As for the father (husband), it is not that easy to determine the lineage for certain. Therefore, determination of paternity is important for the father/husband.⁴ Unlike the case of mother where giving birth is certain and concrete proof, there is not a conclusive evidence that the husband is the father of the child in modern law as well, so being the husband was regarded as an “ordinary evidence”, which is also a rebuttable presumption⁵.

Denial of paternity has some consequences in terms of legal relations with the child and the husband. As a matter of fact, when paternity is denied, child's right of lineage, succession and sustenance exculpated from the father/husband; however, paternity relation is assumed to be existent in terms of testimony, alms (zakat), retaliation, impediment to marry and in a court case in which someone else claims the paternity of the child⁶. Therefore, determination or denial of paternal paternity realistically and its registration is of legal importance.

In classical Islāmic legal doctrine, the husband has the right to deny paternity (right to open a case to disprove paternity) in two ways. First, the husband opens a denial of paternity case by accusing his wife with adultery. In such a case, the husband and wife both swear properly in court (liān/ mulā'ana⁷) and the husband is excluded from paternity a result of the case. The second is the existence of some special conditions which renders it logically and medically impossible that

³ Qāsānī, *Badāi'u al-ṣanāi*, 8: 466, 492; Zuḥaylī, *al-Fiqh al-islāmī*, 7: 675; Bilmen, *Hukuku İslamiyye*, 2: 398-399.

⁴ Dönmez, “Nesep”, 573.

⁵ Turgut Akıntürk, *Yeni Medeni Kanun'a Uyarlanmış Aile Hukuku* (İstanbul: Beta Yay., 2004), 320, 327; Hüseyin Hatemi ve Rona Serozan, *Aile Hukuku* (İstanbul: Filiz Kitabevi, 1993), 286-289.

⁶ See Kamāluddīn Ibn al-Humām, *Fatḥ al-Qādir* (Bairut: Dar al-kütüb al-İlmiyya, 2003), 4:266; Ibn 'Abidīn, *Radd al-mukhtār*, ed. 'Adil 'Ahmed 'Abd al-Mawjūd and 'Ali Muḥammad Muawwid (Riyadh: Dār 'Alam al-kütüb, 2003), 5: 164; *al-Mawsūa al-fiqhiyya*, “Liān”, Wizāra al-'Awqāf wa al-Shuūn al-İslāmiyya al-Quwayt, vol. 35 (Quwayt: 1995), 264-265; Muḥammad Abū Zahra, *al-Ahwāl al-shaiyya* (Cairo: Dār al-Fikr al-'Arabī, 1957), 346; Abd al-Karīm al-Zaydān, *al-Mufaṣṣal fi ahkām al-mar'a wa al-bayt al-muslim fi al-sharīa al-islāmiyye* (Bairut: Müassasa al-Risāla, 1993), 8: 404-405; Zuḥaylī, *al-Fiqh al-islāmī*, 7: 582; Ali Muḥammad Yusuf Moḥammadi, *Ahkām al-nasab fi al-sharīa al-islāmiyye: turuqu ithbātihī wa nefyihī*, (Qatār: Dār Qatrā bin Fūjāe, 1994), 455-456.

⁷ For li'ān (mutual repudiation) institution and its legal consequences see. *al-Mawsūa al-fiqhiyya*, “Liān”, 246-267; M. Akif Aydın, “Liān”, Türkiye Diyanet Vakfı İslām Ansiklopedisi, vol. 27 (Ankara: TDV, 2003), 172-173. See also. Muḥammad Abū Zahra, *al-'Uqūba* (Cairo: Dār al-Fikr 'Arabī, undated), 113-122.

the husband is the father of the child. In such a case, the husband has the right to open denial of paternity without swearing in court (li‘ān / mulā‘ana)⁸.

In parallel with advancements in science and technology, new means of proving have come up⁹. One of these means of proving is DNA fingerprint, which is based on genetic similarity (genotype) among people. DNA fingerprint is based on the fact that Deoxyribo Nucleic Acid in human cells, which are the basic building blocks of human beings, is sequenced differently in every human being¹⁰. Therefore, as in fingerprint, which is based on normal physiological characteristic, each human being has a different genotype DNA fingerprint. No two human beings can have the same DNA fingerprint except for maternal twins¹¹. Accordingly, “DNA fingerprint is a genetic trace, characteristic or password, which is passed down to the child from parents through (genetic) heritage, which indicates the biological identity of the individual and which can be discovered using certain scientific procedures”¹².

Today, DNA fingerprint test is accepted as a recognized and reliable means of proof in paternity and homicide cases.¹³ Modern Islāmic law researchers have

⁸ For a study on denial of lineage of a child born within wedlock in Islāmic Law see İbrahim Yılmaz, “İslām Aile Hukukunda Nesebin (Soybağının) Reddi”, *Marife* 14, no. 1 (2014): 31-51.

⁹ For a study on this topic see. Eyman Muhammad ‘Umar al-‘Amr, *al-Mustajaddāt fi wasāil al-ithbāt fi al-ibādāt we al-muāmalāt we al-huqūk we al-hudūd we al-jināyāt* (Bairut: Dāru İbn Hazm/al-Dāru al-Osmāniyye, 2010).

¹⁰ William S. Klug et al., *Genetic Concepts*, translation editor: Cihan Öner et al. (Ankara: Palme Publishing, 2011), 567; Neil A. Campbell ve Jane B. Reece, *Biyoloji*, çev. Editörleri: Ertunç Gündüz-Ali Demirsoy-İsmail Türkan (Ankara: Palme Publishing, 2010), 21, 387; ‘Amr, *al-Mustajaddāt fi wasāil al-ithbāt*, 443.

¹¹ Naşr Farid Wāşil, “al-Başma al-wirāthiyya wa majālāt al-istifāda minhā”, *Majalla al-Majma al-Fiqh al-İslāmī: Rābita al-‘Ālam al-İslāmī* 15, no.17 (1425/2004): 60; ‘Amr, *al-Mustajaddāt fi wasāil al-ithbāt*, 443.

¹² İbrahim Yılmaz, “İslām (Aile) Hukukunda DNA Parmak İzi Testi ile Nesebin Sübütü”, *İslām Hukuku Araştırmaları Dergisi*, no. 22 (Ekim 2013): 63, 111. See also. ‘Ali Muhyiddin al-Qaradāghī, and ‘Ali Yusuf Muḥammadi “al-Başma al-wirāthiyya min manzūr al-fiqh al-İslāmī”, in *Fiqh al-Qadāyā al-tibbiyye al-muāsira* (Bairut: Dār al-beshāir al-İslāmīyya, 2005): 339-340; *Qarārāt al-majma al-fiqh al-İslāmī bi Makka al-Mukarrama*, al-Davarāt min al-‘ūla ilā al-sābiata aşara, al-Qarārāt: nim al-‘ūla ilā al-sāni ba‘d al-mia (1988-2004) “Qarārāt al-davra al-sādisata aşara, al-Qarār al-sābi‘: Bi Sha’n al-başma al-wirāthiyya wa majāl al-istifāda minhā” (5-10 January, 2002): 343; Saduddin Mas‘ad Hilālī, *al-Başma al-wirāthiyya wa ‘alāiquha al-Shar’iyya: dirāse fiqhiyya muqārana* (Quwayt: Jāmia al-Quwayt, 2000), 35.

¹³ For the uses of DNA fingerprint test see. Rifat Erten et al., “Gen (DNA) Testinin İspat Hukuku Açısından Değerlendirilmesi”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 45, no. 1-4 (1996): 573-588.

also emphasized the place of DNA fingerprint test as a means of proof.¹⁴ In this study, we will only dwell upon “Denial of Paternity with DNA Fingerprint Test in Islāmic Family Law”.

1. MODERN ISLĀMIC LEGISTS’ APPROACHES to DENIAL of PATERNITY with DNA FINGERPRINT TEST

It is quite normal that DNA fingerprint test, which is a scientific and modern means of proving, is not given place in classical Islāmic law. In classical Islāmic legal doctrine, the only means of proof that can be related with the DNA fingerprint test, which is based on genetic similarity, is “kiyāfa”¹⁵ proof.¹⁶

In parallel with developments in science and technology, Islāmic legalist examined the validity of DNA fingerprint test in Islāmic law as a means of proof in proving crimes like homicide and adultery as in the proof and denial of paternity. In the final declaration of the symposium organized in Kuwait in 1998 on the place and uses of DNA fingerprint test in Islāmic law, the following overall conclusion was drawn:

¹⁴ For a study on the place of DNA fingerprint test as a means of proof in Islāmic law and determination of paternity with DNA fingerprint test see. Yılmaz, “İslām (Aile) Hukukunda DNA Parmak İzi Testi ile Nesebin Sübütü”, 63-112.

¹⁵ “Kiyāfa”, which also means the science of “Trace/lineage”, is “reaching the conclusion that there is paternity relation between two individuals based on physiological similarity (phenotype). Those who are engaged in this science are called “kâif/iz-lineage experts” see. Mehmet Tayşi, “Kiyāfe”, *Türkiye Diyanet Vakfı İslām Ansiklopedisi*, vol. 15 (Ankara: TDV, 1997), 508.

For the views of Islāmic scholars on “kiyāfe” (physiological similarity) as a means of proof for “concluding that there is a paternity relation between two individuals based on physiological similarity (phenotype) see. Ibn Qudāma, *al-Mughnī*, ed. ‘Abdullah ibn ‘Abdulmuhsin al-Turki and ‘Abdulfattah Muḥammad al-Huluv (Riyadh: Dār al-‘ālem al-kütüb, 1998), 8: 371-373; İbn Hazm, *al-Muḥallā* (Cairo: İdāra al-tibāa al-muniriyya, 1352h.) 10: 149-150; İbn Qayyim al-Jawziyya, *al-Turuq al-ḥukmiyya fi al-siyāsa al-Shar’iyye*, ed. Nāyif ibn Ahmed al-Hamad (Makka: Dār al-‘ālam al-fawāid, 1428h.). 1/2: 573-575; İbn Qayyim al-Jawziyya, *Zād al-maād*, ed. Shuayb al-‘Arnawut and ‘Abd al-Kadir al-‘Arnawut (Bairut: Muassasa al-Risāla, 1994), 5: 418-421; Zuḥaylī, *al-Fiqh al-islāmī ve edilletüh*, 7: 680-681; Khatīb, *Thubūt al-nasab*, 249-250; Mohammed Muṣṭafa al-Zuḥaylī, *Wasāi al-ithbāt fi al-sharīa’ al-islāmiyya fi al-muāmelāt al-madaniyya wa al-aḥwāl al-shakhsiyya* (Dimashq-Bairut: 1982), 1/2: 542 vd.; Tayşi, “Kiyāfe”, 508.

¹⁶ For the relation between “kiyāfe” proof and DNA fingerprint test as a means of proof see. Yılmaz, “İslām (Aile) Hukukunda DNA Parmak İzi Testi ile Nesebin Sübütü”, 80-81, 97-99.

DNA fingerprint is a genetic makeup that specifically indicates the identity of each individual. DNA fingerprint gives almost flawless results especially in determining and identification of biological father in forensics. In most cases other than ecclesiastical punishments, they are accepted as irrefutable presumption by most of the Islāmic scholars. DNA fingerprint test is a modern means of proof, which is regarded as *kiyāfe* proof by most of the scholars. In solving disagreements about the lineage of illegitimate children, it is not inconvenient to act according to DNA fingerprint test in sharia. However, accepting DNA fingerprint test as a means of proof (in law cases) is left to discretion of public authority that has the right to make and amend laws for social affair.¹⁷

In the final declaration of the meeting by Islāmic Law Academy in 2002 on DNA fingerprint test as a means of proof also repeated the decisions made in the symposium in Kuwait in 1998¹⁸. Today, most Islāmic countries have adopted DNA fingerprint test and reached an overall agreement on the legitimacy of DNA fingerprint test¹⁹. As a matter of fact, family laws in most Islāmic countries give place to paternity with DNA fingerprint in their laws and legal regulations were made on this issue²⁰.

When the decisions above are taken into consideration, it seems plausible to argue that there is no inconvenience in using DNA fingerprint test as a means of proof in rejecting paternity just as in determination of paternity in terms of Islāmic law. However, in principle late Islāmic law researchers who have positive views of DNA fingerprint test as a means of proof in determination of paternity; have some reservations in terms of its use in denial of paternity.²¹ The main point in discussion is whether DNA fingerprint can be used to replace “*li‘ān/mu‘lāna*” practice in denial of paternity of a child that was born within wedlock.

In the following section, the views of late Islāmic law researchers on this topic will be presented.

¹⁷ Hilālī, *al-Başma al-wirāthiyya*, 81-82.

¹⁸ *Qarārāt al-majma al-fiqh al-‘Islāmī*, 343-344.

¹⁹ Hilālī, *al-Başma al-wirāthiyya*, 98.

²⁰ See. Hilālī, *al-Başma al-wirāthiyya*, 7-8; Khalifa ‘Ali al-Ka‘bī, *al-Başma al-wirāthiyya wa ‘etheruhā al-ahkām al-fiqhiyya: Dirāsa fiqhiyya muqārana* (Jordan: Dār al-Nafāis, 2006), 83-154.

²¹ For views on the issue see. Ka‘bī, *al-Başma al-wirāthiyya*, 442-460; Abd al-Rashid Muḥammad Emīn ibn al-Qāsım, “*al-Başma al-wirāthiyya wa ḥujjiyyatühā*”, *Mejelletü’l-adl, Wizāratü’l-adli’s-Su‘ūdiyya* 6, no. 23 (Rajab 1425): 66-78.

1.1. The View that DNA Fingerprint Test Cannot be used to Replace Li‘ān Practice

According to the proponents of this view, in Islāmic law the only legitimate way of denying paternity of a child born within wedlock is li‘ān practice. Therefore, DNA fingerprint test cannot substitute li‘ān practice. For denial of paternity husband and wife must perform li‘ān practice in court.²²

According to supporter of this point of view, there are many profundities of li‘ān, which involves denial in court before public, for couples, family and society and it is deterrent. That is why replacing li‘ān with DNA fingerprint test, which can be performed for simple reasons in suspicious cases, can lead to great problems in protecting the respectability of family institution and lineage. In such a case, individuals can resort to DNA fingerprint test in every suspicious occasion instead of preserving the respectability of the family institution and thrusting their spouses. Therefore, it is not a correct approach to pave way to the denial of paternity with DNA fingerprint test.²³

However, if the husband has strong suspicion that he is not the biological father of the child and has reliable information and documents, DNA fingerprint test can be resorted to do away with the husband’s suspicions and to assure the husband before opening a denial of paternity case or without li‘ān practice. Before passing on to li‘ān practice, the judge can suggest the husband to make DNA fingerprint test.²⁴ If it is understood that the child belongs to the husband as a result of DNA fingerprint test, li‘ān practice can be waived thereby decreasing the number of li‘ān cases.²⁵ Accordingly, it is not permissible for the husband to insist on opening a li‘ān case if DNA fingerprint test proves that the child belongs to him.²⁶

²² Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 351.

²³ Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 356-357; Ka‘bī, *al-Başma al-wirāthiyya*, 451.

²⁴ Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 355.

²⁵ ‘Umar ibn Muḥammad al-Sabil, “al-Başma al-wirāthiyya wa madā meshrūiyya istihdāmiḥā fi al-nasab wa al-jināya”, *Majalla Majma al-Fiqh Al-‘Islāmi: Rābita al-‘Alem ‘Islāmi* 13, no. 15 (1423/2002): 58-59; Ka‘bī, *al-Başma al-wirāthiyya*, 443-444.

²⁶ Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 356.

Modern Islāmīc law researchers like Ali Muhyiddin al-Qaradāghī,²⁷ Muḥammad Sulayman al-‘Ashqar,²⁸ Fuād Ahmed ‘Abdulmun‘im,²⁹ ‘Umar ibn Muḥammad Sabīl,³⁰ Wahba Mustafa al-Zuḥaylī,³¹ Nāşır Abdullah al-Mayman,³² Khalīfa ‘Ali al-Ka‘bī,³³ prefer this view.³⁴ In Islāmīc Fiqh Academy in Mecca in 2002, it was concluded that DNA fingerprint test cannot replace li‘ān practice and that paternity cannot be denied with DNA fingerprint test.³⁵

The evidences and justifications of the proponents of this view are as follows:

- 1) “It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error”³⁶.

In the verse above, believers are required to conform to Allah and His Messenger and accept the decree if they have made a decree about an affair. Therefore, it is not licit to discard Allah’s decision based on a medical view which indicates suspicion.³⁷

²⁷ Qaradāghī and Muḥammadī, “al-Başma al-wirāthiyya”, 355.

²⁸ Muḥammad Sulayman al-‘Ashqar, “İthbāt al-nasab bi al-Başma al-wirāthiyya”, in *Ebhāsun ij-tihādiyyātun fi al-fiqh al-tıbbī* (Bairut: Muassasa al-Risāle, 2001), 269; Sabīl, “al-Başma al-wirāthiyya”, 58.

²⁹ Fuād Ahmad ‘Abdulmun‘im, “al-Başma al-wirāthiyya wa dawruhā fi al-ithbātī'l-jināi bayn al-sharīa ve al-künün”. *Mu’tamar al-handasa al-wirāthiyya bayn al-sharīa ve al-känün, Jāmia al-İmāra* 4 (5-7 May 2002): 1421.

³⁰ Sabīl, “al-Başma al-wirāthiyya”, 56, 58.

³¹ Wahba Mustafa al-Zuḥaylī, “al-Başma al-wirāthiyya wa majālā al-istifada minha”, *Amāl wa bühüth al-dawra al-sādīsa ‘aşara li al-mejma al-fiqh al-İslāmī fi Makka al-Mukarrama* 3 (2003): 25-26, 33.

³² Nāşır Abdullah Mayman, “al-Başma al-wirāthiyya wa ḥükmü istihdāmihā fi majāl al-tıbb al-sharīa wa al-nasab”, *Mu’tamar al-handasa al-wirāthiyya bayna al-sharīa ve al-känün, Jāmia al-İmāra* 2 (5-7 May 2002): 617-619.

³³ Ka‘bī, *al-Başma al-wirāthiyya*, 450-460.

³⁴ Recent Islāmīc law researchers such as Hasan Hathut, Abd al-Sattār Abū Gudde and Ahmad al-Kurdī have also this opinion. See. Ka‘bī, *al-Başma al-wirāthiyya*, 446, 449.

³⁵ *Qarārāt al-majma al-fiqh al-İslāmī* (decision:7/decision substance: 3), 344; See also. Qaradāghī and Muḥammadī, “al-Başma al-wirāthiyya”, 368; ‘Abd al-mun‘im, “al-Başma al-wirāthiyya”, 1421-1422. al-Akhzab 33/36.

³⁶ al-Akhzab 33/36.

³⁷ Ka‘bī, *al-Başma al-wirāthiyya*, 447; Sabīl, “al-Başma al-wirāthiyya”, 57- 58.

- 2) The Prophet (pbuh) ordained “The child belongs to the husband who is married to her. Adulterers are deprived”³⁸.

As it is understood from the hadith, paternity is principally determined based on marriage. A paternity relation determined within wedlock should be denied with li’an, which is stronger than marriage. Accordingly, the husband accuses his wife of adultery and if this turns out to be true, the husband can deny paternity of the child only with li’an. Therefore, if the husband does not require li’an, there is no sense in making DNA fingerprint test.³⁹

- 3) The fact that Prophet (pbuh) accredited physiological similarity via “kiyāfa”⁴⁰ was because of the lack of stronger evidence. Therefore, when stronger evidence is found, similarity is not accredited. The evidence of marriage is stronger than similarity. As a matter of fact, in a paternity case between Sa’d ibn Abi Waqqas (may Allah be pleased) and Abd Ibn Zam (may Allah be pleased), the Prophet (pbuh) did not attributed the paternity of the child to Sa’d ibn Abi Waqqas (may Allah be pleased) because of physical similarity. In contrast, he attributed the paternity of the child to the husband based on stronger evidence, marriage.⁴¹ However, he exercised caution by asking Savda bint Zam’a (may Allah be pleased) to pay attention to veiling when she was with the boy, who was registered as her brother.⁴²
- 4) When Hilāl ibn Umayya (may Allah be pleased) accused his wife of adultery⁴³ the Prophet (pbuh) administered li’an and did not take physical similarity into consideration, which emerged later.⁴⁴

³⁸ Bukhārī, “Buyū”, 3, 100; “Khusumat”, 6; “Vaşāyā”, 4; “Maghāzī”, 53; “Farāid”, 18, 28; “Ḥudūd”, 23; “Aḥkām”, 29; Muslim, “Raḍa’”, 10; Abū Dāwūd, “Talāq”, 33-34; Nasāī, “Talāq”, 48; İbn Māja, “Nikāḥ”, 59; Ahmad ibn Hanbal, *Musnad*, VI, 37, 129, 200, 226, 237, 246. (الولد للفراش وللعاهر الحجر)

³⁹ Ka’bī, *al-Başma al-wirāthiyya*, 448; Sabil, “al-Başma al-wirāthiyya”, 57.

⁴⁰ For narration about the genealogist’s ruling that there was a lineage relation between Zeyd ibn Harise and Usame ibn Zeyd due to physiological similarity and the Prophet’s (pbuh) welcoming this see. Bukhārī, “Manākīb”, 23; “Farāid”, 31; Muslim, “Raḍa’”, 11; Abū Dāwūd, “Talāq”, 31; Tirmizī, “al-Walā wa al-Hiba”, 5; Nasāī, “Talāq”, 51.

⁴¹ The explanation of narration has already been mentioned. (See. Footnote: 37)

⁴² Ka’bī, *al-Başma al-wirāthiyya*, 448; Sabil, “al-Başma al-wirāthiyya”, s. 56; Zühaylī, “al-Başma al-wirāthiyya”, 26.

⁴³ For a narration about this incidence see. Buhārī, “Tefsīr/Sūretu’n-Nūr (24), Bābu ve yudrau anha al-azāb”, 3; Muslim, “Li’an”, 11 (nr. 1496).

⁴⁴ Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 350-352.

- 5) According to majority of Islāmic law experts, DNA fingerprint test is not used as a means of proof in proving adultery;⁴⁵ four witnesses are required for proving adultery and execution of the hadd punishment. Therefore, it is not licit to prioritize or substitute DNA fingerprint test, which is not used in proving adultery and execution of sentence, with li'an.⁴⁶
- 6) Li'an is an ecclesiastical practice based on Qur'an, sunnah and ijma. Therefore, acting upon DNA fingerprint test means abolishment and cancelation of li'an practice and thus nullifying the verses on this issue⁴⁷. Nullification of a Qur'an verse can only be possible with nass (explicit statement in Qur'an and/or in hadith upon which a ruling is based). Today it is not possible to find such a nass. Thus, even if the woman accepts the adultery accusation, the child is attributed to the husband and the husband cannot deny the paternity of the child unless he applies to li'an practice.⁴⁸
- 7) Islām encourages proving of lineage even with the weakest proof; however, it is very strict in denial of paternity. Therefore, there is a need for a stronger proof than marriage so that paternity can be denied for a child born within wedlock.⁴⁹
- 8) As it is a decree whose legitimacy is fixed based on Qur'an, sunnah and ijma, li'an practice has a worship aspect⁵⁰. Thus, although experts state that DNA fingerprint test is a legitimate means of proof, it is not licit to cancel li'an practice and replace it with a new proof/method.⁵¹
- 9) In Qur'an, a husband who accuses his wife of adultery but cannot find a witness to prove it is ordered to apply to li'an practice. Thus, if the husband does not have any witness other than himself, he should apply to li'an practice. In this case, quitting li'an and applying to DNA test would mean making addition

⁴⁵ *Qarārāt al-majma al-fiqh al-Islāmī*, 344.

⁴⁶ Ka'bi, *al-Başma al-wirāthiyya*, 438; Qāsım, "al-Başma al-wirāthiyya", 70.

⁴⁷ al-Nūr 24/6-9.

⁴⁸ Mayman, "al-Başma al-wirāthiyya", 618.

⁴⁹ Sabīl, "al-Başma al-wirāthiyya", 56.

⁵⁰ In Islāmic law, the decrees whose reason cannot be fully understood with wisdom are called *taabbudī* decrees. For comprehensive explanation about Taabbudī decrees see. Abdullah Kahraman, "İslam Hukuk Düşüncesinde Taabbudī Hükümler ve Taabbudiyatın Sahası Üzerine", *İslām Hukuku Araştırmaları Dergisi* 2 (2003): 25-57.

⁵¹ Sabīl, "al-Başma al-wirāthiyya", 56-57; Ka'bi, *al-Başma al-wirāthiyya*, 450-451, 453.

to Qur'ān verses. The Prophet (pbuh) ordains "He who innovates something in this matter of ours [Islām] that is not of will have it rejected"⁵². Accordingly, turning to DNA fingerprint test by abandoning li'an, which is ordered in Qur'ān, means making addition to Qur'ān. Thus, it is rejected.⁵³

- 10) Applying to lian practice has also some other consequences other than denial of paternity. Therefore, DNA fingerprint test cannot replace li'an in all aspects.⁵⁴
- 11) Allah Almighty wanted to keep women's affairs about honor and pudicity secret by legitimating li'an because in this case it is not apparent whether the husband or the wife is telling lie or the truth. When DNA fingerprint test is administrated, the intention of Shari (the Rule Maker-Allah) to conceal with li'an is violated. That is why it is not permissible to deny paternity with DNA fingerprint test.⁵⁵
- 12) Shari gives the husband the right to deny paternity but does not want family secrets to be revealed. If the right to deny paternity with DNA fingerprint test were given, this would mean revelation of family secret in the court. Thus, if the husband insists that his wife has committed adultery and that lineage of the child does not belong to him, he is to use his right to deny paternity by applying to li'an.⁵⁶

Substitution of DNA fingerprint test with li'an is a modern issue and there is no foundation in sharia for it. As it is a controversial issue, it is necessary to consult to the Qur'ān verse, "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day.

⁵² Bukhārī, "Sulh", 5; Muslim, "Aqdiye", 8.

⁵³ Qāsım, "al-Başma al-wirāthiyya", 68.

⁵⁴ Mayman, "al-Başma al-wirāthiyya", 618; Ka'bi, *al-Başma al-wirāthiyya*, 435. According to Ka'bi for detail the differences between li'an and DNA fingerprint test see. Ka'bi, *al-Başma*, 436-439.

⁵⁵ Māzin 'İsmāil Haniyye and 'Ahmed Ziyāb Shuvaydah, "Nafy al-nasab fi al-fiqh al-'İslāmī wa davr al-haqāik al-'İlmiyya allatī al-muāsıra fihi", *Majalla al-Jāmia al-'İslāmiyya (Silsila al-dirāsa al-'İslāmiyya)* 16, no. 2 (2008): 16-17.

⁵⁶ Haniyye and Shuvaydah, "Nafy al-nasab", 17.

That is the best [way] and best in result”⁵⁷. When this verse is consulted, it is understood that it is necessary to act upon li‘ān⁵⁸.

1.2. The View that DNA Fingerprint Test Can Replace Li‘ān

Proponents of this view argue that as it indicates 99,9% certainty in proving and rejecting paternity, DNA fingerprint test replaces li‘ān and the court decrees the rejection of paternity according to the result of DNA fingerprint test. There is no need for additional li‘ān.⁵⁹ Accordingly, the husband reveals that his wife is pregnant and if he is sure that the child does not belong to him, he waits till birth and applies to DNA fingerprint test. If it is understood that the child does not belong to the child as a result of DNA fingerprint test, the judge rules that paternity of the child does not belong to the husband without li‘ān practice.⁶⁰

Some modern Islāmīc law scholars like, Muḥammad Muhtār al-Salāmī,⁶¹ Yusuf al-Qaradāwī,⁶² Şaduddin Mas‘ad Hilālī,⁶³ ‘Ali Muḥyiddīn al-Qaradāghī,⁶⁴ İbrahim Ahmad Othman,⁶⁵ Bandar ibn Faḥd al-Suwaylim⁶⁶ prefer this view. Şaduddin Mas‘ad Hilālī, who is one of the leading proponents of the view that DNA fingerprint test can be used as means of proof in the denial of paternity as in proving of paternity, states the following considerations with regard to the issue:

If it is certainly understood with DNA fingerprint test that pregnancy or the child is not related to the husband, there is no need for lian practice. However, in

⁵⁷ al-Nisā 4/59.

⁵⁸ Ka‘bī, *al-Başma al-wirāthiyya*, 450.

⁵⁹ Ka‘bī, *al-Başma al-wirāthiyya*, 442.

⁶⁰ Hilālī, *al-Başma al-wirāthiyya*, 351-352.

⁶¹ Muḥammad Muhtār al-Salāmī, “al-Tahlīl al-biyolojī li al-jināt al-bashariyya wa ḥujjiyyatūha fī al-ithbāt”, *Mu‘tamar al-handasa wirāthiyya bayn al-sharīa wa al-qānūn, Jāmia al-İmāra 2* (5-7 May 2002): 456. See also. Hilālī, *al-Başma al-wirāthiyya*, 80-81.

⁶² Abd al-Rashīd Muḥammad ibn Qāsım reports that Yūsuf al-Qaradāwī stated that paternity can be denied as a result of DNA fingerprint test in the Islāmīc Fiqh Academy organized in Mecca on 9 September 2002 without li‘ān procedure. See. Qāsım, “al-Başma al-wirāthiyya”, 67.

⁶³ Hilālī, *al-Başma al-wirāthiyya*, 351-352.

⁶⁴ Qaradāghī and Muḥammadi, “al-Başma al-wirāthiyya”, 355.

⁶⁵ İbrahim Ahmad ‘Osman, “Davir al-Başma al-wirāthiyya fī Qadāya ithbāt al-nasab wa al-gerāim al-jināiyya”, *al-Mu‘tamar al-Arabī al-awwal li ‘ulūm al-adilla al-jināi wa al-tıbb al-shar‘iyyi, Jāmia aj-Nāyif al-Arabiyya li al-‘ulūm al-amniyya* (Riyād: 2007): 23.

⁶⁶ Bandar ibn Faḥd al-Suwaylim, “al-Başma al-wirāthiyya wa etharuhā fī al-nasab”, *Majalla al-adl, Wizāra al-adl al-Şu‘ūdiyya 37* (Muharram 1429): 151.

this case the woman reserves the right to ask for *li‘ān* in the face of the possibility that the woman has become pregnant as a result of forced or suspicious sexual intercourse. Accordingly, DNA fingerprint test is a proof in favor of or against the husband, such that approval of husband’s claim via DNA fingerprint test renders *li‘ān* unnecessary and paternity is denied as a result of DNA test. However, if DNA test results against the husbands claim, he is given the *qazif* (inaccurate accusation of adultery) punishment. However, according to the view which states that “qazif punishment is the right of the woman; she can demand that the sentence not to be executed”⁶⁷, qazif punishment might not be executed. Or qazif punishment is executed as the husband accuses his wife of adultery but not because of denial of paternity.⁶⁸

In his second discussion of the issue, ‘Ali Muhyiddīn al-Qaradāghī makes the following statements about the issue:

If the adultery of the woman becomes definite with the confession or testimony and it is understood that the woman is pregnant, it is not ruled that pregnancy is not by the husband with the absolute existence of adultery because of the marriage evidence which renders paternity certain. In this case, it is possible that the wife has become pregnant before or after adultery. Therefore, there is not a causal relation between proving adultery and denial of paternity. In this case, the husband can do two things: First, he can keep silent and accepts the paternity of the child because of marriage proof. Second, he can reject the paternity of child as it is suspicious that the child is from him. In the second case, the husband is not sentenced to qazif punishment as it is proven that the woman has committed adultery with confession or by witnesses, and *li‘ān* is not necessary. The Qur’ān verses on this issue necessitate *li‘ān* when adultery cannot be proven with four witnesses or when it is not confessed. Proving of adultery also renders *li‘ān* unnecessary. Therefore, an absolute proof like DNA fingerprint test which proves –just as testimony or confession– that the child is not from the husband, renders *li‘ān* unnec-

⁶⁷ For this view see. Ibn al-Humām, *Fath al-Qādīr*, 4: 251; Ibn Qudāma, *al-Mughnī*, 11: 138.

⁶⁸ Hilālī, *al-Baṣma al-wirāthiyya*, 351-352.

essary because upon proving adultery, the marriage proof is afflicted. Thus, marriage does no longer have power to resist against such powerful proof like DNA fingerprint test.⁶⁹

The evidences and justifications of the proponents of this view are as follows:

1) In Qur'ân it is ordained that "And those who accuse their wives [of adultery] and have no witnesses except themselves - then the witness of one of them [shall be]."⁷⁰

The reason why the husband is ordered to apply to li'ân is that it is not possible for the husband to prove that his wife has committed adultery and that the child is not his child. However, with the development of science and technology, the husband is no longer alone in his accusation and DNA fingerprint test, which is determined with scientific truth, has become a sort of witness for him. DNA fingerprint test can give almost a hundred percent certainty (99,9%). Therefore, it saves the husband from the qazif (adultery accusation) punishment. That is why if it is understood with DNA fingerprint test that the child does not belong to the husband, the paternity of the child is denied without needing li'an.⁷¹

2) In the Qur'ân verses which orders li'ân practice, it is mentioned that the punishment quashed and paternity is denied. Therefore, there is not a causal relation between the denial of paternity and li'ân practice. With li'an, the husband is saved from qazif punishment; however, if it is understood as a result of DNA fingerprint test that the husband is the father of the child, the paternity of the child is attributed to the husband even if li'ân has already been applied.⁷²

3) In Qur'ân, it is stated that "And a witness from her family testified. "If his shirt is torn from the front, then she has told the truth, and he is of the

⁶⁹ 'Ali Muhyiddin al-Qaradāghī, "al-Başma al-wirāthiyya min manzūr al-fiqh al-İslāmī", *Majalla al-Majma al-Fiqh al-İslāmī* 14, no.16 (1424/2003): 58. According to Qaradāghī, the same edict is valid for woman who got pregnant as a result of rape or suspicious sexual intercourse. In such cases, the husband has the right to reject the paternity of the child as a result of DNA fingerprint test. See Qaradāghī, "al-Başma al-wirāthiyya", 59.

⁷⁰ al-Nūr 24 /6.

⁷¹ Salāmī, "al-Tahlil al-biyolojī", 456; Suwaylim, "al-Başma al-wirāthiyya", 152; Qaradāghī and Muḥammadī, "al-Başma al-wirāthiyya" 355-356.

⁷² Qāsim, "al-Başma al-wirāthiyya", 71.

liars. But if his shirt is torn from the back, then she has lied, and he is of the truthful" and "So when her husband saw his shirt torn from the back, he said, "Indeed, it is of the women's plan. Indeed, your plan is great"⁷³. In this incidence, the fact that Prophet Yusuf's (pbup) shirt was torn from the back was accepted as evidence in favor of him. Thus, DNA fingerprint test is also considered as testimony in favor of the husband.⁷⁴

- 4) As DNA fingerprint test is based on material and biological data, its results indicate certainty and its result is to be accepted according to sharia law as sharia does not conflict with wisdom and science. Accordingly, if the husband opens a case for denial of paternity even if it is understood that the child belongs to the husband as a result of DNA fingerprint test, husband's asking for li'ān to deny the child's paternity is nothing but to obstinate with data based on science and wisdom. Sharia law is excluded from decree based on obstinacy. Therefore, li'ān is not a kind of worship. Once it is understood that the child's lineage is from the husband, it is not correct for the husband to apply to li'ān application for denial of paternity.⁷⁵
- 5) The husband's application to "li'an" practice for accusing his wife with adultery or for denial of paternity is an exceptional rule that can be applied when there is no other evidence. The main rule is that adultery is to be proven with four witnesses. Accordingly, if it is known for certain that the husband did not have sexual intercourse with his wife and if the woman gets pregnant in this period, the husband waits till birth and DNA fingerprint test is done. If the DNA fingerprint test indicates that the child does not belong to the husband, it is proven that the woman has committed adultery and that the child belongs to someone else. Therefore, once it is proven that the woman has committed adultery, paternity is denied without li'ān procedure.⁷⁶

⁷³ Yusuf 12/26-28.

⁷⁴ Qāsım, "al-Başma al-wirāthiyya", 71.

⁷⁵ Salāmī, "al-Tahlil al-biyoloji", 456; Qāsım, "al-Başma al-wirāthiyya", 72.

⁷⁶ Ka'bi, *al-Başma al-wirāthiyya*, 442.

- 6) Islāmic law experts state that paternity is rejected without li‘ān in some cases when it is known for sure that the child does not belong to the husband.⁷⁷ Accordingly, if it is understood that the child does not belong to the husband based on DNA fingerprint test, the paternity of the child is rejected without li‘ān procedure.⁷⁸

1.3. The View that DNA Fingerprint Test Supports the Proof of Paternity or Denial of Paternity with Li‘ān

According to the proponents of this view, the paternity of a child who is born within wedlock can be only rejected with li‘an. DNA fingerprint test can be used as supplementary evidence for proving of paternity or the necessity of li‘ān procedure.⁷⁹ Accordingly, if the husband has opened a denial of paternity case, the judge wants DNA fingerprint test before li‘ān procedure because the condition for the husband to apply for li‘ān procedure is that he cannot prove with witnesses. Therefore, the wife or the husband finds a witness with DNA fingerprint test.⁸⁰

According to the proponents of this view, if DNA fingerprint test indicates that the child belongs to the husband, li‘ān is not necessary. In this case, DNA fingerprint test reiterates that the child belongs to the husband and it is doubtless that the child belongs to the husband. In such a case, the husband does not have the right to open a case for li‘an.⁸¹ However, if DNA fingerprint test indicates that the child does not belong to the husband, the husband has to open a li‘ān case for the denial of paternity. The denial of paternity cannot be ruled only based on DNA fingerprint test. In this case, DNA fingerprint test supports the husband in opening li‘ān case for denial of paternity.⁸²

On the other hand, according to the proponents of this view, if li‘ān is administered before applying for DNA fingerprint test and it is ruled that the child does not belong to the husband, and if it is later understood with DNA fingerprint test that the child belongs to the husband, DNA fingerprint test supports the proof

⁷⁷ For example see al-Māwardī, *al-Ḥāwī al-kabīr fī fiqh madhhab al-Imām al-Shāfi‘ī*, ed. Ali Muhammed Muawwad and Adil Ahmed Abd al-Mawjūd (Bairut: Dār al-kütüb al-‘ilmiyya, 1994), 11: 159; Ibn Qudāma, *al-Mughnī*, 11: 167-168.

⁷⁸ Suwaylim, “al-Başma al-wirāthiyya”, 151.

⁷⁹ Wāşıl, “al-Başma al-wirāthiyya”, 81; Qāsım, “al-Başma al-wirāthiyya”, 67, 75-76.

⁸⁰ Qāsım, “al-Başma al-wirāthiyya”, 78.

⁸¹ Wāşıl, “al-Başma al-wirāthiyya” 81-82; Qāsım, “al-Başma al-wirāthiyya”, 67.

⁸² Qāsım, “al-Başma al-wirāthiyya”, 78.

of marriage. Therefore, the husband does not have the right to apply for li‘ān procedure for the denial of paternity of a child whose lineage is proven with DNA fingerprint test.⁸³

As it can be understood from the explanations made above, DNA fingerprint test is used as a proof not for denial of paternity but for proving paternity. Therefore, if it is understood as a result of DNA fingerprint test that the child does not belong to the husband, paternity is not rejected based only on DNA fingerprint test, the husband has to apply for li‘ān procedure.

This point of view which is adopted by late Islāmic law researchers like Naşr Farīd Wāşıl,⁸⁴ Abd al-Rashid Muḥammad Emīn al-Qāsım,⁸⁵ and Şa‘d al-Anzī⁸⁶, partially tallies with the first view that DNA fingerprint test cannot replace li‘ān procedure. However, the proponents of this view cut loose from the first view by stating that “When it is understood that the child belongs to the husband with DNA fingerprint test, the husband cannot open denial of paternity case and that lineage cannot be rejected with lian”.

Some of the proofs and justifications of the view which basically argues that if DNA fingerprint test proves that the husband is the father, li‘ān procedure is not necessary are as follows:

- 1) Islām encourages the proving of paternity even with the weakest proof so as to protect the child’s rights of lineage. DNA fingerprint test indicates certainty. Accordingly, if DNA fingerprint test confirms that the child belongs to the husband, the husband does not have the right to deny the paternity of the child via li’an.⁸⁷

⁸³ Wāşıl, “al-Başma al-wirāthiyya” 82. In 1995, in a denial of paternity case opened in Cairo, Egypt, the husband denied the lineage of the child with li’an procedure. However, upon the woman’s request the court asked DNA test report from forensic department. The report indicated that the child belonged to the husband and the court decreed that the child’s lineage belongs to the husband (Ka‘bī, al-Başma al-wirāthiyya, 483-485.) Similarly, Egypt Fatwa Department also gave the fatwa that the lineage of the child should be assigned to the husband if the DNA test report indicates that the child belongs to the husband even if he had already rejected paternity with li’an procedure. See Ka‘bī, al-Başma al-wirāthiyya, 485-486.

⁸⁴ Wāşıl, “al-Başma al-wirāthiyya”, 81-82.

⁸⁵ Qāsım, “al-Başma al-wirāthiyya”, 73.

⁸⁶ Hilālī, *al-Başma al-wirāthiyya*, 81.

⁸⁷ Wāşıl, “al-Başma al-wirāthiyya”, 82.

- 2) Today there can be some corrupt husbands/fathers who apply to liān procedure to deny the paternity of their own child. Therefore, to prevent husbands from denying their children's paternity via slandering their wives using li'an, it is not licit for the husband to apply for li'an procedure if it is found out that the child belongs to the child via DNA test.⁸⁸
- 3) Islām is excluded from rendering a ruling that is contradictory with wisdom, logic and reality. Such that, if an individual argues that someone else who is at the same age as him is their child and find witnesses for this, it is not possible for Islām to approve something like this which is contrary to wisdom. In the same way, if a man and a woman who live so far away from each other that sexual intercourse between them is impossible get married and if the woman gives birth to a child, it is not possible to attribute the paternity to the husband according to majority of Islāmic law experts. Rendering a verdict according to views of majority⁸⁹ does not mean to deny the principle that "the child belongs to the owner of the bed" (marriage proof). Therefore, if it is understood that the child belongs to the husband with DNA fingerprint test, the husband's application for li'an for denial of paternity is not accepted. In other words, arguing that the husband who knows that the child belongs to him as a result of DNA fingerprint test can open li'an case is legitimate in terms of Islāmic law means endorsing that Islām contradicts with wisdom and science.⁹⁰
- 4) The legitimacy of li'an is confined with the lack of any witness other than the husband. As it is understood that if there is a proof other than testimony, there is no need to apply li'an procedure. As a matter of fact, if the husband accuses his wife of adultery and the woman confesses her offense, there is no need for li'an. Similarly, if the husband accuses his wife of adultery and if DNA test indicates that the child belongs to the husband, the husband cannot apply for li'an procedure. The husband insistence on li'an procedure in this case means contradicting with wisdom and science

⁸⁸ Wāṣil, "al-Baṣma al-wirāthiyya", 82.

⁸⁹ See for the opinion of majority Ibn Rushd al-Hafid, *Bidāya al-mujtahid wa nihāya al-muqtasid*, ed. Taḥa Abd al-Raūf Ṣa'd. (Bairut: Dār al-Jīl, 2004), 2: 573-574; Māwardī, *al-Ḥāwī al-kabīr*, 11: 159-162; Ibn Qudāma, *al-Mughnī*, 11: 168-169.

⁹⁰ Qāsim, "al-Baṣma al-wirāthiyya", 73.

because it is not part of worship to apply to li‘ān procedure for denial of paternity. In other words, it is not licit for the husband who accuses his wife of adultery and claims that the child given birth does not belong to him to open a denial of paternity case (in spite of the fact that DNA fingerprint test proves that the child belongs to the husband) by considering li‘ān as a religious service.⁹¹

- 5) In Qur’ān it is stated that, “Call them (your children) by their fathers. It is more just in the sight of Allah”⁹². Therefore, if it is understood as a result of DNA fingerprint test that the child belongs to the husband, the husband does not have the right to apply for li‘ān procedure to reject the paternity of the child and to ask for attribution of the lineage to someone else.⁹³

2. DISCUSSION

Human beings can be physically similar and different for each other.⁹⁴ Similarly, although genotypic characteristics (biological and genetic structure) of human beings are largely similar⁹⁵ there are some differences as well.⁹⁶ Hence, it is scientifically proven that human beings who physiologically look very similar to each other are different in terms of some biological/genetic (genotype) characteristics like “finger print, voice, smell and DNA fingerprint”.⁹⁷

In Qur’ān, it is stated that “And on the earth, are signs for the certain [faith] and in yourselves. Then will you see? And in the heaven, is your provision and whatever you are promised. Then by the Lord of the heaven and earth, indeed, it is truth- just as [sure as] it is that you are speaking”⁹⁸; and that “We will show them Our signs in the horizons and within themselves until it becomes clear to them that it is the truth. But is it not sufficient concerning your Lord that He is, over all things, a Witness?”⁹⁹. This indicates that human beings will witness many scientific

⁹¹ Qāsim, “al-Başma al-wirāthiyya”, 73-74.

⁹² al-Aḥzab 33/5.

⁹³ Qāsim, “al-Başma al-wirāthiyya”, 74-75.

⁹⁴ Bk. al-Rūm 30/20, 22; al-Fātır 35/28.

⁹⁵ Seda Ercan Akkaya et al., (9. Sınıf) *Biyoloji Ders Kitabı* (Ankara: MEB, 2012), 56.

⁹⁶ Klug et al., *Genetik Kavramlar*, 567; ‘Amr, *al-Mustajaddāt fī wasāil al-ithbāt*, 443.

⁹⁷ Yasin bin Nāsır bin Muḥammad al-Khatīb, “al-Başma al-wirāthiyya: mafhūmuhā ve hujjiyyātuhā wa majālāt al-istifādati minhā wa al-hālāt al-latī yumnu ‘amaluhā fihi”, *Majalla al-adl* 41 (Muharram 1430): 176.

⁹⁸ al-Zāriyāt 51/20-23.

⁹⁹ al-Fussilat 41/53.

miracles/proofs that demonstrate the existence and might of Allah in macro and micro universe (in the creation of human being and universe).¹⁰⁰

As pointed out in the expression that “In yourselves (your creation/biological structure)” in these verses¹⁰¹, one of the evidences, perhaps the most important one, that indicates the existence and might of Allah, is that everyone is created with a unique genetic structure, that is the DNA fingerprint.¹⁰² Hence, today Islāmīc law scholars agree that DNA fingerprint test is a legitimate as a means of proof.¹⁰³

On the other hand, Islāmīc law experts agreed that marriage evidence is fundamental in proving paternity¹⁰⁴ and stated that there must be stronger evidence than marriage for denial of paternity. Therefore, they pointed out that paternity of a child born within wedlock cannot be denied due to “physiological similarity”, which is a weaker proof than marriage.¹⁰⁵

Hanbali canonist Ibn Kudame (d. 620/1223) makes the following assessment on this issue:

¹⁰⁰ Qaradāghī, “al-Başma al-wirāthiyya”, 32-33; Wāşıl, “al-Başma al-wirāthiyya” 61; Suwaylim, “al-Başma al-wirāthiyya”, the fact that preposition (sin /س) in verse 82 and 83, which indicates future, is used and mentioning of more than one proofs is also interesting. In these verses, it is indicated that new proofs that indicates the existence and greatness of Allah will emerge and that there are more than one proofs in the biological structure of human beings. In this sense, the cell, which makes up the building blocks of human beings and the nucleus, chromosome and DNA spiral in cells each make up one verse (Ka’bī, al-Başma al-wirāthiyya, 6-7, 24-26.)

¹⁰¹ In interpretations of Qur’ān, it is pointed out that the expression “yourselves” indicates “human beings biological creation and their biological building blocks”. See Ibn Kathīr, ‘Ismail. *Tefsīr al-Qur’ān al-‘Azīm*, ed. Mustafa Sayyid Muḥammad et al., (Cairo: Muassasa Qurtuba, 2000) 12: 250.

¹⁰² Qaradāghī and Muḥammadī, “al-Başma al-wirāthiyya”, 338-339; Hilālī, *al-Başma al-wirāthiyya*, 85; Ka’bī, *al-Başma al-wirāthiyya*, 6, 24, 26.

¹⁰³ See. Zūhaylī, “al-Başma al-wirāthiyya”, 16-23; Hilālī, *al-Başma al-wirāthiyya*, 112; Abd al-Mun‘im; “al-Başma al-wirāthiyya”, 1377-1382; Sabil, “al-Başma al-wirāthiyya”, 55,60; Wāşıl, “al-Başma al-wirāthiyya”, 61-63.

¹⁰⁴ See. Marghīnānī, *al-Hidāya Sharhu Bidāya al-mūbtadī* (İstanbul: Dāru Kahraman, 1986), 2: 23; Abū Is-hāk İbrahim ibn Alī al-Shirādhi, *al-Muhedhdhab fi al-fiqh al-‘Imām al-Shāfi*, (Bairut: Dār al-kütüb al-‘ilmiyye, 1995), 3: 78; Ibn Qudāma, *al-Mughnī*, 11: 152, 159; Ibn Qayyim, *Zād al-maād*, 5: 410; Zaydān, *al-Mufaşşal*, 9: 319-320; Hayreddin Karaman, *Mukayseli İslām Hukuku* (İstanbul: Nesil Yay., 1987), 1: 336-337; Zūhaylī, *al-Fiqh al-‘islāmī*, 7: 681.

¹⁰⁵ Shirādhi, *al-Muhedhdhab*, 3: 82; Ibn Qudāma, *al-Mughnī*, 11: 158-159; Ibn Qayyim, *al-Turuq al-huk-miyya*, 1/2: 587-588; Muḥammad ibn Ali ibn Muḥammad al-Shavqānī, *Nayl al-‘awtār* (Riyadt: Dāru Ibn Qayyim, 2005), 8: 280-287; Muḥammadī, *Ahkām al-nasab*, 398-405.

All human beings are descendants of Adam and Eve. They have different colors and creation. If children were not physiologically different from their parents all parents would have the same appearance. Therefore, physiological similarity (or child's not resembling his/her father) is a weak proof for the denial of paternity. Marriage is a strong proof. A strong proof is not abandoned because it conflicts with the weak one. As a matter of fact, in the case between Sa'd ibn Abi Waqqas (may Allah be pleased with him) and Abd ibn Zam (may Allah be pleased with him.), Prophet (pbuh) did not act according to the similarity but to stronger proof of marriage although the child resembled Utbe and ruled that the child belonged to Abd ibn Zam.¹⁰⁶

The apparent decree understood from the general approach and the Prophet's (pbuh) practice is that one cannot act according to "physiological similarity" in denial of paternity, in the legal doctrine there are some views that "physiological similarity" can be taken into consideration¹⁰⁷. Besides, there are also some indications in the Prophet's (pbuh) practices and expressions that "physiological and genetic similarity" can be taken into consideration. As a matter of fact, in the case between Sa'd ibn Abi Waqqas and Abd ibn Zam¹⁰⁸, although the Prophet (pbuh) ruled that the child's paternity belonged to the one who is married to the woman, but the Prophet (pbuh) by asking the child's daughter Sevde ibn Zam (May Allah be pleased with her) to pay attention to veiling when her brother is with her indicated that "physiological similarity" can also be taken into consideration.¹⁰⁹

Similarly, in the case of Hilal ibn Umeyye, the Prophet (pbuh) "Go and find out. If the woman gives birth to a child with eyes kohl-rimmed eyes and large hips and calves, this child is by Sherik ibn Sehma. "The woman really gave birth to such a child". Prophet (pbuh) stated: "If it had not been that decree in Allah's book been

¹⁰⁶ Ibn Qudāma, *al-Mughnī*, 11: 158-159. For similar assessments see. Ibn Qayyim, *al-Turuq al-ḥukmiyya*, 1/2: 587-588.

¹⁰⁷ According to a view reported from Shāfiis, some Hanbalis and Ahmad Hanbal, it is licit to deny lineage based on physiological similarity. (Ibn Qudāma, *al-Mughnī*, 11: 159; Muḥammadī, *Ahkām al-nasab*, 399-404.)

¹⁰⁸ The deduction of the rule about the narration on this topic has already been mentioned.

¹⁰⁹ Ibn Qudāma, *al-Mughnī*, 11: 158-159; Ibn Qayyim, *al-Turuq al-ḥukmiyya*, 1/2: 587-588; Ibn Qayyim, *Zād al-maād*, 5: 410; Shavqānī, *Nayl al-ʿawtār*, 8: 291-292; Badruddīn al-ʿAynī, *Umde al-Qārī ṣarhu Sahih al-Bukhārī* (Egypt: 1972), 15: 330.

fulfilled, I would have things to do with her”¹¹⁰. This indicates that the Prophet (pbuh) accepted “physiological similarity” as a proof and that if li‘ān had not been applied, he could have ruled based upon “physiological similarity” proof in spite of the marriage proof.¹¹¹

On the other hand, DNA fingerprint proof, which is based on “genetic similarity” in proving and denial of paternity, is stronger than “kiyafe”¹¹² proof, which is based on “physiological similarity”. Such that, in the case of kifaye, the paternity is proven following from physiological similarity between the child and father.¹¹³ In DNA fingerprint test, the biological materials taken from the father and the child are examined with scientific methods and paternity is proven (or denied) based on genetic similarity between the child and parent.¹¹⁴ Therefore, DNA fingerprint test as a means of proof, gives more reliable and definite results than kiyafe.¹¹⁵ As a matter of fact, today DNA fingerprint test is accepted as a reliable means of proof in paternity and homicide cases.¹¹⁶ Therefore, DNA fingerprint test should also be accepted as a reliable and recognized means of proof in Islāmic law.¹¹⁷

As it is understood from the nasses on the issue¹¹⁸ li‘ān is legitimate when a husband accuses his wife of adultery but cannot find four witnesses.¹¹⁹ Hence, the husband accuses his wife of adultery and proves this with four witnesses or if the woman confesses her offense, li‘ān is not necessary and the woman is sentenced

¹¹⁰ Bukhārī, “Tafsīr”, Şūra al-Nūr (24), Bābu wa yudrau anha al-‘azāb, 3; Muslim, “Liān” (tradition number: 11/1496).

¹¹¹ Shirādhi, *al-Muhedhdhab*, 3: 82; Ibn Qudāma, *al-Mughnī*, 11: 159; Ibn Qayyim, *al-Turuq al-ḥukmiyya*, 1/2: 587; Ibn Qayyim, *Zād al-maād*, 5: 403; ‘Aynī, *Umde al-Qārī*, 15: 333.

¹¹² See. Tayşi, “Kiyāfe”, 508.

¹¹³ Ibn Qudāma, *al-Mughnī*, 8: 159

¹¹⁴ Kāsım, “al-Basmatü’l-virāsiyye”, 60-61.

¹¹⁵ Qaradāghī, “al-Başma al-wirāthiyya” 55-57; Şabil, “al-Başma al-wirāthiyya”, 59-62; Wāşıl, “al-Başma al-wirāthiyya”, 77-79; Qāsım, “al-Başma al-wirāthiyya”, 60-61.

¹¹⁶ See. Hilālī, *al-Başma al-wirāthiyya*, 84-85, 242; Hatib, “al-Basmatü’l-virāsiyye”, 171.

¹¹⁷ Salāmī, “al-Tahlil al-biyoloji”, 456; Qāsım, “al-Başma al-wirāthiyya”, 72; Wāşıl, “al-Başma al-wirāthiyya”, 82.

¹¹⁸ al-Nūr 24/6-9.

¹¹⁹ al-Nūr 24/6.

to adultery punishment because the adultery offense is proven with witnesses and there is no need for li‘ān procedure.¹²⁰

Then, in proving adultery as in the case of denial of lineage, the husband who claims that the pregnancy of his wife and the child who is born within wedlock is not by him and who proves this with DNA fingerprint test, should have the right to deny the child’s lineage. Accordingly, if it is understood that the child is by the husband as a result of DNA fingerprint test, the husband is sentenced to qazif punishment (accusing his wife of adultery). However, if it is understood that the child is by someone else, the lineage of the child cannot be attributed to the husband and the wife is not sentenced to adultery punishment¹²¹ because of the possibility that pregnancy could be as a result of coercion (rape)¹²² or as a result of suspicious sexual intercourse.¹²³

On the other hand, Islāmic law experts state that in case a woman who is married gets pregnant because of suspicious sexual intercourse or forced sexual intercourse, the husband cannot apply to li‘ān procedure,¹²⁴ and that the situation is submitted to the appraisal of the kaif (genealogy experts) whose decision will prove the child’s lineage.¹²⁵ Accordingly, the husband can want to deny the paternity of the child based on DNA fingerprint test result for accurate determination

¹²⁰ Ibn Rushd, *Bidāya al-mujtahid*, 2: 199; Shirādhi, *al-Muhedhdhab*, 3: 77, 85; Shirbinī, *Mughnī al-muhtāj* (Bairut: Dār al-ma‘rife, 1997), 3: 500-501; Ibn Qudāma, *al-Mughnī*, 11: 141. See also. Zaydān, *al-Mufaṣṣal*, 8: 331; Hilālī, *al-Baṣma al-wirāthiyya*, 343.

¹²¹ Hilālī, *al-Baṣma al-wirāthiyya*, 351-352. On this issue also see Sabri Erturhan, “Fikhi Açıdan Nitelikli Cinsel Saldırı (Irza Geçme)”, *Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi* 16, no. 2 (2012): 39-43.

¹²² See if one is forced to have sexual intercourse, s/he is not sentenced to adultery punishment. Ibn Rushd, *Bidāya al-mujtahid*, 2: 692-693; Ibn al-Humām, *Faḥ al-Qādir*, 5: 200-202; Shirbinī, *Mughnī al-muhtāj*, 4: 188; Ibn Qudāma, *al-Mughnī*, 11: 160, 12: 347-348. Also see. Udah, Abd al-Qadir. *al-Tashrī al-jināi al-islāmī* (Bairut: Müassasa al-Risāle, 1989), 2: 364-366.

¹²³ For suspicion quashing adultery see. Marghinānī, *al-Hidāya*, 2: 100-105; Udah, *al-Tashrī al-jināi al-islāmī*, 2: 359-364; Abū Zahra, *al-Ahwāl al-shasiyya*, 147-153. The cases that lead to adultery punishment are the followings: sexual intercourse from anus, sexual intercourse with a dead woman, having sex with a girl under age, coercing of woman or man for adultery existence of wedding suspicion (vicious wedlock), suspicious sexual intercourse (by mistaking him/her with his/her spouse), not knowing that adultery is illicit (Zuḥaylī, *al-Fiqh al-islāmī*, 6: 26-36.)

¹²⁴ Ibn Qudāma, *al-Mughnī*, 11: 160.

¹²⁵ Shirādhi, *al-Muhedhdhab*, 3: 80; Ibn Qudāma, *al-Mughnī*, 11: 172. Hanbali canonist Ibn Qudāma states that if there is doubt that the child born within iddet (waiting period for woman to remarry after divorce), the case is also presented to geneologist see. Ibn Qudāma, *al-Mughnī*, 11:241-262.

of legal consequences of proving paternity. He does so without accusing his wife of adultery within the period of marriage and without trying to divorce her with *li‘ān* due to the possibility that the wife was forced to adultery (rape) or suspicious sexual intercourse or that the women got pregnant before marriage.

We want to point out that DNA fingerprint test cannot fully replace *li‘ān* procedure in all aspects; therefore, the view that DNA fingerprint test should be invalid for the denial of lineage is¹²⁶ not right. Of course, the two issues are different from each other and it is not possible that they have the same results. The aim of denial of paternity with DNA fingerprint test is to prevent the misattribution of a child’s lineage to the husband, and to enable legal determination and registration of the rights and responsibilities of the father based on the proving of lineage. Therefore, when the husband wants the denial of lineage with DNA fingerprint, he might not be aiming to divorce and lead to other consequences. *Li‘ān* application can be only for divorce, it can also include denial of paternity. Accordingly, if a husband who opens a denial of paternity case based on the result of DNA fingerprint test, he can also open a separate case for divorce or use his right to divorce. Therefore, just as there is not a causal relation between *li‘ān* procedure and denial of paternity,¹²⁷ there might not need to be a causal relation between denial of paternity case based on DNA fingerprint test and divorce.

CONCLUSION

DNA fingerprint test is a modern and scientific means of proving, which is not included in classical Islāmic law books. Therefore, late Islāmic law researchers have put forward different views whether DNA fingerprint test should be a binding means of proof. However, when the views and justifications of both sides are assessed, it is understood that the view that DNA fingerprint test can be a binding and legitimate proof in the denial of the paternity just as it is in proving paternity is right.

It is possible to summarize the results of our study on DNA fingerprint test as a means of proof in denial of paternity in Islāmic law as follows:

¹²⁶ Mayman, “*al-Başma al-wirāthiyya*”, 618; Ka‘bī, *al-Başma al-wirāthiyya*, 435-439.

¹²⁷ Qāsim, “*al-Başma al-wirāthiyya*”, 71.

- 1) The determination of the paternity is closely related to many legal issues like inheritance, custody, restraining of marriage, alimony, ransom payment¹²⁸ and testimony.¹²⁹ Therefore, it is important to determine and register paternity accurately.
- 2) In Islāmic law, in line with the edict of hadith “The child belongs to the husband married to the woman. Adulterers are deprived”¹³⁰, the lineage of the child who is born within wedlock is attributed to the husband. However, if it is understood that the child is born as result of adultery or pregnancy occurred in a period before marriage, the husband is given the right to deny paternity through “li’an” or without “liān”.¹³¹
- 3) Accordingly, if the husband accuses his wife of adultery by claiming that the child born within wedlock is not by him but cannot prove this with four witnesses; he opens a denial of paternity case and denies the child’s paternity with li’an procedure. If the woman gets pregnant before marriage, or if it is impossible for the husband to be the father because of biological and physiological reasons and because of impossibility of sexual intercourse as the spouses are far away from each other, the husband has the right to open a denial of paternity case without li’an procedure.¹³²
- 4) On the other hand, “li’an” practice is an exceptional rule for the denial of paternity of a child born within wedlock. The proper practice is to prove that the child is born as a result of adultery with four witnesses or with confession. Therefore, li’an is not a religious practice that must be performed. As a matter of fact, majority of Islāmic law experts state that li’an is not necessary when

¹²⁸ In Islāmic law in unintentional killing or bodily injury, the members of council, professional organization, or the like who are responsible for blood money are called “ākile”. See. Hamza Aktan, “Ākile”, *Türkiye Diyanet Vakfı İslām Ansiklopedisi*, vol. 2 (Ankara: TDV, 1989), 248.

¹²⁹ Karaman, *İslām Hukuku*, 1: 392; Karaman, A. *İslām Hukuku*, 1: 45, 140; Dönmez, “Nesep”, 573.

¹³⁰ Bukhārī, “Buyū”, 3, 100; “Husūmāt”, 6; “Waşāyā”, 4; “Maghāzī”, 53; “Farāid”, 18, 28; “Hudūd”, 23; “Aḥkām”, 29; Muslim, “Radā”, 10; Abū Dāvūd, “Talāq”, 33-34; Nasāi, “Talāq”, 48; İbn Māca, “(الولد للفراش وللعاهر الحجر)”, 59; Ahmad ibn Hanbal, *Musnad*, VI, 37, 129, 200, 226, 237, 246.

¹³¹ İbn Rushd, *Bidāya al-mujtahid*, 2: 194; Māwardī, *al-Ḥāvi al-kabīr*, 11: 159; İbn Qudāma, *al-Mughnī*, 11: 122; See also. Muḥammadī, *Aḥkām al-nasab*, 285-287.

¹³² Yılmaz, “İslām Aile Hukukunda Nesebin Reddi”, 35-45. Besides see. Dönmez, “Nesep”, 573-574.

husband accuses his wife of adultery and proves it with four witnesses or when the woman confesses it.¹³³

- 5) Therefore, if it is proven that the child belongs to someone else with DNA fingerprint test, which is considered as a binding means of proof in many legal and crime cases including the proving and denial of paternity, the husband should have the right to open a denial of paternity without needing li‘ān procedure.
- 6) On the other hand, proving that the child born within wedlock is a result of adultery with DNA fingerprint test and sentencing the woman to adultery punishment (rejm) are different issues. Therefore, when it is proven that the child belongs to someone else with DNA fingerprint test, the woman is not sentenced to adultery punishment (rejm) because of the possibility that pregnancy was the result of rape or suspicious sexual intercourse.
- 7) Accepting DNA fingerprint test as a proof does not mean cancelling or changing li‘ān procedure; on the contrary, it means rendering li‘ān unnecessary by finding a means of proof like DNA fingerprint test, which can substitute it. Therefore, when DNA fingerprint test is not possible, li‘ān procedure will continue to be in effect.
- 8) The fundamental sources of Islām, Qur’ān¹³⁴ and sunnah,¹³⁵ encourage learning science and acting accordingly. Thus, there should not be any objection in Islāmic law to using DNA fingerprint test, which is a scientific means of proof, and acting according to it in the denial of paternity just as in proving paternity.
- 9) As a matter of fact, the general principle in the denial of paternity, which is expressed by Maverdi (d. 450/1058) as follows “If scientific truths indicate that the child does not belong to the husband, the paternity of the child is denied without li‘ān procedure”¹³⁶, indicates that modern and scientific means of

¹³³ Bk. Ibn Rushd, *Bidāya al-mujtahid*, 2: 199; Shirādhi, *al-Muhedhdhab*, 3: 77, 85; Shirbīnī, *Mughnī al-muhtāj*, 3: 500-501; Ibn Qudāma, *al-Mughnī*, 11: 141. See also. Zaydān, *al-Mufaṣṣal*, 8: 331; Hilālī, *al-Baṣma al-wirāthiyya*, 343.

¹³⁴ For example see. Al-Tawba 9/122; Ta-Ḥa 20/114; al-Anbiya 21/7; al-Ankabūt 29/43; al-Fātir 35/28; al-Zumar 39/9; al-Mujādala 58/11.

¹³⁵ “Kitāb al-‘ilm” sections of hadith collection can be seen for examples in this issue.

¹³⁶ Māwardī, *al-Hāvi’ al-kabīr*, 11: 159.

proof like DNA fingerprint test can be taken into consideration for opening denial of paternity case.

- 10) In conclusion, in line with the edict of the Qur'ān verse "Call them (your children) by their fathers. It is more just in the sight of Allah" (al-Ahzab, 33/5)¹³⁷, the husband should have the right to open a denial of paternity case to get paternity proven (or denied) with DNA fingerprint test without needing li'ān procedure.

REFERENCES

- ‘Abdulmun‘im, Fuād Ahmad. "al-Başma al-wirāthiyya wa dawruhā fi al-ithbātī'l-jināi bayn al-sharīa ve al-künün". *Mu'tamar al-handasa al-wirāthiyya bayn al-sharīa ve al-känün, Jāmia al-Imāra al-Mujalad al-Rābi* (5-7 May 2002): 1357-1476.
- Akıntürk, Turgut. *Yeni Medeni Kanuna Uyarlanmış Aile Hukuku*. İstanbul: Beta Publishing, 2004.
- Akkaya, Seda Ercan et al.. *Orta Öğretim (9. Sınıf) Biyoloji Ders Kitabı*. Ankara: MEB, 2012.
- Aktan, Hamza. "Ākile". *Türkiye Diyanet Vakfı İslām Ansiklopedisi*. 2: 248-249. Ankara: TDV Publishing 1989.
- ‘Amr, Eymān Muhammad ‘Umar. *al-Mustajaddāt fi wasāil al-ithbāt fi al-ibādāt wa al-muāmelāt wa al-huqūk wa al-hudūd wa al-jināyāt*. Bairut: Dāru İbn Hazm/al-Dāru al-Osmāniyye, 2010.
- al-‘Ashqar, Muḥammad Sulayman. "Ithbāt al-nasab bi al-Başma al-wirāthiyya", in *Ebhāsun ijtihādiyyatun fi al-fiqh al-tibbi*, 250-269. Bairut: Muassasa al-Risāle, 2001.
- Aydın, M. Akif. "Liān". *Türkiye Diyanet Vakfı İslām Ansiklopedisi*. 27: 172-173. Ankara: TDV Publishing, 2003.
- ‘Aynī, Badruddīn. *Umde al-Qārī sharhu Sahih al-Buhārī*. 20 volumes. Egypt: 1972.
- Bilmen, Ömer Nasuhi. *Hukuku İslāmiyye ve Istilahātı Fikhiyye Kamusu*. 8 volumes. İstanbul: Bilmen Basım ve Yayınevi, 1985.
- Campbell, Neil A. ve Jane B. Reece. *Biyoloji*. çev. Editörleri: Ertunç Gündüz et al. Ankara: Palme P., 2010.
- Dönmez, İbrahim Kāfi. "Nesep". *Türkiye Diyanet Vakfı İslām Ansiklopedisi*. 32: 573-575. Ankara: TDV Publishing, 2006.
- Abū Zahra, Muḥammad. *al-Ahwāl al-shasiyya*. Cairo: Dār al-Fikr al-‘Arabī, 1957.
- Abū Zahra, Muḥammad. *al-‘Uqūba*. Cairo: Dār al-Fikr ‘Arabī, undated.
- al-Mawsūa al-fiqhiyya, "Liān". 35: 246-267. Quwayt: Wizāra al- ‘Awqāf wa al-Shuūn al-Islāmiyya al-Quwayt, 1995
- al-Mawsūa al-fiqhiyya, "Nasab". 40: 231-256. Quwayt: Wizāra al- ‘Awqāf wa al-Shuūn al-Islāmiyya al-Quwayt, 2001.
- Erten, Rifat et al. "Gen (DNA) Testinin İspat Hukuku Açısından Değerlendirilmesi". *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 45, no. 1-4 (1996): 573-588.
- Erturhan, Sabri. "Fikhi Açidan Nitelikli Cinsel Saldırı (Irza Geçme)". *Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi* 16, no. 2 (2012): 21-71.
- Ayman Muhammed Omar al-‘Amr. *al-Mustajaddāt fi wasāil al-ithbāt fi al-ibādāt wa al-muāmelāt wa al-hukūk wa al-hudūd wa al-cināyāt*. Bairut: Dāru İbn Hazm/al-Dār al-‘Osmāniyya, 2010.

¹³⁷ Dönmez, "Nesep", 573.

- Hatemi, Hüseyin ve Rona Serozan. *Aile Hukuku*. İstanbul: Filiz Kitabevi, 1993.
- Khatib, Yasin ibn Nâsır ibn Muḥammad. “al-Başma al-wirâthiyya: mafhûmuhâ ve hujjiyyâtuhâ wa majâlât al-istifâdati minhâ wa al-hâlât al-latî yumnau ‘amaluhâ fihi”. *Majalla al-adl, Wizâra al-adl as-Su‘udiyya* 41 (Muharram 1430): 166-212.
- Khatib, Yasin bin Nâsır bin Muḥammad. *Thubût al-nasab: dirâsa mukârana*. Jeddah: Dâr al-Bayân al-‘Arabi, 1987.
- Haniyye, Mâzin ‘İsmâil and ‘Ahmed Ziyâb Shuweydah. “Nafy al-nasab fi al-fiqh al-‘İslâmî wa davr al-haqâik al-‘İlmiyya allatî al-muâsira fihi”, *Majalla al-Jâmi‘a al-‘İslâmiyya (Silsila al-dirâsa al-‘İslâmiyya)* 16, no. 2 (2008): 1-25.
- Hilâlî, Şaduddîn Mas‘ad. *al-Başma al-wirâthiyya wa ‘alâiquha al-Shar‘iyya: dirâse fiqhiyya muqârana*. Quwayt: Jâmi‘a al-Quwayt, 2000.
- Hilâlî, Şaduddîn Mas‘ad. “al-Başma al-wirâthiyya wa Majâlât al-istifâda minhâ”. *‘Amâl wa buhûs al-davra al-sâdisata ‘aşera li al-majma al-fiqh al-‘İslâmî fi Makka al-mukarrama* 3 (2003): 255-277.
- ibn ‘Abidin. *Radd al-mukhtâr*, ed. ‘Adil ‘Ahmed ‘Abd al-Mawjûd and ‘Ali Muḥammad Muawwid. 13 volumes. Riyadh: Dâr ‘Alam al-kütüb, 2003.
- ibn Ḥazm. *al-Muḥallâ*. 11 volumes. Cairo: İdâra al-tibâa al-muniriyya, 1352.
- ibn Qayyim al-Jawziyya. *al-Turuk al-ḥukmiyya fi al-siyâsa al-Shar‘iyye*. ed. Nâyif ibn Ahmed al-Hamad. 1st and 2nd volumes together. Makka: Dâr al-‘âlam al-fawâid, 1428.
- ibn Qayyim al-Jawziyya. *Zâd al-maâd*, ed. Shuayb al-‘Arnawut and ‘Abd al-Kadîr al-‘Arnawut. 6 volumes. Bairut: Muassasa al-Risâla, 1994.
- ibn Kathîr, ‘Imâduddîn ‘Ebi al-Fidâ ‘İsmail. *Tefsîr al-Qur‘ân al-‘Azîm*. ed. Mustafa Sayyid Muḥammad et al., Cairo: Muassasa Qurtuba, 2000.
- ibn Qudâma, Muvaffakuddîn Abdullah ibn ‘Ahmad. *al-Mughnî*. ed. ‘Abdullah ibn ‘Abdulmuhsin al-Turkî and ‘Abdulfattah Muḥammad al-Huluv. 15 volumes. Riyadh: Dâr al-‘âlem al-kütüb, 1998.
- ibn al-Humâm, Kamâluddîn. *Fath al-Qâdir*. 10 volumes. Bairut: Dâr al-kütüb al-‘İlmiyya, 2003.
- ibn Rushd al-Hafîd. *Bidâya al-mujtahid wa nihâya al-muqtasid*. 2 volumes. ed. Taḥa Abd al-Raûf Şa‘d. Bairut: Dâr al-Jiyl, 2004.
- Ka‘bî, Khalîfa ‘Ali. *al-Başma al-wirâthiyya wa ‘etheruhâ al-ahkâm al-fiqhiyya: Dirâsa fiqhiyya muqârana*. Jordan: Dâr al-Nafâis, 2006.
- Kahraman, Abdullah. “İslâm Hukuk Duşüncesinde Taabbudî Hükümler ve TaAbüdiyyâtın Sahası Üzerine”. *İslâm Hukuku Araştırmaları Dergisi* 2 (2003): 25-57.
- Klug, William S. et al.. *Genetik Kavramlar*, çev. Editörü: Cihan Öner et al. Ankara: Palme Publishing, 2011.
- Qaradâghî, ‘Ali Muḥyiddîn. “al-Başma al-wirâthiyya min manzûr al-fiqh al-‘İslâmî”. *Majalla al-Majma al-Fiqh al-‘İslâmî: Râbita al-‘Âlam al-‘İslâmî* 14, no.16 (1424): 27-67.
- Qaradâghî, ‘Ali Muḥyiddîn and ‘Ali Yusuf Muḥammadi. “al-Başma al-wirâthiyya min manzûr al-fiqh al-‘İslâmî”, in *Fiqh al-Qadâyâ al-tibbiyye al-muâsira*. 337-369. Bairut: Dâr al-beshâir al-‘İslâmiyya, 2005.
- Karaman, Hayreddin. *Mukayeseli İslâm Hukuku*, 3 volumes. İstanbul: Nesil Publishing, 1987.
- Karaman, *Anahatlarıyla İslâm Hukuku*, 3 volumes. İstanbul: Ensar Publishing, 2010.
- Qarârât al-majma al-fiqh al-‘İslâmî bi Makka al-Mukarrama*. al-Davarât min al-‘ûla ilâ al-sâbiata aşara, al-Qarârât: nim al-‘ûla ilâ al-sâni ba‘d al-mia (1988-2004) “Qarârât al-davra al-sâdisata aşara, al-Qarâr al-sâbi‘: Bi Sha’n al-Başma al-wirâthiyya wa majâl al-istifâda minhâ”. (5-10 January, 2002): 343-344.

882 | Yılmaz, İbrahim. Denial of Paternity with DNA Fingerprint Test ...

- Qāsānī, Alā al-Dīn Abū Bakr. *Badāi' al-sanāi' fi tertīb al-sharāi'*. ed. Ali Muhammed Muawwad. 10 volumes. Bairut: Dār al-kütüb al-‘ilmiyye, 2003.
- Qāsim, Abd al-Rashid Muḥammad Emin ibn “al-Başma al-wirāthiyya wa ḥujjiyyatühā”. *Mejletü'l-adl, Wizāratü'l-adli's-Su'ūdiyya* 6, no.23 (1425): 51-78.
- Köse, Saffet. *Genetiğiyle Oynanmış Kavramlar ve Aile Medeniyetinin Sonu*. Konya: Mehir Vakfı, 2014.
- Māwardī, Abū al-Hasan Ali ibn Muhammed. *al-ḥāvi al-kabīr fi fiqh madhhab al-İmām al-Shāfi'*. ed. Ali Muhammed Muawwad and Adil Ahmed Abd al-Mawjūd. 18 volumes. Bairut: Dār alkütüb al-‘ilmiyya, 1994.
- Marghinānī. *al-Hidāya Sharhu Bidāya al-mübtadī*. 4 volumes. İstanbul: Dāru Kahraman, 1986.
- Mayman, Nāşir Abdullah. “al-Başma al-wirāthiyya wa ḥükmü istihdāmihā fi majāl al-tıbb al-shar'ia wa al-nasab”, *Mu'tamar al-handasa al-wirāthiyya bayna al-shar'ia ve al-kānūn, Jāmia al-İmāra* 2 (5-7 May 2002): 589-630.
- Moḥammadi, Ali Muḥammad Yusuf. *Ahkām al-nasab fi al-Shar'ia al-islāmiyye: turuqu ithbātihī wa nefyihī*. Qatār: Dār Qatrā bin Fūjāe, 1994.
- Othman, İbrahim Ahmed. “Davır al-Başma al-wirāthiyya fi Qadāya ithbāt al-nasab wa al-jerāim al-jināiyya”. *al-Mu'tamar al-Arabī al-awwal li 'ulūm al-adilla al-jināi wa al-tıbb al-shar' iyyi*. 1-31. Riyādh: Jāmia aj-Nāyif al-Arabiyya li al- 'ulūm al-amniyya, 2007.
- Sabil, 'Umar ibn Muḥammad. “al-Başma al-wirāthiyya wa madā meshrūiyya istihdāmihā fi al-nasab wa al-jināya”. *Majalla Majma al-Fiqh Al-İslāmī: Rābita al-'Alem 'İslāmī* 13, no. 15 (1423): 27-97.
- Salāmī, Muḥammad Muhtār. “al-Tahlil al-biyolojī li al-jināt al-bashariyya wa ḥujjiyyatüha fi al-ithbāt”. *Mu'tamar al-handasa wirāthiyya bayn al-shar'ia wa al-qānūn, Jāmia al-İmāra* 2. (2002): 435-468.
- Suwaylim, Bandar ibn Faḥd. “al-Başma al-wirāthiyya wa etharuhā fi al-nasab”. *Majalla al-adl, Wizāra al-adl al-Şu'ūdiyya* 37 (1429): 82-166.
- Shavqānī, Muḥammad ibn Ali ibn Muḥammad. *Nayl al-'awtār*. 12 volumes. Riyadh: Dār Ibn Qayyim, 2005.
- Shirādhi, Abū Ishāk İbrahim ibn Ali. *al-Mühezzab fi al-fiqh al-İmām al-Shāfi'* 3 volumes. Bairut: Dār al-kütüb al-‘ilmiyye, 1995.
- Shirbīnī. *Mughnī al-muhtāj*. 4 volumes. Bairut: Dār al-ma'rife, 1997.
- Tayşi, Mehmet. “Kıyāfe”. *Türkiye Diyanet Vakfı İslām Ansiklopedisi*. 25: 508. Ankara: TDV Publishing, 1997.
- Udah, Abd al-Qadīr. *al-Tashrī al-jināi al-islāmī*. 2 volumes. Bairut: Müassasa al-Risāle, 1989.
- Wāşil, Naşr Farīd. “al-Başma al-wirāthiyya wa majālāt al-istifāda minhā”. *Majalla al-Majma al-Fiqh al-İslāmī: Rābita al-'Ālam al-İslāmī* 15, no.17 (1425): 52-98.
- Yılmaz, İbrahim. “İslām (Aile) Hukukunda DNA Parmak İzi Testi ile Nesebin Sübütü”. *İslām Hukuku Araştırmaları Dergisi* 22 (2013): 63-112.
- Yılmaz, İbrahim. “İslām Aile Hukukunda Nesebin (Soybağının) Reddi”. *Marife* 14, no. 1 (2014): 31-51.
- Zaydān, Abd al-Karīm. *al-Mufaşşal fi ahkām al-mar'a wa al-bayt al-müslim fi al-shar'ia al-İslāmiyye*. 11 volumes. Bairut: Müassasa al-Risāle, 1993.
- Zuḥaylī, Wahba. *al-Fiqh al-İslāmī wa 'adillatuhū*. 8 volumes. Dimashq: Dār al-fikr, 1989.
- Zuḥaylī, Wahba Mustafa. “al-Başma al-wirāthiyya wa majālāt al-istifāda minhā”. *'Amāl wa bühūth al-dawra al-sādisa 'aşara li al-mejma al-fiqh al-İslāmī fi Makka al-Mükarrama* 3 (2003): 11-36.
- Zuḥaylī, Mohammed Muştafa. *Wasāil al-ithbāt fi al-shar'ia al-İslāmiyya fi al-muāmelāt al-madaniyya wa al-aḥwāl al-shakhsiyya*. 1st and 2nd volumes together. Dimashq-Bairut: 1982.