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Negation of Paternity in Islamic Law between *Li'ān* and DNA Fingerprinting*

Ayman Shabana

Abstract

This essay explores the impact of DNA fingerprinting on the Islamic law of paternity, with a particular focus on paternity negation and the continued validity of *li'ān* (mutual oaths of condemnation). After surveying the scriptural and legal foundations of *li'ān* in the Islamic legal tradition, the essay traces the introduction of DNA fingerprinting for the resolution of identity and paternity disputes in the modern period, especially in the American legal context. The essay explores the modern Muslim legal opinion on the issue by examining the statements and discussions of three scholarly councils: the Islamic Organization for Medical Sciences, the International Islamic Fiqh Academy, and the Islamic Fiqh Council. The essay argues that the modern Muslim opinion on the issue is a function of both the legal characterization of DNA fingerprinting vis-à-vis shari'ah methods for the establishment and negation of paternity, and the reconstructed role and objective of *li'ān* as a legal method.

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Keywords

DNA, DNA fingerprinting, DNA testing, *fiqh*, genealogy, *ijtihād*, Islam, Islamic law, *li'ān*, lineage, parentage, paternity testing, paternity, paternity negation, *Shari'ah*

Introduction

The discovery of DNA fingerprinting has been hailed as one of the most important achievements of modern biomedical technology. It ushered in a new phase of research in the life sciences and facilitated the launch of the Human Genome Project. DNA fingerprinting is used mainly for identity verification, which includes both paternity and general identity-related purposes, especially in criminal and other forensic investigations. For the first time in human history, DNA tests have made it possible to reveal unique genetic information with unprecedented precision and accuracy.

This, in turn, raises important questions about traditional or religious methods for the establishment, or negation, of paternity and their continued relevance in the modern period. In the age of science, traditional approaches to knowledge and its sources are deemed unscientific and therefore suspect. In the case of Islamic culture, Islamic law provides a comprehensive legal structure that governs various aspects of a Muslim's life at both the individual and collective levels. In no other area has *shari'ah* been as detailed and specific as it is in the area of family law. One reason for this is that rules pertaining to marriage, divorce, inheritance, and related issues are rooted in the Qur'an and the Sunnah of the Prophet. By their nature, these texts, especially the Qur'an, are believed to be definitive not only in origin (*thubūt*) but often also in signification (*dalālah*). Moreover, these texts are connected to precedents established during the lifetime of the Prophet and the early generations of the Muslim community. Over time, and through the employment of consensus (*ijmā'*), the main rules governing family relationships have remained stable even if inter- and intra-school arguments on specific details continued to evolve. Within this Islamic legal structure, paternity has always been connected with licit sexual relationship, either through marriage or ownership of a slave woman. In the case of marriage, children born within wedlock are automatically

attached to the bona fide husband who also becomes the bona fide father.¹ Similarly, negation of paternity is achieved through mutual oaths of condemnation (*li'ān*) that not only negate paternity but also terminate marriage irrevocably.

Traditionally, mutual oaths of condemnation have been considered the absolute last resort for the resolution of a marital dispute involving children after that dispute has reached the point of no return. But the truth value of the opposing claims of the disputing spouses, as borne out by the mutual oaths of condemnation, remain indeterminable. As a legal device, *li'ān* is not meant to reveal the truth or to verify the claims of the disputing parties. Rather, it is meant to end a dispute that has proven irresolvable. *Li'ān*, therefore, cannot remove the ambiguity that results from the competing unverified claims of the disputing spouses, which are bound to remain at that level of (un)certainty. According to classical jurists, *li'ān* provides an opportunity for spouses to end their dispute in a manner that allows them to save face and to preserve their dignity. When the husband cannot substantiate his charge of adultery against his wife, he uses the oaths of condemnation in lieu of the requisite evidentiary support. Similarly, the wife can defend herself against the husband's claim by retorting oaths. However, if, in the past, the opposing claims of disputing spouses remained inconclusive due to lack of a definitive method to verify these claims, modern science has created such a method. While DNA testing can now verify these opposing claims almost beyond doubt, it raises a question regarding the status and continued validity of *li'ān*.

In this essay I argue that in the Muslim world *li'ān* remains the standard method for negation of paternity and that it takes priority over other scientifically proven methods such as DNA testing. Despite occasional calls for the adoption of DNA testing as a definitive method for the resolution of paternity disputes, such disputes are governed by the principles and procedures of Islamic family law, according to which *li'ān* is the ultimate mechanism for the denial of paternity in marital

¹ In the case of ownership, the attachment of a child to the master is dependent on the latter's acknowledgement, which also gives the mother the status of *umm walad* (mother of a child).

disputes. I ascribe the tenacity of Islamic law and its procedures in the modern period as much to the religious dimension of Islamic law as to the decision-making process in areas of interface between Islamic law and modern science and technology. Traditionally, such decision-making process has been governed by the general principles of Islamic legal theory (*uṣūl al-fiqh*), which continue to play an important role in the modern period, although in a completely changed legal landscape. The most important development that relates to the issue at hand is the emergence of legal and scholarly councils that examine new or novel cases, especially those requiring technical expertise. These councils include prominent experts in both Islamic law and relevant scientific fields. Below, I will elaborate on this point with particular focus on the question of denial of paternity by examining the relevant discussions and statements of three representative institutions: The Islamic Organization for Medical Sciences (Kuwait); the Islamic Fiqh Council (Muslim World League, Mecca); and the International Islamic Fiqh Academy (Organization of Islamic Cooperation, Jeddah). These institutions have become important forums that set standards and provide guidelines for conventional legal genres such as substantive legal discussions, fatwas, and court decisions.

Before elaborating on the discussions and statements of these three scholarly councils, I start with the textual references to *li'ān* that have provided the foundation for the legal discourse on the issue both in the past and in the modern period. Next, I will follow the construction of the legal institution of *li'ān* in the legal tradition by examining its applicability and implications. I will then turn to the reconstruction of the *li'ān*-related texts in the modern period and the various methods used for this reconstruction. In order to add a comparative perspective I will look at the impact of DNA testing on paternity in the American legal system. By tracing the textual and legal foundations undergirding denial of paternity in the Islamic legal tradition, the essay aims to illustrate how and why *li'ān* was able to endure the impact of genetic testing, which has managed to bring significant changes to paternity regulations in other legal systems. Paying special attention to the question of reinterpretation, I examine divergent views on *li'ān* in the modern period and attempt to determine if they are anchored in either a particular reading/interpretation of a text or in a reevaluation of the changing

circumstances of the modern context. At the heart of the discussion, I take particular interest in legal methodology in an effort to explore the extent to which classical methods continue to inform legal decision-making in the modern period as well as the relevance of theoretical discussions to real cases in new social and cultural settings. Finally, by exploring some aspects of the interface between modern genetic technology on the one hand and Islamic law and ethics on the other, I seek to show that the subject is not limited to Islamic legal studies but can also be situated within ongoing scholarly efforts to identify, define, or develop the current discourse(s) within the emerging field of Islamic bioethics.

***Li'ān* in Foundational Texts**

The word *li'ān* is derived from a root that means to curse.² It is used in both the Qur'ān and the Prophetic Sunnah to describe the process of dissolving marriage following a husband's accusation of infidelity against his wife.³ The main reference occurs in Q. 24:6-9:

And for those who accuse their spouses [of adultery] and have no evidence but their own [testimony], he [the husband] should bear witness four times by God that he is solemnly telling the truth; and the fifth time is that he solemnly invokes the curse of God on himself if he, by means of this testimony, is telling a lie; but it would avert the punishment from the wife if she bears witness four times by God that he is telling a lie; and the fifth time is that she solemnly invokes the wrath of God on herself if he is telling the truth.⁴

As the verses indicate, the *li'ān* process consists of two sets of five oaths to be taken by the disputing spouses. The word 'curse' refers specifically to the fifth oath, by means of which each spouse invokes God's curse or wrath if he or she takes a vain oath. Although the verses do not mention negation of paternity, *li'ān* is considered the standard method for

² Ibn Manẓūr, *Lisān al-'Arab*, 9 vols. (Cairo: Dār al-Ḥadīth, 2003), 8:92.

³ *EP*, s.v. *Li'ān* (J. Schacht).

⁴ Translation of the *li'ān* verses is a modified version of 'Abdullah Yūsuf 'Alī, *The Meaning of The Holy Qur'ān* (Beltsville: Amana Publications, 1989), 866-67.

the resolution of marital paternity disputes, as evidenced by a number of Prophetic traditions. The procedure described by the verses is meant to substitute for the application of the punishment for false or unsupported accusation (*qadhf*) that otherwise would apply to the husband if he accused his wife of infidelity without full legal proof.

Tradition has it that these verses were revealed in reaction to a specific incident for which the Prophet did not have a ready answer.⁵ The classical sources record two main reports that document this incident, both of which are linked to Q. 24:4, which stipulates the punishment for an unsupported accusation of adultery against innocent women: “And those who accuse chaste women and fail to produce four witnesses, flog them eighty lashes and reject their evidence ever after because they are wicked transgressors.”⁶ The first and probably best-known report is recorded in al-Ṭabarī and attributed to ‘Ikrimah (d. 104/722),⁷ who reported that Sa’d ibn ‘Ubādah (d. 15/636) questioned the applicability of this punishment to married couples. According to this report:

Sa’d ibn ‘Ubādah said [to the Prophet]: “If I find a woman [married to me] in the company of a male stranger [viz., committing adultery] and then report what I saw, will I be liable for the punishment of eighty lashes if I fail to produce four witnesses? But if I wait until I have gathered the required four witnesses, he [viz. the male stranger] will easily be able to flee before I

⁵ I am aware of the debates on the historicity of Islamic literary sources in Western scholarship. Several studies reviewing available theories and methods compare two general approaches: a traditional approach, which accepts Muslim literary sources; and a revisionist approach, which is skeptical about the authenticity of the Muslim sources, see J. Koren and Y.D. Nevo, “Methodological Approaches to Islamic Studies,” *Der Islam* LXVIII (1991):87-107. See also Herbert Berg, *The Development of Exegesis in Early Islam, The Authenticity of Muslim Literature from the Formative Period* (New York: RoutledgeCurzon, 2000), where he argues for a third approach, which he refers to as the “middle ground.” For a critical review of this work see Harald Motzki “The Question of the Authenticity of Muslim Traditions Reconsidered: A Review Article” in *Method and Theory in the Study of Islamic Origins*, ed. Herbert Berg (Leiden: Brill, 2003), 211-257. I am not convinced that preconceived judgments involving wholesale rejection or acceptance are helpful. Alternatively, a more issue-based approach, which examines available sources on an issue and verifies their authenticity, may be more fruitful.

⁶ Q. 24:4.

⁷ He was the freed slave (*mawlā*) of the Companion ‘Abd Allāh ibn ‘Abbās (d. 68/687). See Ibn al-Jawzī, *Ṣifāt al-Ṣaḥābah*, 2 vols., ed. al-Shahhāt al-Ṭahhān (Cairo: Dār al-Manār, 2003), 1:380, 1:311-316 (on Ibn Abbās), and 1:204 (on Sa’d ibn ‘Ubādah).

had done this.” The Prophet responded, “O people of al-Anṣār, don’t you hear what your master is saying?” They noted, “O Prophet of God do not blame him, for he is well-known for his extreme jealousy. He has never married anyone but a virgin and none of us ever dared to marry a woman that he divorced.” The Prophet responded, “But this is God’s rule.” He [Sa’d ibn ‘Ubādah] then said: “God and his Prophet have said the truth.” Shortly thereafter, one of his [viz., Sa’d’s] cousins came and accused his own wife [of committing adultery], which was disappointing to those who were present. The accusing person commented: “By God, God would not subject me to the punishment of eighty lashes because I have seen and heard what made me absolutely certain about my accusation.” [‘Ikrimah] said: “The passage in the Qur’ān providing for *li‘ān* was then revealed.” The accusing man was asked to take the oaths of condemnation and before uttering the fifth oath, the Prophet commanded that he should be reminded that it is this fifth oath that incurs God’s curse [in case of false accusation]. The man responded: “By God, it would not be a cause of punishment in the Fire for me in the same way it delivered me from the punishment of eighty lashes. My accusation is true because I have seen and heard what made me absolutely certain.” When he finished, the woman was asked to retort by taking five counter-oaths to deny the accusation and absolve herself. Similarly, before uttering the fifth oath, the Prophet commanded that she should be reminded that it is this fifth oath that incurs God’s wrath [in case of false statement]. She remained hesitant for a while but eventually became determined and said: ‘I would not bring shame to my people.’ After finishing, the Prophet said: ‘If the child looks like such-and-such, then it is her husband’s but if he looks like such-and-such then it is the other person’s.’ [‘Ikrimah] said: The child’s color was closer to blackness [a description that brought him closer to the accused person than the husband], and later he [viz., the child] became a governor in Egypt despite the fact that his lineage remained unknown.”⁸

Al-Ṭabarī records another version of this report immediately following the first one, also attributed to ‘Ikrimah but citing Ibn ‘Abbās (d. 68/687) as ‘Ikrimah’s source. This second version sheds more light on the incident by clarifying several important points that were not specified in the first version. First, it identifies the person who accused his wife as Hilāl ibn Umayyah.⁹ Second, it specifies that Hilāl ibn Umayyah

⁸) Abū Ja’far Muḥammad ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī, Jāmi’ al-Bayān ‘an Ta’wīl Āy al-Qur’ān*, 26 vols., ed. ‘Abd Allāh ibn Muḥsin al-Turkī (1st ed., Cairo: Hajar li’l-Ṭibā’ah wa’l-Nashr wa’l-Tawzī’ wa’l-Ilān, 1422/2001), 17:179. Ibn Hajar al-‘Asqalānī, *Fath al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, 13 vols. (Cairo, Maktabat al-‘Ilm, 2000), 8:327.

⁹) On Hilāl ibn Umayyah, see Ibn al-Athīr, *Usd al-Ghābah fī Ma’rifat al-Ṣaḥābah*, 8 vols, ed. ‘Alī Muḥammad Mu’awwaḍ and ‘Ādil Aḥmad ‘Abd al-Mawjūd (Beirut: Dār al-Kutub

witnessed the incident on the night before it was reported, but waited until the next morning to ask the Prophet what he should do. Third, it records an encounter between Hilāl ibn Umayyah and the Prophet during which, upon seeing signs of displeasure on the face of the Prophet, Hilāl became regretful but nevertheless insisted that what he said was true and expressed hope that God would provide signs to support the truth of his statement. Echoing the rhetorical question posed by Sa'd ibn 'Ubādah, people wondered whether Hilāl would be subjected to the punishment for false accusation, in which case (according to Q. 24:4) he would be flogged and his testimony would be rendered inadmissible. Fourth, it indicates that as the Prophet was about to issue the command for Hilāl's punishment, the Companions saw signs that often appeared on his face when he was receiving revelation; shortly thereafter, the Prophet recited the *li'ān* verses. Finally, the second version concludes with a statement indicating that the Prophet separated the disputing couple and ruled that the child be attached to the accused woman, not to the person who fathered him. The Prophet also ruled that the child should not be condemned or insulted on account of his parents.¹⁰ According to the version recorded in al-Bukhārī, after the disputing couple had finished the oaths of condemnation, the Prophet noted that if the prospective child were born black-eyed, with rounded rumps, and chubby legs, then he would be the child of Sharik ibn al-Sahmā' (the accused person).¹¹ When the child's physical features

al-'Ilmiyyah, n.d.), 5:380.

¹⁰ Ibid., 182.

¹¹ Some sources refer to Sharik ibn al-Sahmā' by name (as in al-Bukhārī) while others refer to him either in subsequent narrations or commentary notes. Almost all are unanimous that he was the accused person in this incident, see al-Ṭabarī, *Tafsīr al-Ṭabarī*, 17:186. A mystery surrounds the identity and lineage of Sharik ibn al-Sahmā'. A narration in *Ṣaḥīḥ Muslim* attributed to Anas ibn Mālik refers to him as the maternal half-brother of al-Barā' ibn Mālik. See al-Nawawī, *Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī*, 18 vols., ed. Salāḥ 'Uwayḍah and Muḥammad Shihātah (Cairo: Dār al-Manār, 2003), 10:99. In his commentary on *Ṣaḥīḥ al-Bukhārī*, Ibn Hajar al-'Asqalānī disputes this narration because the mother of al-Barā' was the mother of Anas, the famous Umm Salīm, who was never known as al-Sahmā'. Ibn Hajar suggests that al-Sahmā', mother of Sharik, may have been al-Barā's foster mother. Ibn Hajar also records several other opinions regarding the identity and lineage of Sharik without supporting any particular opinion, see al-'Asqalānī, *Fath al-Bārī*, 9:412. Elsewhere he refers to one particular opinion that matches the details of the second report below. According to this opinion, Sharik ibn al-Sahmā's father was 'Abdah ibn

matched this description, the Prophet noted: "Had the Qur'ān not given guidelines on this issue, I would have settled it differently."¹² This statement is often taken to mean that if the *li'ān* verses had not been revealed, the Prophet would have subjected the accused woman to the *ḥadd* punishment for adultery.¹³ It also indicates that the husband's oaths substitute for the punishment for false accusation and that the wife's oaths substitute for the punishment for adultery.¹⁴

The other report on the issue is conveyed on the authority of Mālik ibn Anas (d. 179/795) through Ibn Shihāb al-Zuhrī (d. 124/741):¹⁵

Sahl Ibn Sa'd al-Sā'idī reported that 'Uwaymir al-'Ajlānī went to 'Āṣim Ibn 'Adī al-Anṣārī and said to him: "O 'Āṣim, what if a husband finds a man [committing adultery] with his wife? Shall [the husband] kill him and if he does, would you kill him [viz., the husband, in retaliation for the slain person]? Would you ask the Prophet this question?" When 'Āṣim asked the Prophet, signs of displeasure appeared on his face, causing 'Āṣim to regret having asked the Prophet this question. When 'Āṣim returned, 'Uwaymir asked him what had happened. 'Āṣim replied by saying, "You did not bring me good;¹⁶ the Prophet did not like the question that I asked him." 'Uwaymir said, "By God I will not stop until I ask him about it myself." 'Uwaymir proceeded until he approached the Prophet in the middle of a gathering and said, "O Prophet of God what if a husband finds a man with his wife, shall he kill him, and if he does, would you kill him or what should the husband do?" The Prophet replied, "Revelation came to explain your situation and that of your wife. Go and bring her." Sahl said, "They then exchanged the oaths of condemnation, and I [viz., Sahl] was one of those present with the Prophet. When they finished 'Uwaymir said, 'I would be lying to her O Prophet of God if I continued to keep her [in marriage].' He repudiated her

Mughīth ibn al-Jadd ibn al-'Ajlān—'Ajlān is also the clan of 'Āṣim ibn 'Adī and 'Uwaymir al-'Ajlānī, see Ibn Ḥajar, *Fath al-Bārī*, 9:415. Some argued that he was not even a Muslim. The majority view, however, is that he was a Companion and that he was one of the allies of al-Anṣār, see al-Nawawī, *Ṣaḥīḥ Muslim*, 10:97, Ibn al-Athīr, *Usd al-Ghābah*, 2:631, and Ibn al-Qayyim, *Zād al-Ma'ād fī Hady Khayr al-'Ibād*, 5 vols., ed. 'Imād Zakī al-Bārūdī and Khayrī Sa'd (Cairo: al-Maktabah al-Tawfiqīyah, n.d.), 5:370.

¹² al-'Asqalānī, *Fath al-Bārī*, 8:327.

¹³ Ibid., 9:432.

¹⁴ al-Ṭabarī, *Tafsīr al-Ṭabarī*, 17:187.

¹⁵ On Ibn Shihāb al-Zuhrī, see Ibn al-Jawzī, *Ṣifat al-Ṣafwāh*, 1:398-400 and on Mālik ibn Anas, see ibid., 1:420-1.

¹⁶ "*lam ta'tini bi-khayr*."

three times before the Prophet commanded him to do so." Ibn Shihāb said, "This became the sunnah for those who exchange oaths of condemnation."¹⁷

Other versions of this report open with an introduction, similar to the one attributed to Sa'd ibn 'Ubādah in the first report, indicating that when the *qadhf* verse was revealed, 'Āṣim said, "If I report what I have seen, I will be flogged eighty (lashes) and if I remain silent, I will be suppressing my indignation." The narrator noted that 'Āṣim's remark displeased the Prophet but shortly thereafter the *li'ān* verses were revealed. The narrator added that before a week had passed, a man from 'Āṣim's clan came asking the same question that 'Āṣim had asked, whereupon the Prophet commanded him and his wife to exchange oaths of condemnation.¹⁸ Similarly, in another version in al-Bukhārī, the report concludes with a statement attributed to the Prophet, similar to the one featuring Sa'd ibn 'Ubādah and Hilāl ibn Umayyah, in which the Prophet describes the physical features to be detected in the soon-to-be born child. The statement in this report, however, does not name the accused person. In this version the Prophet states, "If the child is born with a color close to blackness, black-eyed, with bulky rumps and legs, 'Uwaymir will be more likely to have spoken the truth, but if the child is born with a color close to redness, 'Uwaymir will be more likely to have lied about the accused woman. The child's physical features were closer to the specifications that supported 'Uwaymir's statement, and he therefore was attached to his mother."¹⁹

As we will see below, the variations in the different versions of these two reports have legal implications. For example, different versions of these two reports have been used to support legal assessments on questions such as: Must the husband's accusation be based on an eyewitness account? Is a spouse who declines *li'ān* subject to the *ḥadd* punishment (for *qadhf* in the case of the husband and for adultery in the case of the wife) or to imprisonment? Can *li'ān* be used to negate (paternity during) pregnancy? Is *li'ān* categorized as an oath or as a testimony? Is the dissolution of marriage that follows *li'ān* similar to the one that follows

¹⁷ Mālik ibn Anas, *al-Muwatta'*, 2 vols., ed. Hānī al-Ḥājī (Cairo: al-Maktabah al-Tawfiqiyyah, n.d.), 2:77, al-'Asqalānī, *Fatḥ al-Bārī*, 9:413, al-Nawawī, *Ṣaḥīḥ Muslim*, 10:92-4.

¹⁸ al-Ṭabarī, *Tafsīr al-Ṭabarī*, 17:185.

¹⁹ al-'Asqalānī, *Fatḥ al-Bārī*, 8:326.

regular divorce or is it considered nullification of marriage (*faskh*)? Does that separation occur automatically after the execution of *li'ān* or does it require a judicial decree? And is the dissolution of marriage that follows *li'ān* revocable or irrevocable? I will address these points in more detail in the following section.

What is important to note here is the degree of overlap between these two reports. The first report, which is traced back to Ibn 'Abbās through his freed slave 'Ikrimah, identifies Sa'd ibn 'Ubādah as the person who poses an open question regarding the *qadhf* verse. This question is a prelude to the main passage, in which Hilāl ibn Umayyah accuses Sharik ibn al-Saḥmā' of committing adultery with his [viz. Hilāl's] wife. The second report, which is traced back to Sahl ibn Sa'd (d. 88/706) through Ibn Shihāb al-Zuhri—once on the authority of Mālik ibn Anas as recorded in *al-Muwatta'* and once on the authority of al-Awzā'i (d. 157/774) as recorded in al-Bukhārī, identifies 'Āṣim ibn 'Adī (d. 45/665)²⁰ as the person posing the question on behalf of 'Uwaymir al-'Ajlānī regarding the latter's accusation against his own wife.

Although most sources trace these two reports to two separate incidents, several shared details suggest that both reports may refer to a single incident reported by several narrators. For example, almost all versions of these two reports indicate that the accused woman's name was Khawla and that the accused man's name was Sharik ibn al-Saḥmā'.²¹ Based on these shared details, some sources argue that both reports originate in one incident, citing the report of 'Uwaymir al-'Ajlānī as the only report that recounts that incident. According to this view, reference to Hilāl ibn Umayyah was made by mistake. This view, however, has been criticized on the grounds that it ignores other equally important reports that not only refer explicitly to Hilāl ibn Umayyah,²²

²⁰ On Sahl ibn Sa'd, see Ibn al-Athīr, *Usd al-Ghābah*, 2:275-6, on 'Āṣim ibn 'Adī, see, *ibid.*, 3:110-11, and on 'Uwaymir al-'Ajlānī, see *ibid.*, 4:304.

²¹ In his commentary on these reports, al-Khaṭīb al-Tibrizī, notes the reference to Sharik ibn al-Saḥmā' as the accused person in both reports. He does not fully support the view that Sharik ibn al-Saḥmā' was the perpetrator in both incidents. He concludes with an air of uncertainty "*wa fi al-naṣṣ minhu shay'*," see al-Tibrizī, *Mirqāt al-Mafātīḥ Sharḥ Mishkāt al-Maṣābiḥ*, 12 vols., ed. Jamāl 'Itānī (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), 6:423.

²² al-Tabarī, *Tafsīr al-Tabarī*, 17:181, 183, al-'Asqalānī, *Fath al-Bārī*, 8:327, al-Qurṭubī, *al-Jāmi' li Ahkām al-Qur'ān*, 20 vols., ed. 'Imād Zakī al-Bārūdī and Khayrī Sa'īd (Cairo: al-Maktabah al-Tawfiqiyyah, n.d), 12:152.

but also identify him as the first person to have exchanged oaths of condemnation with his wife.²³ Moreover, the association of Hilāl ibn Umayyah with the *li'ān* account was probably one of the important clues to determine the exact date on which the *li'ān* verses were revealed—determined by most sources to be during Sha'bān, 9 AH. The sources that mention the date of the first application of *li'ān*, however, do not single out either of the above reports but speak about *li'ān* in general terms.²⁴ The specification of this particular date was, to a large extent, based on a well-known reference to Hilāl ibn Umayyah's wife in a report recounting events associated with the battle of Tabūk, which took place in 9 AH.²⁵ These sources connect the *li'ān* verses to the Prophet's return from the battle and to reports about those who lagged behind (*al-mukhallafūn*),²⁶ and more particularly to the story of the three repenters in which Hilāl ibn Umayyah and his wife had a visible role.²⁷ According to these clues, most sources suggest that there were two separate incidents, and that the one involving Hilāl ibn Umayyah took place before that of 'Uwaymir al-'Ajlānī.²⁸

Another important point is the reference to *qiyāfah* in these two reports. The passages in both reports citing the indication of physical features were used to support establishment of paternity on the basis of expert examination of bodily features through the classical method of *qiyāfah*. Literally, *qiyāfah* means “to trace” or “to track”. In classical Arabic, it is used in two parallel senses: the ability to examine traces

²³ al-Nawawī, *Ṣaḥīḥ Muslim*, 10:99. “*wa kāna awwala rajulⁿ lā'na fī al-Islām.*” See also al-Tabrizī, 6:421.

²⁴ al-Nawawī, *Ṣaḥīḥ Muslim*, 10:93, al-Nawawī notes “*wa kānat qīṣṣat al-li'ān fī Sha'bān sanat tis' min al-Hijrah.*” See also al-'Asqalānī, *Fath al-Bārī*, 9:414-15, and 7:720.

²⁵ Ibn Hishām, *al-Sīrah al-Nabawīyyah*, 4 vols., ed. Muḥammad Nabil Ṭarīfī (Beirut: Dār Ṣādir, 2010), 4:95.

²⁶ The details of these events are recorded in chapter 9, al-Tawbah, in the Qur'ān, see, al-Ṭabarī, *Tafsīr al-Ṭabarī*, especially 11:602-702 and 12:1-96.

²⁷ Hilāl ibn Umayyah was one of these three individuals. The other two were Ka'b ibn Mālik and Murārah ibn al-Rabī' al-'Amrī. Reference to these events occurs in Q 9:118, see al-Ṭabarī, *Tafsīr al-Ṭabarī*, 12:53-63, Ibn Hishām, *al-Sīrah al-Nabawīyyah*, 4:109, Ibn Kathīr, *al-Bidāyah wa'l-Nihāyah*, 21 vols., ed. 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī (Cairo: Markaz al-Buḥūth wa'l-Dirāsāt al-'Arabīyyah wa'l-Islāmiyyah bi Dār Hajar, 1997), 7:145-98 and al-'Asqalānī, *Fath al-Bārī*, 7:725, 9:414-15.

²⁸ al-Nawawī, *Ṣaḥīḥ Muslim*, 10:92-3, al-'Asqalānī, *Fath al-Bārī*, 8:328 and 9:31.

either of humans or animals on the ground, especially in the desert (*qiyāfat al-athar*); and the examination of the body to determine genealogical connections (*qiyāfat al-bashar*). In legal discussions the term is used mainly in the second sense: to verify claims relating to paternity and lineage. In pre-Islamic Arabia, *qiyāfah* is said to have been one of the important methods for the establishment or verification of paternity in cases of doubt, either in established marriages, if a husband had doubts concerning his relationship to a child born by his wife, or in extra marital relations, for the attachment of children to their most likely biological fathers.²⁹ Some researchers use the English word *physiognomy* or *physiognomancy* as a translation of the Arabic term *qiyāfah*. These English words, however, are used mostly to refer to another Arabic term, *firāsah*, which has a long history that connects it both to classical Greek and Arabic cultures. Although *qiyāfah* bears a degree of resemblance to *firāsah*, the two terms are distinct. Generally speaking, *qiyāfah* denotes a skill or ability to examine and evaluate physical features. In Arabic translations of Greek works, *firāsah* comes close to this sense of *qiyāfah*. In Islamic literature, *firāsah* is usually used to denote a God-given ability to evaluate personal characteristics through the examination of physical features on the basis of intuitive knowledge.

As we will see below, one of the main questions that the classical jurists debated was the reliability of *qiyāfah* to establish paternity and whether it can be used for either the establishment or negation of paternity. The Prophet's reference to the indication of physical features in the above *li'ān*-related reports is taken as evidence of support for *qiyāfah*. In his commentary on this passage, Ibn al-Qayyim (d. 751/ 1350) noted that the Prophet's statement about physical features was not meant to give priority to *qiyāfah* over either licit sexual relationship (*firāsh*), in case of establishment of paternity, or *li'ān*, in case of negation of paternity. In line with the majority juristic view that upholds *qiyāfah* as a secondary method for the verification of paternity, Ibn al-Qayyim noted

²⁹ For the definition of *qiyāfah*, see Ibn Manẓūr, *Lisān al-'Arab*, 7:60 (on *firāsah*) and 7:538 (on *qiyāfah*). On 'physiognomy', see further Mohammed Ghaly, "Physiognomy: A Forgotten Chapter of Disability in Islam The Discussions of Muslim Jurists," *Bibliotheca Orientalis* LXVI (2009): 163-6, on *qiyāfah*, see "Qiyāfah," in *al-Mawsū'ah al-Fiqhiyah*, 34: 92-105, see also *EP*², s.v.v. *Qiyāfa* (T. Fahd) and *Firāsa* (T. Fahd).

that *li'ān* should take priority over *qiyāfah* even if the indication of physical features suggests otherwise³⁰

***Li'ān* in Classical Legal Discourse**

Traces of the debate over the details of these two reports in *tafsīr* and *ḥadīth* can be followed in the classical sources of *fiqh*.³¹ In the legal sources, the discussions are connected to real-life issues that raised new questions about the proper application of *li'ān*. These legal discussions usually follow a standard methodological order that includes not only textual references to *li'ān* but also details that define the latter's applicability and possible implications.

As a matter of principle, juristic deliberations are based on the premise that sharī'ah provides a legal assessment (*ḥukm*)³² for each and every possible occasion (*wāqi'ah*), or at least guidelines that can inform such an assessment.³³ The legal assessment may be drawn directly from scriptural sources or indirectly from juristic deduction. Based on the textual foundations mentioned above, the jurists noted that *li'ān* applies and becomes obligatory in two main cases: If a husband brings a charge of adultery against his wife or if he seeks to negate the paternity of a child. With regard to the first case, the jurists disagreed over whether the husband's accusation must be based on eyewitness testimony. The

³⁰ Ibn al-Qayyim, *Zād al-Ma'ād*, 5:368.

³¹ Ibn Qudāmah begins his chapter on *li'ān* with a reference to the different versions of the two reports mentioned above, see Ibn Qudāmah, *al-Mughnī*, 15 vols. ed. 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī and 'Abd al-Fattāḥ Muḥammad al-Ḥulw (Riyadh: Dār 'Ālam al-Kutub, 1997), 11:121, see also al-Sarakhsī, *al-Mabsūṭ*, 31 vols. (Beirut: Dār al-Ma'rifah, n.d.), 7:39.

³² The jurists classify legal assessments (*ahkām*) into two main types: determinate (*taklīfiyyah*) and correlative (*waḍ'iyyah*). The determinate assessments refer to one of the five sharī'ah-based prescriptions: prohibition, reprehensibility, neutrality, recommendation, and obligation. The correlative assessments refer to the relevant causes, conditions, or impediments that determine the validity of any sharī'ah-based injunction, see Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, 4 vols., ed. 'Abd Allāh Darrāz (Cairo: al-Maktabah al-Tawfiqiyyah, 2003), 1:83-294.

³³ For the debate on whether sharī'ah provides a legal assessment for each and every occasion (*lā nāzilah illā wa lahā fī al-sharī'ah maḥall ḥukm*) and the possibility that sharī'ah can be silent on certain occasions, see al-Shāṭibī, *al-Muwāfaqāt*, 1:136.

majority argued that eyewitnessing is not a prerequisite because it is not clearly stipulated in the foundational texts. They also noted that a blind person can invoke *li'ān*, which would not have been the case if eyewitnessing had been a condition.³⁴ According to the Mālikīs, however, *li'ān* applies only when the husband's accusation is based on eyewitnessing, and a blind man can invoke *li'ān* only if he supports his claim with a statement indicating that he had physically touched the accused in the middle of the act.³⁵ According to the Shāfi'īs, *li'ān* may be used in the case of an adultery accusation to remove the punishment for *qadhf* but is obligatory only in the case of paternity negation, either during pregnancy or after birth.³⁶

³⁴ Similarly, the jurists disagreed on the *li'ān* of the dumb. While the Shāfi'īs approve the *li'ān* of the dumb, by analogy to his ability to execute divorce, other jurists denied the *li'ān* of the dumb because of his inability to express himself/herself unequivocally, see Ibn Qudāmah, *al-Mughnī*, 11:126-7, Muḥammad ibn Aḥmad Ibn Rushd, *Bidāyat al-Mujtahid wa nihāyat al-Muqtasid*, 2 vols., ed. 'Abd al-Ḥakīm ibn Muḥammad (Cairo: al-Maktabah al-Tawfiyyah, n.d.), 2:205.

³⁵ Ibn al-'Arabī notes that some jurists insisted on an eyewitness account in order to discourage the husband from bringing this charge against his wife unless he is absolutely certain about it. In case of overwhelming probability, he can resort to divorce instead of *li'ān*. See Ibn Qudāmah, *al-Mughnī*, 11:136, Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 3:330, Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, 12:152, Ibn Rushd, Muḥammad ibn Aḥmad, *al-Bayān wa'l-Taḥṣil wa'l-Sharḥ wa'l-Tawjīh wa'l-Ta'līl li-Masā'il al-Mustakhrājah*, 20 vols., ed. Muḥammad Ḥijjī (Beirut: Dār al-Gharb al-Islāmī, 1988), 6:409, Ibn Rushd, *Bidāyat al-Mujtahid*, 2:200.

³⁶ *al-Mawsū'ah al-Fiqhiyyah*, 45 vols. (Kuwait: Wizārat al-Awqāf wa'l-Shu'ūn al-Dīniyyah, 2009), 35:247, and al-Shirbīnī, *Mughnī al-Muhtāj ilā Ma'rifat Ma'ānī al-fāz al-Minhāj*, ed. 'Alī Muḥammad Mu'awwad and 'Ādil Aḥmad 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), 5:60. Ibn Qudāmah notes that there are three cases of *li'ān*, each with its own assessment. The first is obligatory *li'ān*, which applies if a wife becomes pregnant as a result of an adulterous affair eyewitnessed by the husband and resulting in pregnancy after a period of purity (*ṭuhr*) during which the husband did not have intercourse with her. In order to verify that the pregnancy was the result of the adulterous affair, the birth of the infant must occur at least six months after the date of that affair, which proves that the husband cannot be the father of the child and, therefore, he must deny paternity of this child. Similarly, obligatory *li'ān* applies if she acknowledges that she committed adultery and he believes her. The second type, permissible *li'ān*, applies in several circumstances, including: If he sees her committing adultery; if it is proven to him that she committed adultery but there are no children whose paternity he seeks to deny; if there are children but he is not certain about their paternity; or if she is well-known for her misconduct. This second type is deemed permissible because the preferable option in this case is to divorce her without bringing shame either to himself or to her. The third type, prohibited *li'ān*,

Juristic discussions over the applicability of *li'ān* reveal a strong connection between *qadhf* and *li'ān*. The former triggers the latter, while the latter suspends the *ḥadd* punishment for the former. The jurists disagree, however, on whether the immediate result of *qadhf* (in the case of married couples) is *li'ān* or *ḥadd* punishment. The Mālikīs and Shāfi'īs hold that the immediate consequence of *qadhf* is *ḥadd* punishment. Thus, if a husband accuses his wife of adultery and refuses to undertake *li'ān*, he is liable for the *ḥadd* punishment for *qadhf*. The Ḥanafīs, on the other hand, hold that the immediate consequence of *qadhf* is *li'ān*, i.e., a husband who refuses to undertake *li'ān* after bringing an adultery accusation against his wife is liable for imprisonment until he undertakes *li'ān*.³⁷ The Mālikīs and Shāfi'īs argue that the *ḥadd* punishment applies in every case of *qadhf* and that the Qur'ān specifies *li'ān* as an exception that applies only in the case of spousal *qadhf*. Therefore, if the husband declines to invoke *li'ān*, the standard *ḥadd* punishment would apply. The Ḥanafīs argue that the Qur'ān does not mention the *ḥadd* punishment in the case of spousal *qadhf* but speaks only about *li'ān*.³⁸ Accordingly, the *ḥadd* punishment for *qadhf* does not apply for spousal disputes.

refers to any other *li'ān* that is not based on strong evidence. See Ibn Qudāmah, *al-Mughnī*, 11:156-7.

³⁷ The same principle applies to the wife if she refuses to undertake *li'ān* after the husband. The Ḥanafīs held that she is liable for imprisonment unless she either undertakes *li'ān* or approves of the husband's accusation. If she approves of the accusation, she should be released without being subjected to the punishment for adultery. According to the Ḥanafīs, the approval (*taṣdīq*) does not amount to acknowledgement (*iqrār*) and therefore is considered insufficient for the application of the *ḥadd* punishment. The Ḥanbalī view corresponds to the Ḥanafī view, with the exception that if she repeats the acknowledgement four times she is liable for the *ḥadd* punishment. The Mālikīs and Shāfi'īs argue that if she refuses to undertake *li'ān* after the husband, she is liable for the *ḥadd* punishment for adultery, see al-Sarakhsī, *al-Mabsūṭ*, 7:57, al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 10 vols., ed. 'Alī Muḥammad Mu'awwaḍ and 'Adil Aḥmad 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 5:49, Ibn Qudāmah, *al-Mughnī*, 11: 188-90, Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 3:334, *al-Mawsū'ah al-Fiqhiyyah*, 35:257-8, Ibn Rushd, *Bidāyat al-Mujtahid*, 2:206.

³⁸ al-Sarakhsī, *al-Mabsūṭ*, 7: 39-40, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:27, Ibn Qudāmah, *al-Mughnī*, 11:136. According to the Mālikīs and Shāfi'īs, the party that refuses to invoke *li'ān*, either the husband or the wife, is not forced to do it but instead becomes liable for the *ḥadd* punishment. According to the Ḥanafīs, the party that refuses to undertake *li'ān* becomes liable for imprisonment unless he (or she) agrees to undertake *li'ān*.

The jurists linked the validity of *li'ān* to the fulfillment of several conditions that they classified according to the pillars (*arkān*) of *li'ān*. According to the Ḥanafis, *li'ān* has only one pillar: statements by the disputing spouses in the order and manner described by the *li'ān* verses. According to the jurists of the other schools there are four pillars of *li'ān*: the accusing husband, the retorting wife, the cause, and the formula. The main condition that they stipulate for the accusing husband is inability to prove his charge of adultery against his wife. If he is able to provide the required evidence to prove the charge [four eyewitnesses to the act], there will be no need to invoke *li'ān*, which is meant to substitute for the required testimonial evidence.³⁹ For the retorting wife, the jurists stipulate two main conditions: denial of the charge that the husband brings against her; and chastity and moral rectitude. Accordingly, if she does not deny the charge, if she acknowledges it, or if she is known for sexual misconduct, there will be no need for *li'ān* and she receives the *ḥadd* punishment for adultery. Some jurists add that she must request the execution of *li'ān* from the judge since the main purpose of *li'ān* for her is to defend herself against her husband's charge. In this sense, *li'ān* becomes her right. She is the only one who can demand this right.⁴⁰

In addition to these conditions, which pertain to each of the spouses separately, the jurists stipulate several other conditions that apply to both of them equally. One such condition is that *li'ān* applies only to couples who are legally married at the time of the charge.⁴¹ The jurists

³⁹) The jurists disagreed over whether the husband may be one of the four witnesses. According to the Ḥanafis, the husband may. They argued that the husband normally does not bring such a charge against his wife unless it is true. According to the Shāfi'is, he may not. They argued that it is conceivable that a husband would make such a charge out of hatred or rancor, see Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:36.

⁴⁰) *al-Mawsū'ah al-Fiqhiyyah*, 35:248, Ibn Qudāmah, *al-Mughnī*, 11:138.

⁴¹) The Ḥanafis held that *li'ān* does not apply in the case of doubtful or wrongful sexual intercourse (*waṭ' al-shubḥah*). Accordingly, if a husband accuses his wife of adultery following intercourse by mistake with a third party, he will not be liable for the *ḥadd* punishment for *qadhf* and she cannot demand *li'ān*. The Ḥanafis argued that the punishment for prohibited intercourse in this case is overridden by the doubt, since the sin/crime here was not intentional. Since the *ḥadd* punishment for adultery is overridden because of the doubt, the same would apply for *li'ān*. Abū Yūsuf, however, held that *li'ān* applies in the case of doubtful intercourse because doubtful intercourse is still treated as legal marriage as far as paternity and dowry are concerned, see al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:42-3.

disagreed, however, on the main criterion for the establishment of marriage. The majority determined that the main criterion is actual consummation of marriage or its feasibility since this is the main purpose of the marital contract. The Ḥanafis, however, argued that the main criterion is the existence of a valid marital contract, regardless of actual consummation of marriage or its feasibility. This disagreement has important implications for the denial of paternity, especially in cases in which consummation is difficult or impossible to verify.⁴²

The jurists disagreed on a number of other conditions. For example, the Ḥanafis specified several conditions, including Islam, maturity, sanity, freedom, ability to speak, and having never been punished for *qadhf*.⁴³ Both the Shāfi'īs and the Mālikīs disagreed with the Ḥanafis on the last three conditions, and this disagreement is based on a fundamental question: Is *li'ān* an oath or testimony? While the Mālikīs and Shāfi'īs consider *li'ān* to be an oath, the Ḥanafis consider it to be testimony.⁴⁴ The former argued that the general rules governing oaths apply to all individuals regardless of their personal status (free or slave) and, by extension, the same rules apply to *li'ān*. The latter argued that only free individuals may give testimony and, therefore, slaves are ineligible for *li'ān* (*li'ān* does not apply to them).⁴⁵ The Mālikī and Shāfi'ī

⁴² al-Sarakhsī, *al-Mabsūṭ*, 4:199, Kāsānī, *Badā'i' al-Ṣanā'i'*, 3:607, Ibn Rushd, *Bidāyat al-Mujtahid*, 2:203, Ibn Qudāmah, *al-Mughnī*, 11:168.

⁴³ *al-Mawsū'ah al-Fiqhiyyah*, 35:249.

⁴⁴ Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 3:330-1, al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, 12:153-4, As'ad ibn Muḥammad ibn al-Ḥusayn al-Nisābūrī, *al-Furūq li'l-Karābīsī*, 2 vols., ed. Muḥammad Ṭamūm (Kuwait: Wizārat al-Awqāf wa'l-Shu'ūn al-Dīniyyah, 1982), 1:225.

⁴⁵ In Islamic law testimony is tied to legal capacity (*ahliyyah*), which is divided into two main types: acquisition capacity (*ahliyyat taḥammul*) and discharge capacity (*ahliyyat adā'*). Acquisition capacity refers to the legal capability that one acquires by the mere fact of being human. The jurists classified legal capacity into four main types that correspond to the main stages of human life: conception and pre-birth; birth to the age of discretion (*tamyīz*); age of discretion to the age of puberty (*bulūgh*); and full maturity (*rushd*). Discharge capacity refers to one's legal eligibility to carry out certain duties or tasks. The jurists discussed the different impediments to legal capacity (*'awāriḍ al-ahliyyah*) and they classified them into two main types: natural impediments (e.g. madness, imbecility, oblivion, sleep, unconsciousness, sickness, slavery, menstruation, confinement, and death) and acquired impediments (e.g. ignorance, intoxication, jesting, foolishness, bankruptcy, travel, error, and duress). The majority of jurists held that slaves are ineligible to give testimony because they lack the prerequisite of freedom. The Ḥanbalīs, however, argued that the testimony

argument begins with a linguistic analysis of the word *azwāj* in the *li'ān* verse (Q. 24:6). The word literally means 'spouses,' without further specification as to whether the spouses are free persons or slaves. Moreover, inasmuch as *li'ān* results in the nullification of marriage, it is similar to divorce. Just as divorce applies to slaves, so too does *li'ān*. In addition to reference to versions of the reports cited above in which the Prophet refers to *li'ān* as an oath,⁴⁶ the Mālikīs and Shāfi'īs use several other arguments to support their view. The strongest of these is that the multiple statements of *li'ān* absolve each of the spouses from the punishment that would otherwise apply in return for false accusation by the husband or adultery by the wife. This brings these statements closer to oaths than to testimony because witnesses cannot give testimony in support of their own claims.⁴⁷

With regard to the cause of *li'ān*, the jurists stipulated two main conditions. The first is a statement by the husband in which he either

of a slave is acceptable in everything except *hudūd* punishments and retaliation (*qisās*), *al-Mawsū'ah al-Fiqhiyyah*, 7:151-69; 23:39, 81-2; 26:221 and 'Alā' al-Dīn al-Bukhārī, *Kashf al-Asrār 'an Uṣūl al-Bazdawī*, 4 vols., ed. 'Abd Allāh Maḥmūd Muḥammad 'Umar (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 4:335-569, Shihāb al-Dīn al-Qarāfi, *Kitāb al-Furūq, Anwār al-Burūq fī Anwā' al-Furūq*, 4 vols., ed. Muḥammad Aḥmad Sirāj and 'Alī Jum'ah Muḥammad (Cairo: Dār al-Salām, 2001), 1:77.

⁴⁶ Support for the view that *li'ān* is a type of oath is traced back to the concluding passages of several versions of a report attributed to Ibn 'Abbās in which the Prophet indicated the descriptions to be detected in the prospective child. According to one version, "Had it not been settled by the book of God (*lawlā mā maḍā min kitāb Allāh*)" (see 'Asqalānī, *Fatḥ al-Bārī*, 8:327). According to another version, "Had it not been settled by the oaths (*lawlā mā maḍā min al-aymān*)." Both versions are recorded in Abū Dāwūd, see Sijistānī, *Sunan Abī Dāwūd*, 3 vols., ed. Muḥammad 'Abd al-'Azīz al-Khālidi (Beirut: Dār al-Kutub al-'Ilmiyyah, 2007), 2:142-4.

⁴⁷ Similarly, the condition of Islam was disputed. While the Mālikīs insisted that the husband must be Muslim, both the Shāfi'īs and the Ḥanbalīs noted that *li'ān* applies to *dhimmīs* as well, because of the validity of the oath of the non-Muslim, see Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:46. In addition to these conditions, the Mālikīs also stipulated that the accusation must be either of seeing the act of adultery or negating pregnancy; *li'ān* must come immediately after knowledge of the incident; refraining from intercourse after knowledge of the incident; and the presence of a group of people (no less than four) to witness the exchange of the oaths of condemnation. The Shāfi'īs stipulated that *li'ān* must follow the accusation of the wife; and that *li'ān* must be ordered by a judge or his deputy, who will also dictate the exact formula to be uttered by the spouses, see *al-Mawsū'ah al-Fiqhiyyah*, 35:250-1.

accuses his wife of adultery or denies paternity of her child. The second is evidence by the wife verifying her husband's accusation in case the husband denies making such accusation.⁴⁸ Finally, with respect to the fourth pillar of *li'ān* (the formula itself), the jurists stipulated that the statements uttered by the disputing spouses during the exchange of oaths of condemnation must follow the manner and order specified in the *li'ān* verses.⁴⁹

In the classical legal sources, discussions of the implications of *li'ān* revolve around the distinction between *li'ān* and divorce, both of which result in the termination of the marital bond. Bearing in mind the objective of *li'ān* and the reason for its execution, the jurists were unanimous that the two main effects of *li'ān* are: termination of marriage and negation of paternity. Notwithstanding the juristic unanimity over *li'ān*'s termination of marriage, the jurists debated the question of whether *li'ān* amounts to divorce or whether divorce still needs to occur after the completion of *li'ān*. According to the Mālikīs, *li'ān* by itself results in an irrevocable termination of the marital relationship. Accordingly, the performance of *li'ān* results in permanent dissolution of marriage, thereby rendering remarriage impossible. In this respect, *li'ān* resembles breastfeeding (*riḍā'*) and marriage-based relationships (*muṣāharah*) because they render marriage with certain individuals within these relationship prohibited.⁵⁰ Although the Shāfi'īs also hold that *li'ān* results in termination of marriage, they argue that such ter-

⁴⁸ The jurists stipulated that evidence in this case is a minimum of two male witnesses supporting the wife's statement. This is consistent with the rule that female witnesses are ineligible as witnesses in the case of *ḥudūd*, see *al-Mawsū'ah al-Fiqhiyyah*, 35:251.

⁴⁹ The jurists specified some general conditions for the validity of *li'ān*, which include: it should be undertaken in the presence of the ruler or his deputy; each party should repeat the statements following the instruction of the ruler or his deputy; all five statements should be uttered in order; each spouse should point at the other spouse while uttering the statements, if both are present at the same time and place; and they should mention the child in case of paternity negation, see Ibn Qudāmah, *al-Mughnī*, 11:179.

⁵⁰ In Islamic law, fosterage relationships, which are based on breastfeeding, result, among other things, in the prohibition to marry one's foster mother or sister. The fosterage relationship mainly affects inter-gender relationships, which are treated as natural (birth-based) relationships, in accordance with the ḥadīth: "*yaḥrumu min al-riḍā' mā yaḥrumu min al-nasab*," see al-Kāṣanī, *Badā'i' al-Ṣanā'i'*, 5:65. Marriage relationships (*muṣāharah*) refer, for example, to the prohibition to marry one's mother-in-law, see al-Qurṭubī, *al-Jāmi' li-aḥkām al-Qur'ān*, 12:159.

mination becomes effective immediately after the husband has completed his oaths of condemnation and before the wife begins her counter-oaths. According to the Ḥanafīs, *li'ān* does not automatically result in termination of marriage, which can be achieved only through a judicial decree.⁵¹ The implications of this disagreement are substantial, especially with regard to post-marital arrangements such as divorce, remarriage, and inheritance. According to the Mālikīs, Shāfi'īs, and Ḥanbalīs,⁵² all applicable post-marital rules become effective upon the completion of *li'ān*. According to the Ḥanafīs, however, they do not apply until a judicial decree of divorce has been issued.⁵³ Moreover, according to the Ḥanafīs, the termination of marriage subsequent to *li'ān* is not automatically permanent because the couple can remarry if the husband revokes his *li'ān*.⁵⁴

The main distinction between *li'ān* and divorce is their respective implications with regard to the paternity of children born during a preceding marriage. While *li'ān* negates such paternity, divorce does not. In fact denial of paternity is the most important reason for the use of *li'ān*. This explains why some jurists recommend *li'ān* only in the case of denial of paternity—due to *li'ān*'s consequences on, among other things, inheritance and inter-gender relationships. In the case of an accusation of adultery, without denial of paternity, they recommend

⁵¹ Ibn al-Mundhir, *al-Awsaṭ min al-Sunan wa'l-Ijmā' wa'l-Ikhtilāf*, 15 vols., ed. Ayman al-Sayyid 'Abd al-Fattāḥ and ʿĪḥāb 'Abd al-Wāḥid (Doha: Wizārat al-Awqāf wa'l-Shu'ūn al-Dīniyyah, 2010), 9:452-3. On the (im)possibility of remarriage after *li'ān*, see 9:490.

⁵² Ibn Qudāmah noted that there are two views within the Ḥanbalī school. He supported the view that a judicial decree is necessary for the separation between the spouses after they complete the *li'ān*, see Ibn Qudāmah, *al-Mughnī*, 11:144.

⁵³ al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:50 and *al-Mawsū'ah al-Fiqhiyyah*, 35:259. Ibn Qudāmah, *al-Mughnī*, 11:144.

⁵⁴ al-Qurṭubī, *al-Jāmi' li-ahkām al-Qur'ān*, 12:160, Ibn Rushd, *Bidāyat al-Mujtahid*, 2:207. Similarly, the jurists disagreed on the nature of the termination of marriage and the separation between the spouses and whether *li'ān* amounts to divorce (*ṭalāq*) or nullification of marriage (*faskh*). *Ṭalāq* does not nullify the marriage contract but terminates it, while *faskh* nullifies the contract due to the infringement of one of the marriage contract conditions, as when a couple discovers that they are foster siblings, see *al-Mawsū'ah al-Fiqhiyyah*, 32:135. Following the arguments of the Mālikīs, Shāfi'īs, and Ḥanbalīs, the separation between the disputing spouses is considered *faskh* and therefore *li'ān* results in permanent dissolution of marriage. The Ḥanafīs argued that the separation following *li'ān* is considered divorce and therefore remarriage becomes possible if the husband revokes his *li'ān*.

regular divorce, which results in the termination of an unwanted marriage but without the social stigma associated with *li'ān*. Another related question is whether *li'ān* can take place after divorce. The jurists stipulated that this is allowed only when *li'ān* is pursued for denial of paternity or denial of pregnancy. They disagreed, however, over the period during which the husband can pursue a denial of paternity after divorce. The majority of jurists argued that this period is equal to the maximum length of gestation but they differed on the determination of the exact length of this period. The majority argued that the minimum period is the most common one, estimated to be six months, to be calculated from the conclusion of the marital contract (according to the Ḥanafis), from the actual consummation of marriage or its feasibility (according to the majority view), or from the time of the secluded meeting (*khalwah*) of the couple after conclusion of the marital contract (according to the Shāfi'is). Similarly, they disagreed on the maximum period of pregnancy. The Ḥanafis estimated that to be two years. The Shāfi'is, Ḥanbalis, and some Mālikis specified it as four years, while the Mālikis extended the period to five years. Ibn 'Abd al-Ḥakam and Ibn Ḥazm limited the maximum period of pregnancy to the most common one, nine months.⁵⁵ Basing themselves on modern scientific knowledge, the majority of modern Muslim jurists have chosen the minimum of six months and the maximum of nine months.⁵⁶ Other jurists argued that denial of paternity is possible only during the waiting-period. Thus, if the husband does not undertake the denial of paternity before the expiration of the waiting-period, not only will he be liable for the *ḥadd* punishment for *qadhf*, but also paternity will not be affected (i.e. he will remain the legal father).⁵⁷

⁵⁵ *al-Mawsū'ah al-Fiqhiyyah*, 18:144, 40:240.

⁵⁶ 'Umar Sulaymān al-Ashqar, "al-Ḥayḍ wa'l-Ḥaml wa'l-Nifās bayna al-Fiqh wa'l-Ṭibb," *Majallat al-Sharī'ah wa'l-Dirāsāt al-Islāmiyyah* 11 (1988): 173-9. Most of the Arab personal status laws have adopted the minimum of six months and the maximum of one year, see Muḥammad Sulaymān al-Nūr, "Muddat al-Ḥaml bayna al-Fiqh wa'l-Ṭibb wa-ba'd Qawānīn al-Aḥwāl al-Shakhṣiyyah al-Mu'āṣirah," *Majallat al-Sharī'ah wa'l-Dirāsāt al-Islāmiyyah* 70 (2007): 288-315.

⁵⁷ Ibn Rushd, *Bidāyat al-Mujtahid*, 2:203. The jurists also distinguished between revocable and irrevocable divorce. The majority of jurists argued that *li'ān* can occur only after a revocable divorce. Accordingly, if a husband becomes guilty of *qadhf* after an irrevocable divorce, he will be liable for the *ḥadd* punishment and paternity will not be negated. Some

The jurists are unanimous that *li'ān* is the only legal method for paternity negation. According to a well-known juristic rule, without *li'ān*, paternity cannot be denied “*kullu mawḍiʿin lā li'āna fih, fa'al-nasabu lāhiqun fih.*”⁵⁸ In certain exceptional cases, however, denial of paternity can occur without *li'ān*. The jurists give some examples that include: if a wife gives birth immediately after marriage or less than six months after marriage; if the husband is less than ten years old; or if the husband is impotent.⁵⁹ Moreover, *li'ān* does not automatically result in the severance of the paternal link between a child and his/her legal father. As noted earlier, *li'ān* is meant to override the *ḥadd* punishment for *qadhf* for the husband and the *ḥadd* punishment for adultery for the wife. When used to deny paternity, several conditions are stipulated for the achievement of this purpose. The first is immediacy, i.e. the husband should not wait a long time following the birth of the child without demanding *li'ān*. According to the Ḥanafis, such a denial should occur after the judicially-decreed separation: prior to this separation, marriage is still presumed to exist and so long as a marriage exists paternity follows.⁶⁰ The exact length of the period during which the husband is allowed to negate the paternity of an infant is disputed. Some Ḥanafis advanced estimations ranging from one day to the end of the period of confinement. Other Ḥanafis argued that the timeframe may be determined by custom: the time taken to finish post-delivery celebrations, a sign of the family's acknowledgement of the child. The Mālikīs, Shāfiʿīs, and Ḥanbalīs stipulate immediate denial, i.e. as soon as the husband learns about the pregnancy of his wife or the birth of the baby. If he does not deny paternity of the infant immediately, he is liable for the *ḥadd* punishment for *qadhf*, and the paternity is not affected, unless there was an acceptable excuse for not declaring his denial sooner.⁶¹

jurists argued that *li'ān* can also occur during the waiting period that follows an irrevocable divorce also, see Ibn al-Mundhir, *al-Awsaṭ*, 9:461.

⁵⁸ Ibn Qudāmah, *al-Mughnī*, 11:129.

⁵⁹ Ibid., *al-Mughnī*, 11:167.

⁶⁰ al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:55.

⁶¹ *al-Mawsūʿah al-Fiqhiyyah*, 35:262. The jurists discussed other details, such as the case of the absent or imprisoned husband and the extent to which he can use *li'ān* for the denial of paternity. While some jurists were inclined to specify a fixed timeframe, others linked the possibility to use *li'ān* to the husband's knowledge (of pregnancy or birth of the infant)

The jurists disagreed on paternity negation during pregnancy and before childbirth. The Ḥanafīs and some Ḥanbalīs argued that paternity negation cannot occur before childbirth because of uncertainty about the result of the pregnancy. Within the Ḥanafī school, however, there was a disagreement on this point. Abū Ḥanīfah did not allow negation of paternity during pregnancy because the criterion that he used was birth during marriage in general. Both Muḥammad and Abū Yūsuf noted that if the child is born six months after a denial claim, the child is attributed to the husband. If, on the other hand, the child is born less than six months (from the time of the denial claim), the husband can resort to *li'ān* because such pregnancy cannot be attributed to the husband. The Mālikīs and the Shāfi'īs, on the other hand, argued that paternity negation during pregnancy is possible, following references in the Prophetic reports on *li'ān*. Ibn Rushd noted that Mālik stipulated that if a husband does not deny paternity during pregnancy, he cannot deny it thereafter.⁶²

The second condition stipulated by the jurists for the validity of a denial of paternity is that such a denial is not preceded by prior acknowledgement, acceptance or approval of the paternity of the same child. The jurists noted that acknowledgement of paternity need not be explicit. Any sign indicating the absence of objection on the part of the husband may be taken as acknowledgement. The underlying thesis of this and all other conditions stipulated by the jurists is that paternity is established *de facto* by marriage and it does not require any additional evidence. According to conventional juristic practice, once paternity is established, explicitly or implicitly, it cannot be revoked because it becomes the right of the child and no one can withdraw this right from him or her.⁶³ By contrast, denial of paternity is a claim that the husband brings against this *bona fide* paternity and the burden of proof lies upon him. In case of doubt, priority should be given to the establishment of paternity, rather than its denial. According to the Ḥanafīs, any denial

and the time it usually takes to make a decision regarding this issue, see al-Sarakhsī, *al-Mabsūṭ*, 7:52, Ibn Qudāmah, *al-Mughnī*, 11:162.

⁶²⁾ al-Sarakhsī, *al-Mabsūṭ*, 7:45, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:34, Ibn Qudāmah, *al-Mughnī*, 11:160, Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 3:332, Ibn al-Mundhir, *al-Awsaṭ*, 9:458, and Ibn Rushd, *Bidāyat al-Mujtahid*, 2:202.

⁶³⁾ al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 5:56, *al-Mawsū'ah al-Fiqhiyyah*, 35:263.

of paternity on the part of the husband subsequent to a sign indicating acknowledgement amounts to an accusation of adultery against the wife, as a result of which she can demand *li'ān* to absolve herself. In this case paternity is not negated. The Mālikīs noted that if *li'ān* cannot be undertaken because of doubt, the marriage remains valid and paternity is not negated.⁶⁴

The third condition for the validity of *li'ān* is that the infant whose paternity is in dispute must be living. This is emphasized by the Ḥanafīs and Mālikīs, according to whom paternity cannot be disputed after death. However, if a husband denies paternity of a deceased child, he can still undertake *li'ān* to avoid the *ḥadd* punishment for *qadhf* (since a claim of paternity denial automatically involves an accusation of adultery against the wife), without impacting the paternity of the deceased child. The Shāfi'īs and Ḥanbalīs, on the other hand, argued that paternity can still be denied after death because reference to, and identification of, a deceased person is made through the line of descent, which continues after death.⁶⁵

If these three conditions (immediacy, absence of prior acknowledgement, and life of the infant whose paternity is in dispute) are fulfilled, *li'ān* becomes effective, which means that the filial connection between the child and its legal father is severed, although not completely, and the child becomes legally attached to its mother. Subsequent to *li'ān*, the child and the father are treated as strangers in certain respects, as in matters pertaining to inheritance and maintenance (*nafaqah*). In other respects, they continue to be treated as related to each other, as in issues pertaining to testimony, retaliation, and eligibility for marriage with female relatives.⁶⁶

⁶⁴ al-Qurṭubī, *al-Jāmi' li-aḥkām al-Qur'ān*, 12:156. Examples of cases in which *li'ān* becomes doubtful include: if the husband has intercourse with the wife after he sees her commit adultery; if he has intercourse with her after pregnancy or delivery; and if he does not negate paternity immediately after he learns about the pregnancy or the childbirth.

⁶⁵ al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, 5:57, *al-Mawsū'ah al-Fiqhiyyah*, 35:264.

⁶⁶ Ibid., 35:265.

New Variables: Negation of Paternity in the Wake of DNA Fingerprinting

After this survey of some of the most important rules concerning *li'ān* in the classical sources of Islamic law, we turn now to biomedical technological developments—associated with the discovery of deoxyribonucleic acid (DNA) testing—that triggered renewed discussions of the relevance and applicability of *li'ān* in the modern period.

Until a few decades ago, the methods for the determination of paternity in most legal systems did not differ much from the methods used by pre-modern jurists for both the establishment and denial of paternity. To determine if the presumed father might have conceived the child, courts relied on either the calculation of the beginning of conception or the examination of physical resemblances.⁶⁷ The history of DNA discovery goes back to 1953 when Francis H.C. Crick and James D. Watson identified and described the double-helix structure of DNA as the basic genetic repository of living organisms. Every individual possesses his/her own unique DNA, which exists in every cell of his/her body, be it a blood cell, sperm cell, or skin cell. Only identical twins have the same DNA blueprint.⁶⁸ Before the discovery of DNA testing (genotype), blood group typing (phenotype) was the established method of relationship verification. Although blood group typing can be used to prove that individuals are unrelated, it is not as effective in proving the opposite. It cannot, therefore, be considered conclusive evidence in paternity establishment disputes.⁶⁹

In 1985 the Englishman Alec J. Jeffreys and his coworkers suggested that patterns of molecular markers in human DNA may function as uniquely identifying personal traits or DNA fingerprints. Although the term 'DNA fingerprinting' is often used to refer to DNA analysis, this may be a misnomer because the complete DNA structure of billions of

⁶⁷ Jean E. McEwen, "Genetic Information, Ethics, and Information relating to Biological Parenthood," in *Encyclopedia of Ethical, Legal, and Policy Issues in Biotechnology*, eds. Thomas H. Murray and Maxwell J. Mehlman, 2 vols. (New York: Wiley, 2000), 1:357.

⁶⁸ Shirelle Phelps and Jeffrey Lehman (eds.), "DNA Evidence," in *West's Encyclopedia of American Law*, 13 vols. (Detroit: Gale, 2005), 3:485-9.

⁶⁹ Paul G. Debenham, "DNA Fingerprinting, Paternity Testing and Relationship (Immigration) Analysis," in *eLS* (John Wiley & Sons, Ltd, 2001), accessed October 20, 2011, <http://0-dx.doi.org.library.lausys.georgetown.edu/10.1038/npg.els.0005202>

compounds cannot be examined like a complete fingerprint. The result of DNA typing produces a statistical likelihood, which is why it resembles blood group typing, although with a higher degree of accuracy, in its ability to prove unrelatedness but not the opposite. DNA analysis was quickly adopted for general identity verification (including paternity) as well as related forensic purposes, and by the late 1980s DNA analysis was used both by government investigation agencies and private laboratories. Governments started authorizing the collection of DNA samples from culprits to be stored in national electronic databases of DNA profiles, against which samples from crime scenes may easily be checked.⁷⁰ Ethicists, however, have expressed serious concerns about the increasing tendency to collect personally identifying patterns (iDNAfication). Unlike other identification methods, such as fingerprints and photographs, iDNAfication can disclose important health-related information that can put the individual in question at a disadvantage.⁷¹

In the West DNA paternity testing is no longer limited to what used to be called the traditional case, in which the paternity of a child born to unmarried parents is disputed. Increasingly paternity testing is also undertaken to verify cases of misattributed paternity, where presumed fathers challenge the established legal presumption that the child born to a woman during the course of a marriage is the biological offspring of the woman's husband. Moreover, advances in reproductive techniques (in vitro fertilization, surrogacy, egg or sperm donation, and cloning)

⁷⁰ Eric T. Juengst, "DNA Identification," in *Encyclopedia of Bioethics*, ed. Stephen G. Post, 5 vols. (New York: Macmillan USA, 2004), 2:677-83.

⁷¹ In order to guard against the considerable risks that the process of iDNAfication poses to personal privacy, it is urged that a number of precautions be observed. These include, for example, restricting the parts of the DNA that are analyzed to non-coding regions that will not reveal any biologically significant information. Another precaution is to destroy the physical samples of DNA once DNA profiles have been created from them. The potential misuse of genetic information extracted from DNA samples was the main impetus behind the establishment of the Ethical, Legal, and Social Issues (ELSI) as a component of the federally funded United States Human Genome Project, which started in October 1990. It is funded by the Department of Energy and the National Institutes of Health. It is estimated that about 3% of the budgets of the two funding agencies is spent on ELSI research, see Susan Connell, "Bioethics: ELSI," in *Encyclopedia of Life Sciences*, 20 vols. (Chichester, United Kingdom: Wiley, 2005), 3:179-82.

have given rise to situations in which not only paternity but also maternity are disputed. Furthermore, unanticipated findings about paternity or other familial relationships may be revealed incidentally in the course of genetic testing that was undertaken for non-identification purposes. These technologies are introducing new cases that will make the task of deciphering familial relationships, including posthumous kinship, much more challenging than it was in the past.⁷²

The main interest of this essay is to investigate the extent to which DNA analysis can be used as evidence in paternity disputes in general and in paternity negation in particular. Because the technology of DNA analysis originated in the West, the use of DNA paternity tests as evidence in paternity disputes has a relatively longer history there and the results of these tests are rarely disputed. A distinction should be made, however, between three types of disputes involving DNA testing: use of DNA testing itself as a reliable legal method; reliability of DNA testing results; and legal consequences of DNA testing. Although these disputes remain unsettled, DNA testing is generally less contested in Western than in Muslim-majority contexts at these three levels. In the United States, for example, all fifty states have statutes providing for the admissibility of DNA testing. Several states have issued laws that recognize DNA evidence as admissible in criminal cases, while others have passed laws that admit DNA evidence for the resolution of civil paternity cases. While states differ on the methods of statistical analysis to determine the probative value of a test result, they tend to agree that statistical results in the range of 95 to 99% create a rebuttable presumption of paternity, although some statutes define more specific thresholds as conclusive presumption of paternity. The increased acceptance of DNA testing as evidence for paternity determination has led to a growing tendency to settle most paternity disputes by agreement of the parties without the need for trial, even though disagreement over statistical analysis persists.⁷³ Review of most cases in which DNA-based evidence was introduced indicates that juries tend to view statistical

⁷²) Jean E. McEwen, "Genetic Information," 1:356-63. Scholars suggest several methods to address these novel cases, including full disclosure, nondisclosure, partial disclosure, disclosure only to the woman, or the institution of informed consent procedures.

⁷³) Ibid. The discussion in this section is focused primarily on the US legal context. For a wider comparative perspective, see Ron Shaham, *The Expert Witness in Islamic Courts*,

analysis of these samples as highly reliable.⁷⁴ It is interesting to note that no court has rejected DNA evidence on scientific grounds. When DNA evidence is disputed, however, it is usually due to contextual considerations such as possible sample contamination, significance of statistical probabilities, or laboratory error.⁷⁵

In the United States, the admissibility of evidence based on novel scientific findings such as DNA testing is governed by two main standards: the general acceptance standard (based on the 1923 case *Frye v. United States* 293 F. 1013 D.C. Cir.) and the relevancy-reliability standard (based on the 1993 Supreme Court decision *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469). According to the general acceptance standard, the admissibility of evidence based on a specific technique is measured by whether such a technique has been “sufficiently established to have gained general acceptance in the particular field in which it belongs.” This general acceptance standard, however, was held by the Supreme Court to be too stringent and, for this reason it was overruled by the relevancy-reliability standard, which allows any evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Although states are free to choose their own standards for the admission of evidence, they have tended to favor the relevancy-reliability standard.⁷⁶

Paternity claims are filed either to assert rights or deny obligations that often involve legal and financial consequences such as claims of inheritance or child support that transcend mere biological pedigree. One of the questions that concerns us here is the impact of DNA testing on paternity disputes involving married couples and the extent to

Medicine and Crafts in the Service of Law (Chicago: The University of Chicago Press, 2010), 154-88.

⁷⁴) Phelps et al, “DNA Evidence,” 485.

⁷⁵) Ibid., 486.

⁷⁶) Ibid., 488. According to *West’s Encyclopedia of American Law*, the debate over the admissibility of DNA evidence “pits those, such as prosecutors and law enforcement officials, who are eager to use it as a tool to fight crime, against those, particularly defense attorneys, who claim that it is unreliable and will lead to the wrongful conviction of innocent people.” Ibid., 486.

which putative (biological) fathers can challenge the claim of presumed (legal) fathers regarding paternity rights or vice versa. The United States Supreme Court has consistently held the common law rule of the marital paternity presumption. Accordingly, putative fathers cannot challenge the presumption of paternity as a matter of constitutional law.⁷⁷ This also means that a child born as a result of the wife's adulterous relationship is still treated as a legitimate child of the marriage. The marital paternity presumption was developed at a time when no medical tests to prove paternity existed. A husband could rebut the paternity presumption only if he could prove that he was impotent or that he was away (not with his wife) at the time of conception. The 1973 Uniform Parentage Act (UPA),⁷⁸ which was proposed to provide a consistent rule to adjudicate paternity disputes, has subsequently been adopted by many states. Although the UPA continued to adopt the marital paternity presumption, it also indicated that the presumption of paternity may be rebutted by clear and convincing evidence.⁷⁹ Undisputed evidence is usually interpreted to include cases in which the husband is sterile, impotent, or geographically distant at the beginning of pregnancy. While it may be argued that no man should be forced to take the responsibility for a child that is not his, the marital paternity presumption was intended to give more consideration to both the sanctity of marriage and the welfare of the child.⁸⁰ Following the discovery of modern blood and DNA testing, many of the states that adopted UPA have created a presumption of paternity that relies exclusively on genetic testing. Some have even questioned the validity of the paternity presumption altogether when near certainty can be afforded by genetic testing. Although the revised UPA, published in 2000, retains all the presumptions concerning marriage, it removed the standard of clear and convincing evidence for rebutting the marital paternity assumption and included clearer provisions on genetic testing. For example, it states

⁷⁷) McEwen, "Genetic Information," 357, see also Phelps et al, "Paternity," in *West's Encyclopedia of American Law*, 7:398.

⁷⁸) Most states drafted their paternity laws according to one of the two uniform paternity statutes: the Uniform Parentage Act (UPA) or the Uniform Act on Paternity (UAP), see McEwen, "Genetic Information," p. 357.

⁷⁹) Phelps et al, "Paternity," 398.

⁸⁰) McEwen, "Genetic Information," 358.

that “the existence of modern genetic testing obviates this old approach to the problem of conflicting presumptions when a court is to determine paternity.” Moreover, according to the new UPA, a putative (biological) father⁸¹ can bring an action to determine a parent-child relationship within two years from the birth of the child if the presumed (legal) father lives in the same household in which the child lives or if he treats the child as his own. In light of these new standards, some observers question the continued validity of the marital paternity presumption, which arguably has become eroded. Despite this increasing reliance on DNA testing, however, most state laws and courts still place emphasis on the best interest of the child, which can overrule the results of DNA testing if the court so judges.⁸²

Negation of Paternity: Between *Li‘ān* and DNA Fingerprinting in the Muslim World

The discovery of DNA technology and its varied potential applications has had wide repercussions in the Muslim world. In general the use of DNA analysis for criminal or forensic purposes has been less problematic than for paternity disputes. Even in paternity disputes, most reservations are limited to the use of DNA analysis within the context of a valid marital relationship.

According to Islamic family law, paternity revolves around the existence of marriage or doubt thereof. This is why calls for the adoption of DNA analysis as the sole criterion for either the establishment or negation of paternity is considered a direct attack against the sharī‘ah. Apart from this general agreement on limitations to the applicability of DNA testing in marital disputes, there is a wide array of opinions on the different uses of DNA testing. Since this issue was not discussed by the classical jurists, it necessitated the launch of a new *ijtihād* (independent legal reasoning) that would explain the view of sharī‘ah in light of relevant scriptural passages as well as earlier precedents in the legal

⁸¹⁾ The new UPA did not limit the ability to challenge the marital paternity presumption to putative fathers. It also allowed other individuals to do that, see Phelps et al, “Paternity,” 399.

⁸²⁾ Ibid.

tradition.⁸³ The introduction of this new technology to the area of paternity generated several important questions, such as (1) the exact legal status of DNA fingerprinting and whether it is possible to ascribe shari'ah-based assessments to DNA fingerprinting, given the standard juristic view that such assessments apply mainly to human actions; (2) whether evidence in Islamic law is limited to testimony; (3) the legal characterization (*takyīf*)⁸⁴ of DNA fingerprinting and whether it should be considered a valid legal proof (on a par with other valid proofs in the area of paternity, such as marriage or *li'ān*) or mere corroborative evidence; (4) the exact role that DNA fingerprinting should play and the position it should occupy within the hierarchical methods for paternity verification stipulated by the classical jurists; and (5) the conclusiveness of DNA testing and whether testing should be repeated.

⁸³ The jurists often referred to the legal status of DNA testing as a new issue that calls for fresh assessment in light of the scriptural sources as well as the fundamental principles of shari'ah. The term '*ijtihād*' was occasionally used to refer to this process, see, for example, 'Abd Allāh bin Bayyah's commentary on the opinion of Muḥammad Mukhtār al-Salāmī, *Ru'yah Islāmiyyah li-ba'd al-Mushkilāt al-Ṭibbiyyah al-Mu'āṣirah, Thabṭ Kāmil li-A'māl Nadwat al-Wirāthah wa'l-Handasah al-Wirāthiyyah wa'l-Jinūm al-Bashari wa'l-'Ilāj al-Jinī—Ru'yah Islāmiyyah*, eds. 'Abd al-Rahmān al-'Awaḍī and Aḥmad Rajā'ī al-Jindī, 2 vols., (Kuwait: al-Munazzamah al-Islāmiyyah li'l-'Ulūm al-Ṭibbiyyah, 2000), 1:504 (hereinafter *Ru'yah Islāmiyyah* 1).

⁸⁴ The term '*takyīf*' is used to refer to the process of examining a given phenomenon within its context and linking the result of this examination to the sources of shari'ah and its general principles, with the goal of discovering God's rule on the issue in the form of a legal assessment. The analogy is often made between the process undertaken by a jurist while performing a new *ijtihād* and the diagnosis made by a physician when examining a medical problem. Through *takyīf*, which is sometimes also referred to as *taṣwīr*, the jurist seeks to formulate an accurate conceptualized image of the issue before determining the applicable legal assessment, see 'Alī Jum'ah Muḥammad, "Tajdīd al-Fiqh al-Islāmī," in *Mawsū'at al-Tashrī' al-Islāmī* (Cairo: al-Majlis al-A'lā li'l-Shu'ūn al-Islāmiyyah, 2006), 261. *Takyīf* is a modern term that is used in the analysis of new and novel cases (*nawāzil*) but can be traced back to classical juristic discussions of *ijtihād*, which is divided into two main types: *ijtihād* that seeks to discover legal assessments from the scriptural sources; and *ijtihād* that seeks to implement legal assessments, see Muḥammad Abū Zahrah, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-'Arabī, 2004), 341. The history of the term *takyīf* (*characterization, framing, and adjustment* in English and *qualification* in French) can be traced back to modern legal reforms in the Muslim world and the accommodation between Islamic law and foreign legal codes, especially in personal status laws, see Maurits S. Berger, "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor," *The American Journal of Comparative Law* 50 (2002): 563 and Muḥammad Rawwās Qal'ajī and Ḥamid Ṣādiq Qanībī, *Mu'jam Lughat al-Fuqahā'* (Beirut: Dār al-Nafā'is, 1988), 143.

In addition to these specific questions there are also general questions such as: (1) To what extent can DNA fingerprinting, or indeed any new scientifically proven method, be incorporated within the classical framework of Islamic law? (2) How can such incorporation be achieved? (3) How accurate is the comparison of these new methods to classical methods or techniques, such as *qiyāfah*? And, (4) would such new methods necessarily lead to the automatic erosion of the classical methods or would the knowledge produced by these new scientific methods necessarily change classical legal institutions, even if the latter are based on clear scriptural foundations?

The exact shape of any new *ijtihād* on this issue depends on answers to these questions. Because this is a new issue, Islamic legal opinion on it may be explored through analysis of relevant fatwas, court decisions, and most importantly statements of juristic councils. In this section of the essay, I will focus mainly on the discussions and statements of juristic councils.

One of the earliest and most important meetings that discussed the impact of DNA fingerprinting on paternity from an Islamic perspective was a symposium on genetics, genetic engineering, and the human genome organized by the Islamic Organization for Medical Sciences [IOMS] in Kuwait in October 1998, the proceedings of which were published in 2000. In this symposium one panel was dedicated to the various implications of DNA testing on paternity. Although the panel included four papers that addressed the issue from different angles, I will focus here on the question of paternity negation and the extent to which DNA testing may impact the continued validity of *li'ān*. The first paper, submitted by the former Muftī of Tunisia Muḥammad al-Mukhtār al-Salāmī, suggested that *li'ān* may be replaced by DNA testing when the husband is certain that he is not the biological father of the child. For example, this might be the case if the husband did not have intercourse with the wife after a menstruation period and until the occurrence of pregnancy. Once the signs of pregnancy become visible, he must wait until delivery and then request that DNA testing be performed. If the results of the test prove that he is not the biological father, invoking *li'ān* becomes unnecessary. Al-Salāmī argued that the *li'ān* verses in the Qur'ān indicate that the husband may invoke *li'ān* if

he is unable to substantiate his accusation. In the modern period DNA testing can serve as the requisite support.⁸⁵

This view was, to some extent, reiterated in the second paper, by Sa'd al-'Anzī, who was reluctant to allow the results of DNA testing to trump *li'ān*. In the end, he preferred to give priority to *li'ān* over DNA testing, which should serve only as a complementary or corroborating form of evidence. Accordingly, the husband may demand *li'ān*, despite the DNA results, because *li'ān* is a shari'ah-based institution.⁸⁶ The third paper, presented by Muḥammad Sulaymān al-Ashqar, emphasized the priority of *li'ān* over DNA testing. Although DNA testing may prove that the husband is the biological father of the child, it cannot remove the doubt that the wife may have had a concurrent adulterous affair. Therefore, the husband may insist on using *li'ān* to bring an adultery accusation against his wife, as a result of which she may be liable for the *ḥadd* punishment, unless she responds with a corresponding *li'ān* to deny the accusation. The question remains, in the case of a concurrent adulterous affair, whether the child will be attached to the legal father if the results of the test confirm that he is also the biological father.⁸⁷ On the other hand, if DNA testing proves that the husband is not the biological father, it serves as corroborating evidence that strengthens the husband's request for *li'ān* and his denial of paternity.⁸⁸ The final paper, presented by Hasan 'Alī al-Shādhilī, restricted the scope of DNA testing to the role of *qiyāfah*, arguing that the former should serve as the

⁸⁵ Muḥammad al-Mukhtār al-Salāmī, "Ithbāt al-Nasab bi'l-Baṣmah al-Wirāthiyyah," in *Ru'yah Islāmiyyah* 1, 1:405. In this opinion, one can see traces of the classical juristic disagreement over whether *li'ān* constitutes repeated oaths or testimonies. It is interesting that although al-Salāmī tends to follow the Mālikī school, his opinion here is more in line with the Ḥanafī school. See also his opinion on the issue in his *al-Ṭibb fī Ḍaw' al-Īmān* (Beirut: Dār al-Gharb al-Islāmī, 2001), 184.

⁸⁶ Sa'd al-'Anzī, "al-Baṣmah al-Wirāthiyyah wa-madā Ḥujjiyyatihā fī Ithbāt wa-Nafy al-Nasab," in *Ru'yah Islāmiyyah* 1, 1:411-38.

⁸⁷ Elsewhere, however, al-Ashqar was even more emphatic on the precedence of *li'ān* over DNA testing. In a separate book, al-Ashqar reproduced the paper that he submitted to the IOMS symposium, after removing the section that addresses ways of incorporating DNA testing with *li'ān*, see Muḥammad Sulaymān al-Ashqar, *Abḥāth Ijtihādiyyah fī al-Fiqh al-Ṭibbī* (Ammān: Dār al-Nafā'is, 2006), 251-69.

⁸⁸ Muḥammad Sulaymān al-Ashqar, "Ithbāt al-Nasab bi'l-Baṣmah al-Wirāthiyyah," in *Ru'yah Islāmiyyah* 1, 1:460.

modern equivalent of the latter.⁸⁹ In this sense, DNA testing assumes the same position in the hierarchy, devised by the classical jurists, of the methods for both the establishment and negation of paternity.⁹⁰

During the discussion that followed this panel, the participants, who included both jurists and physicians, were divided into two main groups. The first group was open to the view that *li'ān* may be replaced by DNA testing if the latter proves conclusively that the child and the father are unrelated. The second group insisted that *li'ān* may not be compared to DNA testing, which, at most, may be compared to the classical method of *qiyāfah*. Some went so far as to exclude DNA testing altogether from the realm of paternity verification methods.⁹¹ The disagreement between the two groups revolved around the question of whether paternity is a purely medical, scientific, or biological issue or rather a purely legal one. It must be noted that although the gap between the two groups was not always as sharp as suggested here, the question of the nature of paternity can serve as an important criterion to distinguish the views expressed during the discussion. Others sought to harmonize these two orientations by developing a synthesis that would maintain *li'ān* as the final and ultimate method for the resolution of marital paternity negation, but without complete disregard for reliable scientific methods.⁹²

The first group, which contemplated the possibility that DNA testing may (at least in part) replace *li'ān*, gave significant attention to the scientific grounds that confirm the reliability of DNA testing, thereby underscoring the need to insure the compatibility of sharī'ah-based

⁸⁹ The idea that DNA testing is the modern equivalent of *qiyāfah* is reiterated in many modern studies on the role of DNA testing in Islamic paternity issues. See, for example, Asmā' Mandūh Abū Khuzaymah, *Wasā'il Ithbāt al-Nasab bayna al-Qadīm wa'l-Mu'āṣir, dirāsah fiqhīyah muqāranaḥ* (Alexandria: Dār al-Fikr al-'Arabī, 2010), 35-40.

⁹⁰ Hasan 'Alī al-Shādhilī, "al-Baṣmah al-Jīniyyah wa-Atharuhā fī Ithbāt al-Nasab," in *Ru'yah Islāmiyyah* 1, 1:463-99.

⁹¹ *Ru'yah Islāmiyyah* 1, 1:511-2.

⁹² For example, Hassān Ḥaṭhūt suggested that, in case of doubt, DNA testing may be undertaken by the mutual agreement of the disputing spouses. If the result supports the husband's claim, the spouses can proceed with *li'ān*, but if the test proves that the husband is the biological father, then *li'ān* is unnecessary. Although this opinion seeks to strike a middle ground, it clearly overlooks the usual rift in the relationship following such a dispute, regardless of the results of the DNA testing, see *ibid.*, 1:507.

rules and scientifically-proven methods. Although this group made frequent references to *qiyāfah*, they did so mainly to emphasize the point that sharī'ah, as a matter of principle, does not reject scientific methods, since *qiyāfah* is the classical scientific equivalent of DNA testing. By contrast, the second group restricted the scope of DNA testing to that of *qiyāfah* within the classical hierarchy of legal methods for paternity verification. Accordingly, DNA fingerprinting, similar to *qiyāfah*, should be treated as supporting evidence, which means that it cannot substitute for the stronger method of *li'ān* in the case of paternity negation. Moreover, they argued that in paternity cases, doubt and uncertainty cannot be removed entirely, not because DNA testing itself is questionable but because of numerous attending factors or circumstances such as contamination of samples or lab error.

The distinction between these two groups becomes clearer when we refer to the example cited above: A husband and legal father who insists on *li'ān* despite positive DNA evidence that confirms his paternity of the child. The first group argued for the modification of the classical *li'ān*-based model by admitting the DNA evidence and attaching the child to the father even after the performance of *li'ān*, which would render it practically ineffective. The underlying argument is twofold: textual and rational. The textual argument interprets reference to *shahādah* (testimony) in the *li'ān* verse (Q. 24:6) to mean any evidence (including DNA evidence) that supports the claim. The rational argument considers the husband's motive behind such insistence in the face of seemingly conclusive evidence, e.g., rancor or malice.

The second group gave priority to the *li'ān*-based model with all its implications, including paternity negation, regardless of the results of DNA testing. The underlying argument is again both textual and rational. The textual argument, which follows the majority of classical jurists, limits *shahādah* to actual testimony and insists on the definitive meaning of the *li'ān* verses (Q. 24:6-9) as being anchored in scholarly consensus (*ijmā'*). The rational argument focuses on the importance of limiting paternity negation to *li'ān*. It emphasizes the need to avoid opening the door for disputing parties to resort to DNA testing in any paternity dispute, given the grave social and psychological consequences that often accompany and follow such disputes. Moreover, the argument considers sharī'ah's intent to safeguard people's privacy and to

surround such personal matters with a high degree of confidentiality (*satr*), even if this means that the disputing claims will remain forever unverified. Moreover, this accords with the general tendency in *hudūd*-related matters to relegate to the consciences of disputants the verification of the truth value of conflicting claims.⁹³

Another important issue that emerged during the course of this discussion, and which serves as an indicator to distinguish these two views, was the paternity of a child born as a result of an adulterous relationship.⁹⁴ The juristic consensus of the classical and modern scholars is that paternity is associated with marriage and that in the presence of a valid marital relationship any child born by the wife will automatically be attached to the husband, even if in reality the husband is not the biological father of that child. If, however, the mother is not married the question becomes: Should the child be attached to the biological father? The majority of classical jurists held that the child in this case is not attached to the biological father because paternity depends on marriage, and in the absence of marriage the child is attached to his mother. According to a minority opinion, however, the child in this case can be attached to the biological father, for the sake of its best interest and also as a punishment for the biological father, who should be held accountable for his deeds. The first group of discussants (in favor of DNA evidence) supported this minority opinion on the grounds that if, in the past, paternity could not be decided beyond any doubt, at the present time it can be conclusively determined through paternity testing.⁹⁵ The second group insisted that paternity remains a legal question and a sharī'ah-based matter regardless of the certainty of

⁹³ Khalīfah 'Alī al-Ka'bī, *al-Baṣmah al-Wirāthiyyah wa-Atharuhā 'alā al-Ahkām al-Fiqhiyyah* (Amman: Dār al-Nafā'is, 2006), 448. The majority of modern Muslim scholars adopt the second view, which gives priority to *li'ān* when applicable, or in cases of conflict, see *ibid.*, 442-60.

⁹⁴ Ru'yah Islāmiyyah li-ba'd al-Mushkilāt al-Ṭibbiyyah al-Mu'āshirah, *Thabt Kāmil l-A'māl al-Halaqah al-Niqāshiyyah ḥawla Ḥujjiyyat al-baṣmah al-Wirāthiyyah fī Itbbāt al-Nasab*, ed. Sa'd al-Dīn al-Hilālī and Aḥmad Rajā'ī al-Jindī (Kuwait: al-Munazzamah al-Islāmiyyah li'l-'Ulūm al-Ṭibbiyyah, 2002) (hereinafter *Ru'yah Islāmiyyah* 2), 174, see also Sa'd al-Dīn Muṣ'ad Hilālī, *al-Baṣmah al-Wirāthiyyah wa-Ālā'iqubā al-Shar'iyyah*, *Dirāsah Fiqhiyyah Muqāranah* (Kuwait: Majlis al-Nashr al-'Ilmi, 2001), 352.

⁹⁵ See on this point, Ibn al-Qayyim, *Zād al-Ma'ād*, 5:408 and Hilālī, *al-Baṣmah al-Wirāthiyyah*, 354, 88.

the scientific method or lack thereof. This group alludes to some indications in prophetic reports associated with the issue of paternity in which the Prophet's judgment was based on legal evidence even when non-legal evidence suggested otherwise. In particular, they refer to a ḥadīth in which the Prophet is reported to have said "*al-walad li'l firāsh wa li'l 'āhir al-ḥajar*," (the child belongs to the owner of the bed and the adulterer receives the stone).⁹⁶ This report is used to prove that the primary factor for the establishment of paternity is birth as a result of a legitimate sexual relationship either through marriage or ownership. The importance of this report lies in the fact that it originated in a dispute over paternity in which the Prophet was asked whether the ancestral line should be determined on the basis of a legitimate sexual relationship (ownership of the slave mother in this case) or on the child's physical resemblance to a man who claims to have fathered the child through an illegitimate sexual relationship. Although the physical resemblance was strong, the Prophet's decision in this case gave precedence to the legitimate sexual relationship.

Ultimately, these two views can be seen as two different answers to two main questions. The first is whether *li'ān*, when used for paternity negation, is meant to reveal the true paternity of a child or rather to end an irresolvable marital dispute involving the paternity of a child. The second is whether DNA fingerprinting may serve as conclusive evidence that can be compared to the shari'ah-based method of *li'ān*. Apart from the purely legal complexities, the symposium discussions revealed other cultural, social, and political implications that would shape any final conclusion.⁹⁷ The section on DNA fingerprinting in

⁹⁶ Al-'Asqalānī, *Fatḥ al-Bārī*, 12:38, 140 and al-Nawawī, *Ṣaḥīḥ Muslim*, 10:31. The phrase "and the adulterer receives the stone" has been interpreted both literally (to mean he deserves stoning to death) and metaphorically (to mean loss or disappointment), for more on this report and on the establishment of paternity in Islamic law, see Ayman Shabana, "Paternity between Law and Biology: the Reconstruction of the Islamic Law of Paternity in the wake of DNA Testing," *Zygon: Journal of Religion and Science* 47 (2012): 214-39.

⁹⁷ For example, some of the participants spoke about the social and cultural images associated with parenting a handicapped person, which becomes harder to deny with DNA testing; the use of DNA testing to acquire citizenship and the political implications of this (*Ru'yah Islamiyyah* 1,1:535-7); and concerns about relegating the power to decide on this issue to secular parliaments, which would eventually curtail the power and scope of shari'ah even further (*Ru'yah Islamiyyah* 1,2:1000).

the concluding statement confirmed the scientific reliability of DNA testing, but refrained from passing any specific recommendations and suggested a special meeting to discuss the different dimensions of the issue in more detail.⁹⁸

In November 1998 the International Islamic Fiqh Academy [IIFA]⁹⁹ held its 11th session in Bahrain. One of the issues on the agenda was genetics, genetic engineering, and the human genome, the title of the symposium organized by IOMS in 1998.¹⁰⁰ The concluding statement of IIFA's 11th session, which cites the proceedings of the IOMS symposium, similarly defers decision on the issue for further study and research. Meanwhile the IOMS held a special meeting in Kuwait in May 2000 to address the implications of DNA fingerprinting on the issue of paternity. The discussions centered on a paper that sought to address the general rules pertaining to DNA fingerprinting but more specifically to answer four main questions that had been proposed at the conclusion of the 1998 meeting.¹⁰¹ The paper and the subsequent

⁹⁸) The statement says: "from the scientific perspective, DNA testing is a method that hardly yields incorrect results (*wasīlah lā takādu tukhḍī*) for the verification of biological paternity and personal identity especially in the area of forensic medicine. It may reach the level of strong circumstantial evidence that most jurists rely on in cases other than *ḥudūd*. It represents a great development in the field of *qiyāfah* that the majority of legal schools admit for establishing contested paternity provided that DNA testing is conducted in several laboratories." See *Ru'yah Islamiyyah* 1, 2:1050.

⁹⁹) The International Islamic Fiqh Academy is affiliated with the Organization of Islamic Cooperation and is based in Jeddah, KSA. This organization was previously known as the Organization of the Islamic Conference before the name was changed in June 2011. It was established in 1981 in order to serve as a transnational forum that brings together Muslim experts, scholars, and researchers to study pressing contemporary problems. For more information about the IIFA, see its webpage, <http://www.fiqhacademy.org.sa/> (accessed November 2011).

¹⁰⁰) The IIFA's discussion is based on the IOMS Symposium and its concluding statement, which is republished along with the proceedings of IIFA's 11th session in the IIFA's journal, see *Majallat Majma' al-Fiqh al-Islāmi* 11:3 (1998): 533-43. The IIFA's deliberations consist mainly of suggestions involving modifications of the concluding statement of the IOMS Symposium. Most of these suggestions, however, focus on genetic engineering in general, and it seems that an early decision was taken to postpone discussions of DNA testing and paternity-related questions, see *ibid.*, 554. See the full text of these discussions in *ibid.*, 547-90.

¹⁰¹) *Ru'yah Islamiyyah* 2, 68. This paper was written by Sa'd al-Dīn Hilālī, a faculty member of the Faculty of Shari'ah and Law at al-Azhar University and who was at the time teaching

discussions were not limited to these four questions. In large part they echoed the earlier discussion on the impact of DNA fingerprinting on paternity in general, including the question of whether DNA fingerprinting can substitute for *li'ān*. In the latter meeting most participants were reluctant to suggest a complete replacement of *li'ān* by DNA testing.¹⁰² Similarly, the concluding statement of the 2000 meeting mirrors the concluding statement of the 1998 meeting and even repeats the latter's position on the scientific value of DNA fingerprinting. The 2000 statement confirmed the scientific reliability of DNA fingerprinting but refrained from passing any judicial-like decisions, which, as many of the participants argued, would be the prerogative of a judge upon the examination of individual cases and evaluation of competing pieces of evidence.

The majority of the participants favored the admission of DNA fingerprinting in paternity disputes as the modern equivalent of *qiyāfah*. Therefore it would occupy its place in the hierarchical order of paternity verification methods. Moreover, the statement considers DNA fingerprinting as corroborative evidence that can be used either to support

at the Faculty of Shari'ah and Islamic Studies at Kuwait University. The four questions were concerned with the use of DNA fingerprinting as conclusive evidence for the verification of contested paternity involving: newborns, revocation of an earlier acknowledgement of paternity, a dispute among heirs over the paternity of a potential heir, and maternity claims.

¹⁰² Although Sa'd al-Dīn Hilālī is often quoted as a staunch supporter of adopting DNA fingerprinting, on the issue of *li'ān* he noted that DNA fingerprinting functions as corroborating evidence that supports either the claim of the husband or that of the wife; in either case, *li'ān* is needed to avert either the *ḥadd* punishment for *qadhif* for the husband (if the result is against him) or the *ḥadd* punishment for adultery for the wife (if the result is against her). Muftī Mukhtār al-Salāmī reiterated the question of whether DNA fingerprinting should be treated like testimony and whether it should replace *li'ān*, but he stopped short of giving an unequivocal answer (ibid., 183). Sa'd al-Dīn Hilālī denied that he ever suggested the replacement of *li'ān* by DNA fingerprinting (ibid., 188, 182-88). Part of the confusion in the interpretation of Hilālī's opinion on this point lies in a question that he posed regarding the need for the performance of *li'ān* if DNA testing proves that the husband is not the father of the child. The question suggests that the ultimate goal of *li'ān* is to verify the true paternity of the child. If such verification could not be achieved conclusively in the past, DNA technology makes this possible and, therefore, DNA testing should replace *li'ān*. Moreover, it also suggests that positive DNA testing indicates, by itself, the negation of paternity without the need for the performance of *li'ān* to complete the legal process, see *Ru'yah Islāmiyyah* 2, 59. The same passage can be found in his book, see Hilālī, *al-Baṣmah al-Wirāthiyyah*, 351.

sharia-based methods or to settle disputes in the absence of such methods. Although the concluding statement does not specify the exact relationship between *li'ān* and DNA fingerprinting, it is understood that the former cannot be trumped or replaced by the latter. Finally, the statement includes some general guidelines for the admission of DNA testing results: testing should be performed only by official authorization; testing should be repeated at least twice in two different licensed laboratories; and testing staff should be known for their technical competence as well as their professional and ethical conduct.¹⁰³

The statement of the Islamic Fiqh Council [IFC], which studied the issue at its 16th session held in Mecca in January 2002,¹⁰⁴ was more categorical on the relationship between DNA fingerprinting and *li'ān*.

¹⁰³ Ibid., 259-62.

¹⁰⁴ The Islamic Fiqh Council started its discussion on the issue in its 15th session, held in October 1998. The decision of the 15th session on the issue emphasizes the importance of the different forensic applications of DNA fingerprinting without passing any specific judgments. Instead, it recommended the formation of a special committee with the membership of 'Alī Muḥyī al-Dīn al-Qaradāghī, Najm 'Abd Allāh 'Abd al-Wāhid, Muḥammad 'Ābid Bākhaṭmah, and Muḥammad 'Alī al-Bārr to study the issue in more detail and to report its findings in the following (16th) session, see *Qarārāt al-Majma' al-Fiqhī al-Islāmī bi-Makkah al-Mukarramah* (Mecca: al-Majma' al-Fiqhī al-Islāmī, 2004), 314. The report that the committee submitted to the 16th session was based on a field visit to the Criminal Investigation Unit of the Ministry of Interior (Kingdom of Saudi Arabia). The report focused on the forensic uses of DNA fingerprinting and concluded that it is extremely useful in this respect. As far as its use for paternity-related applications, the report noted that it should be subjected to the rules and regulations of shari'ah and that it should not take precedence over either marriage, in case of paternity establishment, or *li'ān*, in case of paternity negation. The report alluded to the possibility of using DNA fingerprinting either before *li'ān* or to prevent it. For example, a wife or a judge may resort to DNA analysis to rebut or to verify a husband's accusation of infidelity against his wife. If the result supports the claim of the husband, the couple should proceed to undertake *li'ān*. If, however, the result is in favor of the wife, the couple should not proceed to undertake *li'ān* and this would be the end of the dispute. This suggestion echoes the opinion expressed by Ḥassān Ḥathūt during the discussions that followed the first symposium of the IOMS, see *Ru'yah Islamiyyah* 1, 1: 507. See the complete report of the special committee that was published in the IFC's journal "Taqrīr al-Lajnah al-Ilmiyyah 'an al-Baṣmah al-Wirāthiyyah," in *Majallat al-Majma' al-Fiqhī al-Islāmī* 16 (2003): 289-99 and also in 'Alī Muḥyī al-Dīn al-Qaradāghī and 'Alī Yūsuf al-Muḥammadī, *Fiqh al-Qadāyā al-Ṭibbiyyah al-Mu'āshirah* (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 2008), 359-66. On the same report see also 'Alī Muḥyī al-Dīn al-Qaradāghī, "al-Baṣmah al-Wirāthiyyah min Manzūr al-Fiqh al-Islāmī," in *Majallat al-Majma' al-Fiqhī al-Islāmī* 16 (2003): 27-67 and al-Qaradāghī et al, *Fiqh al-Qadāyā al-Ṭibbiyyah*, 337-69.

While confirming the scientific reliability of DNA fingerprinting,¹⁰⁵ the concluding statement clearly indicates that DNA fingerprinting cannot be used exclusively to negate paternity and it cannot be given priority over *li'ān*.¹⁰⁶

¹⁰⁵ “*natā’ij al-baṣmah al-wirāthiyyah takādu takūnu qāṭ’iyyah*” *fi ithbātī nisbatī al-awlādī ilā al-wālidayni aw nafiyhim ‘anhumā*.” See *Qarārāt al-Majma’ al-Fiqhī*, 344. The statement also notes that mistakes in DNA analysis can be the result of either human effort associated with the process of testing or contamination of the samples being tested—not necessarily the scientific fallibility of DNA testing itself.

¹⁰⁶ “*lā yajūzu shar‘an al-i’timādu ‘alā al-baṣmah al-wirāthiyyah fi nafi al-nasab wa lā yajūzu taqdīmuhā ‘alā al-li’ān*.” See *Qarārāt al-Majma’ al-Fiqhī*, 344. The opinions of the participants in the IFC’s discussions reveal the same tension as in the earlier discussions organized by the IOMS. While those participants confirmed the scientific reliability of DNA fingerprinting, they were reluctant to admit it as the sole and exclusive criterion in paternity-related questions. This explains the many suggestions to delineate the exact relationship between DNA fingerprinting and the sharī‘ah-based methods. For example, while al-Qaradāghī criticized the view that DNA fingerprinting may replace *li’ān*, he did not rule out the possibility that DNA fingerprinting can still be admitted, either alongside or in lieu of *li’ān*. Apart from confirming the view that DNA fingerprinting can be used to settle cases of disputed and unknown paternity (as long as such use does not conflict with sharī‘ah), he also noted that DNA fingerprinting can be used to confirm paternity negation in the case of proven adultery, either by admission or by the requisite testimony. In this case, although adultery has been proven, paternity cannot be verified because the child may be the offspring of the biological father or the legal father. In other words, the verification of adultery does not necessarily result in the negation of paternity because paternity is still tied to marriage. Al-Qaradāghī suggests resort to DNA analysis in this case to verify the paternity of the child. If DNA testing proves that the child is the offspring of the husband, it confirms the original marriage relationship. If, however, the result indicates that the child is the offspring of the biological father, it confirms the already proven adultery charge and in this case there will be no need for *li’ān*. Al-Qaradāghī’s opinion involves partial and conditional substitution of *li’ān* by DNA testing but it builds on a classical distinction between establishment of adultery and negation of paternity because the former does not automatically result in the latter, see Ibn Qudāmah, *al-Mughnī*, 11:141. Al-Qaradāghī also listed several other cases in which DNA fingerprinting can be used to settle marital paternity disputes. These include sexual assault, husband absenteeism, posthumous paternity, and tribal affiliation, see al-Qaradāghī, “al-Baṣmah al-Wirāthiyyah,” 58-9, see also al-Qaradāghī et al, *Fiqh al-Qadāyā al-Ṭibbiyyah*, 355. Other scholars suggested different ways of reconciling DNA testing with *li’ān* in the case of paternity negation. For example, Yūsuf al-Qaradāwī argued that DNA testing should be undertaken if the accused wife requests it. He reasoned that she would not request such testing unless she were certain that the result would be in her favor. The outcome would be better for all the parties: She would prove her innocence, the child’s paternity would be established, and the husband’s doubt would be removed. See Yūsuf al-Qaradāwī, *Min Hady al-Islām Fatāwā Mu’āṣirah*, 4 vols. (Cairo: Dār al-Qalam, 2009), 4:901-2.

Careful review of the published literature on the relationship between DNA fingerprinting and the Islamic law of paternity reveals the importance of the deliberations undertaken by these three institutions (IOMS, IIFA, and IFC). Although their collective decisions are not binding, they carry significant authority and their recommendations are usually cited in relevant fatwas and court decisions.¹⁰⁷ In the absence of a unified decision-making mechanism for Islamic legal matters, the decisions of these councils serve as important guiding principles. Although, as shown above, there is hardly consensus on the exact role of DNA fingerprinting in paternity issues, the majority of scholars have adopted the recommendations of these councils, which consistently refer to DNA fingerprinting as corroborative evidence that may be used to

¹⁰⁷ For an extensive review of court cases and decisions in Arab countries see Ka'bī, *al-Baṣmah al-Wirāthiyyah*, 83-154 and 479-514. The relevant fatwas and court decisions consistently refer to the collective discussions and statements of these scholarly councils. Moreover, they often denote the above-mentioned tension that marks most of the discussions in the scholarly councils (confirmation of the scientific value of DNA fingerprinting while emphasizing its subjugation to shari'ah-based methods). For example, in his paper, the former Mufti of Egypt Naṣr Farīd Wāṣil, referenced a particular fatwa of Dār al-Iftā' al-Miṣriyyah that was solicited by a Family Court in Cairo regarding the permissibility of relying on the results of DNA testing to verify a marital paternity dispute. The interesting feature of this case is that the court sought the opinion of Dār al-Iftā' after it had already executed the *li'ān* oaths between the disputing spouses. The fatwa of Dār al-Iftā' was quite unexpected because although it upheld the validity of the *li'ān* oaths, by severing the marital bond, it still admitted the positive results of DNA testing and accordingly attached the disputed paternity of the daughter to the husband, even after execution of *li'ān*. In other words, the Dār al-Iftā' fatwa chose to divide the implications of *li'ān* in this case, upholding the impact of *li'ān* on the marital relationship between the disputing spouses but modifying the classical rule on paternity in light of DNA fingerprinting. For details see Naṣr Farīd Wāṣil, "al-Baṣmah al-Wirāthiyyah wa-Majālat al-Istifādah minhā" *Majallat al-Majma' al-Fiqhī al-Islāmī* 17 (2004): 82-92. For a critique of this case and of Dār al-Iftā' fatwa, see Ka'bī, *al-Baṣmah al-Wirāthiyyah*, 483-513. Similarly, in a paper submitted to the IOMS first Symposium, Sa'd al-'Anzī referred to a Kuwaiti cabinet memorandum suggesting the introduction of a modification of relevant family laws to allow the admission of DNA fingerprinting for the settlement of paternity disputes. Upon consultation, the Fatwa Administration at the Ministry of Endowments and Islamic Affairs approved the permissibility of relying on DNA fingerprinting for paternity negation but not for paternity establishment. This opinion, however, was criticized by a Higher Consultative Committee that favored exclusive reliance on shari'ah-based methods for the resolution of paternity disputes, see al-'Anzī "al-Baṣmah al-Wirāthiyyah wa-Madā Hujjiyyatihā" (*Ru'yah Islamiyyah* 1,1:416-17).

resolve paternity disputes, so long as such use does not conflict with sharī'ah methods for both the establishment and negation of paternity.

Concluding Remarks: Legal Decision Making and Continued Validity of *Li'an*

Constructing a sharī'ah-based assessment regarding a new question involves two important steps that a competent jurist must undertake.

The first step is full understanding of the incident that gave rise to the question and its contextual background. This explains why jurists often begin their legal analysis by defining the phenomenon they seek to examine, following the classical dictum which states that judgment is dependent on comprehension.¹⁰⁸ This also explains why, during the scholarly deliberations at the three above-mentioned forums, many scholars were reluctant to express any categorical pronouncements before understanding the different dimensions of DNA fingerprinting, which resulted in frequent postponement of final recommendations on the issue. The second step is investigating whether there are relevant regulations or precedents in either the textual sources or the legal tradition. *Ijtihād*, or independent reasoning, is performed by a competent jurist in order to give a reasoned sharī'ah-based opinion that pertains to, but is not necessarily limited to, a new case (*nāzilah*, pl. *nawāzil*). As much as *ijtihād* may articulate a sharī'ah-based opinion on a new issue, it may also involve revision of an earlier assessment following a substantial change in the contextual background of that earlier assessment.¹⁰⁹

DNA fingerprinting is a new technological development that has been facilitated by modern science. In this sense it does not have a historical precedent. In terms of its potential implications, however, it relates to legal assessments connected with several legal institutions that are rooted in scriptural sources. In this sense it can be seen as the mod-

¹⁰⁸ *al-ḥukm 'alā al-shay' far'ūn 'an taṣawwurih*, see Jamāl al-Dīn al-Isnawī, *Nihāyat al-Sūl fi Sharḥ Minhāj al-Wuṣūl ilā 'Ilm al-Uṣūl*, 2 vols., ed. Sha'bān Muḥammad Ismā'īl (Beirut: Dār Ibn Ḥazm, 1999), 1:27.

¹⁰⁹ Ibn al-Qayyim notes that the work of a Muftī or a judge requires two types of understanding: understanding the question and its context; and understanding the appropriate legal assessment, see Ibn al-Qayyim, *I'lām al-Muwaqqi'in*, 4 vols. (Cairo: Dār al-Ḥadīth, 2002), 1:77.

ern equivalent of the classical method of *qiyāfah*. The legal characterization (*takyīf*) of DNA fingerprinting would, therefore, depend on the exact delineation of the relationship between DNA fingerprinting and the classical method of *qiyāfah*. This may be one of the main factors causing disagreement over a final decision on the legal status of DNA fingerprinting. More particularly, the legal status of DNA fingerprinting requires the determination of whether it can be treated as a reliable proof (like marriage for paternity establishment, or *li'ān*, for paternity negation) or rather merely as corroborative evidence that supports and confirms the established proofs. This point can be traced back to a classical debate over the definition of the term 'evidence' (*bayyinah*) and whether it is limited to testimony.¹¹⁰ Moreover, the legal characterization of DNA fingerprinting depends on the meaning of the word *shahādah* in the *li'ān* verses and whether it refers exclusively to testimony or whether it can also refer to any other type of supporting evidence (including DNA fingerprinting).

As for the impact of DNA fingerprinting on paternity negation and on the continued validity of *li'ān*, the statements and discussions of the three scholarly councils mentioned above reveal four general orientations: (1) Adoption of DNA fingerprinting in lieu of *li'ān* (at least in part); (2) postponement of *li'ān* until after the performance of DNA testing; (3) exact delineation of situations involving the intersection of *li'ān* and DNA fingerprinting; and (4) complete disregard for DNA fingerprinting in the area of paternity verification. These different positions can be attributed as much to disagreement over the exact legal characterization of DNA fingerprinting vis-à-vis the classical shari'ah-based methods, as to disagreement over the ultimate objective of *li'ān* as a mechanism for marital paternity negation. If the ultimate objective of *li'ān* is to verify the conflicting claims in contested paternity cases, DNA fingerprinting can be seen as an effective method that can yield more accurate and certain results. If, however, *li'ān* is understood as a legal tool to end a marital paternity dispute, without necessarily verifying the claims of the disputing parties, DNA fingerprinting becomes an irrelevant method for the resolution of a purely legal dispute.

¹¹⁰ Ibid., 1:78. On the development of the concept of *bayyinah* in Islamic judicial practice, see Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9 (2002): 168-93.