

# RECONSTRUCTION OF DIVORCE EVIDENCE ON THE GROUND OF ADULTERY



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## Abstrak

*Perkembangan dalam teknologi medis yang mampu untuk memastikan hubungan darah antara seorang anak dan ayah melalui tes DNA telah menuntut kontekstualisasi hukum pembuktian dalam sengketa hukum keluarga. Dalam hal cerai dengan alasan zina karena suami mengingkari anak yang dilahirkan oleh istrinya, Pasal 87 ayat (1) Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama masih menggunakan sumpah li'an sebagai alat bukti. Artikel ini mengkaji hukum pembuktian dalam kasus yang demikian dengan menggunakan pendekatan hermeneutika. Artikel ini dimulai dengan pembahasan tentang li'an, baik di dalam Al-Qur'an, fikih, maupun peraturan perundang-undangan. Selanjutnya artikel membahas tentang kegunaan tes DNA dan pembuktian cerai dengan alasan zina berdasarkan ketentuan hukum acara yang berlaku. Terakhir, artikel akan ditutup dengan kesimpulan dan rekomendasi atas persoalan yang telah dikaji. Sebagai kesimpulan, pada saat ini, tes DNA yang memiliki tingkat akurasi yang tinggi untuk mendeteksi hubungan darah seharusnya menjadi alat bukti primer dalam perkara cerai dengan alasan zina yang diajukan oleh suami untuk menggantikan alat bukti sumpah li'an. Melalui cara yang demikian, perlindungan terhadap perempuan dan anak dapat ditingkatkan, dan penyelesaian sengketa dengan sumpah li'an dapat dihindari.*

**Kata Kunci:** cerai dengan alasan zina (li'an), hukum pembuktian, tes DNA.

## Abstract

*Development in medical technology that is able to ascertain blood relationship between a child and father through DNA paternity testing has demanded contextualization of law of evidence in family law disputes. In cases of divorce due to adultery (li'an) where the husband denies paternity, Article 87 (1) of Law Number 7 of 1989 on Religious Judiciary still relies on oath as evidence. This article attempts to study law of evidence in such case using hermeneutical approach. It begins with a discussion of li'an, in the Koran, Islamic jurisprudence, and statutory regulations. Furthermore, it discusses the usefulness of DNA testing and evidence of divorce on the ground of adultery based on the provisions of procedural law. Last, it provides conclusions and recommendations on the issue. As conclusion, the DNA paternity testing that has high level of accuracy in detecting blood relationship should be the primary evidence to settle divorce case on the ground of adultery accusation filed by husband that replaces the evidence of oath. In this way, the protection of woman and child can be improved, and the dispute settlement using oath of li'an might be avoided.*

**Keywords:** divorce on the ground of adultery (li'an), law of evidence, DNA test..

## 1. INTRODUCTION

Technology development in medical science that might provide knowledge that was previously difficult to know related to reproduction and blood relations requires contextualization in the application of evidentiary law in the field of Islamic family law. One of developments in medical technology is *Deoxyribonucleic Acid* (DNA) paternity testing that is able to provide knowledge related to the origin of a child with a high level of accuracy. DNA paternity testing can thus be primary evidence in resolving marital disputes related to the origin of a child.

One of divorce types regulated in Law Number 7 of 1989 on Religious Judiciary Article 87 and Article 88 is divorce on the ground of adultery or what is known as *li'an*. In Article 126 of the Compilation of Islamic Law (Kompilasi Hukum Islam, KHI), *li'an* occurs because the husband accuses his wife of committing adultery and/or denying the child in the womb or that has been born to his wife, while the wife rejects the accusation and/or denial. In divorce on the ground of adultery, the evidence imposed on the husband is to take an oath. The problem arises is in terms of the reason the husband filed for divorce because he denied the child that had been born to his wife, is the evidence of an oath still relevant? While technological developments in the field of medicine currently make it possible to conduct DNA tests to find out the origin of a child?

A review of the literature on DNA testing in relation to the oath of *li'an*, reveals a limited scholarly discussion. Notably, As'ad argued that in order to prevent the oath of *li'an* which has more harmful consequences for the wife who already has children, a DNA test needs to be conducted to find out who is wrong and who is right between the husband and wife, and who is the biological father of the born child.<sup>1</sup> However, As'ad did not discuss the evidence of divorce on the ground of adultery in procedural law applied in the Religious Courts environment.

This article attempts to examine the above issue by contextualizing the evidence of divorce on the ground of adultery (*li'an*). The author begins with a discussion of *li'an* in the Koran, Islamic jurisprudence, laws and regulations. Furthermore, the author discusses the usefulness of DNA testing and evidence of divorce on the ground of adultery based on the provisions of applied procedural law. In the last, the author provides conclusions and recommendations on the issue.

## 2. METHODOLOGY

Data used in this research is qualitative data. Primary data sources of this research are the Koran, Hadith, Book of Fiqh, and Statutory Regulation and secondary data sources consist of books, journal, research report related to the issue. The data will be described and qualitatively analysed and interpreted using hermenutical approach.

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<sup>1</sup> Abd. Rasyid As'ad, "Tes DNA Untuk Mencegah Terjadinya Li'an," Badilag Mahkamah Agung Republik Indonesia, accessed April 27, 2023, <https://badilag.mahkamahagung.go.id/artikel/publication/article/test-dna-to-prevent-occurrence-of-other-by-drs-h-abd-rasyid-asad-mh-2210>.

### 3. DISCUSSION

#### 3.1 Divorce on the Ground of Adultery (*Li'an*) in the Koran

In the Koran, *li'an* is discussed in QS An-Nuur (24): 6-9 as follows:

والذين يرمون أزواجهم ولم يكن لهم شهود إلا أنفسهم فشهادة أحدهم أربع شهادات بالله إنه لمن الصادقين. والخامسة أن لعنت الله عليه إن كان من الكاذبين. ويدراً عنها العذاب أن تشهد أربع شهادات بالله إنه لمن الكاذبين. والخامسة أن غضب الله عليها إن كان من الصادقين.

Translation:

“And those who accuse their wives but have no witnesses except themselves, the testimony of one of them shall be four testimonies by God that he is of the truthful. And the fifth, “The curse of God be upon him if he is of the liars.” And it will avert [the punishment] from him. The punishment will also be averted from wife if she testifies four times by God that he is a liar. The fifth is that God’s wrath will be upon her if he is truthful.”

The context behind the revelation of the verses concerning *li'an* is linked to an event narrated by Ikrimah and Ibn ‘Abbas. Hilal bin Umayyah accused his wife of committing adultery with a man named Syarik bin Sahma’ and brought the case before the Prophet Muhammad (peace be upon him). The Prophet responded by instructing Hilal to present evidence; otherwise, he would be subjected to the *had qadzif* punishment of eighty lashes. Hilal then pleaded, “O Prophet of God, what if one of us sees another man with his wife? Should he be required to seek further evidence?” The Prophet repeated his instruction, emphasizing the need for proof. Hilal persisted, declaring, “By the One who sent you with the truth, I am indeed speaking the truth. May Allah reveal a verse that spares me from the punishment of eighty lashes.” Subsequently, Allah revealed the verse concerning *li'an*.<sup>2</sup>

In another narration, it is reported that when Hilal bin Umayyah accused his wife of adultery, he was warned: “By Allah, the Messenger of Allah (peace be upon him) will lash you eighty times.” Hilal responded, “Allah is far more just than to have me lashed eighty times. He knows that I truly saw with certainty and truly heard with conviction. No, by Allah, the Messenger of Allah will not lash me forever.” Subsequently, the verse concerning *li'an* was revealed.<sup>3</sup>

According to Az-Zuhaili’s interpretation, the verses concerning *li'an* were revealed subsequent to and independently of the verse on *qadzif* (the accusation of a woman of committing adultery). Prior to the revelation of the *li'an* verses, it was generally understood that the legal consequences for a man accusing a woman who was not his wife of adultery were the same as those for a man accusing his wife. The *li'an* verses were thus revealed as a form of concession to the husband and as a procedural solution to an urgent matter requiring evidentiary resolution.<sup>4</sup>

From this explanation, it is evident that in the case of Hilal bin Umayyah, which forms the background to the revelation of these verses, Allah, the All-Knowing, was aware that Hilal was not lying. However, because Hilal lacked witnesses other than himself, divine leniency was

<sup>2</sup> Wahbah Az-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, (Dar al-Fikr 1989), VII, 560.

<sup>3</sup> Nasir Misfir Al-Zahrani, *Encyclopedia of the Prophet and the Court*, (Salam Internasional for Fairs and Conferences, 2020 AD/1442 H), 182-83.

<sup>4</sup> Wahbah Az-Zuhaili, *op.cit.*, VII, 561.

extended by instituting the oath of *li'an* as a means of freeing him from the prescribed punishment (*had qadz*) of eighty lashes. Significantly, the verses on *li'an* also grant the wife an equal opportunity to take the oath if she denies the accusation of adultery, thereby exempting her from the prescribed *had* punishment. This demonstrates that in cases of *qadz*, the law imposes a severe penalty to deter men from carelessly accusing women of adultery.

Conversely, in cases of *li'an*, the law provides leniency to a husband who accuses his wife of adultery but lacks sufficient witnesses, thereby sparing him from the severe punishment. This leniency is similarly extended to the wife if she denies the accusation. The *qadz* provisions, in particular, reflect an effort to protect women from unfounded allegations of adultery, especially in patriarchal societies such as that of the early Arabs, where men held significant social privileges.

### 3.2 Divorce on the Ground of Adultery in Islamic Jurisprudence

Islamic jurisprudence scholars have discussed divorce with *li'an* in various *fiqh* books. The discussion of *li'an* in various *fiqh* books includes the definition of *li'an* and the reasons for *li'an*, the pillars and conditions of *li'an*, the conditions of both parties to conduct *li'an*, the procedures and role of the judge in *li'an*, what is required when one party refuses or returns the oath, whether *li'an* is a testimony or an oath, the consequences of *li'an*, what can invalidate and cancel *li'an* after it is required, and the law of *li'an* before divorce.

This article focuses on the discussion of *li'an* within Islamic jurisprudence, particularly in cases involving the denial of pregnancy or paternity, as well as the methods employed for establishing *li'an* on these grounds. According to Maliki jurists, the conditions under which a husband may deny paternity include: (1) his assertion that he has not engaged in sexual intercourse with his wife for a period sufficient to connect the child to his lineage, (2) his claim that his wife was not pregnant during a complete menstrual cycle, and (3) his issuance of the denial prior to the birth of the child. If the wife remains silent until after childbirth, she becomes subject to the *hadd* punishment rather than *li'an*.<sup>5</sup>

With regard to the timing of the denial, scholars of Islamic jurisprudence express differing opinions. The Hanafi school maintains that the appropriate time for denying paternity is after the child's birth, typically within seven days; if the denial occurs beyond this period, it is no longer valid, and the child's lineage is legally established. Some Hanafi scholars, however, argue that denial may also be issued during the postpartum (*nifās*) period, as it constitutes a continuation of childbirth. In contrast, the Maliki school requires the denial to occur either before the child's birth or immediately upon the husband's knowledge of the pregnancy or birth. Shafi'i scholars permit the denial of pregnancy but allow the husband to wait until after the birth to issue a formal denial. Meanwhile, Hanbali scholars prohibit denial prior to childbirth, requiring that it be made only after the birth.<sup>6</sup>

In the *Compilation of Islamic Law* (Kompilasi Hukum Islam, KHI), the provisions concerning the time frame for denying paternity are set out in Article 102, which states:

<sup>5</sup> Wahbah Az-Zuhaili, op.cit., VII, 557.

<sup>6</sup> Wahbah Az-Zuhaili, op.cit., VII, 558-59.

## Article 102

- (1) A husband who intends to deny paternity of a child born to his wife must file a lawsuit with the Religious Court within 180 days of the child's birth, or within 360 days of the dissolution of the marriage, or from the time the husband becomes aware that his wife has given birth to a child and is in a position to file his case with the Religious Court.
- (2) Objections submitted after the expiration of the prescribed time period shall not be accepted.

When compared to the views of classical Islamic jurists, the time limit stipulated in Article 102 of the KHI is notably longer.

The denial of paternity by a husband does not necessarily imply that the wife has engaged in sexual relations with another man resulting in the birth of the child. For instance, there may be cases where a husband lives apart from his pregnant wife due to work obligations, and during his absence the wife experiences a miscarriage. In an effort not to disappoint her husband, she may take the initiative to adopt another person's child and present the child as their own. Over time, the husband may come to suspect that the child is not biologically his and subsequently file a denial of paternity. Nevertheless, the scope of this article is confined to cases in which the husband denies paternity of a child conceived and/or born to the wife, thereby directly implicating her in the commission of adultery.

### 3.3 Divorce on the Ground of Adultery (*Li'an*) in Statutory Regulations

#### 3.3.1 Law Number 7/1989

*Li'an* was among the issues included in the Problem Inventory List (*Daftar Inventarisasi Masalah*) during the deliberations on the Religious Courts Bill that had not yet received approval from the Special Committee (*Panitia Khusus*-Pansus). After extensive debate among the factions of the House of Representatives (Dewan Perwakilan Rakyat, DPR) and the government, it was agreed that the institution of *li'an* would remain incorporated into the Religious Courts Bill. However, it was retitled "Divorce on the Ground of Adultery" in its procedural law formulation, with due consideration given to upholding the principle of equality between men and women.<sup>7</sup>

The legal provisions governing divorce on the grounds of adultery (*li'an*) are codified in Articles 87 and 88 of Law Number 7 of 1989 as follows:

## Article 87

- (1) Where a divorce application or lawsuit is submitted on the grounds that one of the parties has committed adultery, and the petitioner or plaintiff is unable to present evidence while the respondent or defendant denies the allegation, and the judge considers that the application or lawsuit is not entirely without basis but no further evidence can reasonably be obtained from either party, the judge, ex officio, may order the petitioner or plaintiff to take an oath.

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<sup>7</sup> Wahiduddin Adams et al., *Peradilan Agama di Indonesia: Sejarah Perkembangan Lembaga dan Proses Pembentukan Undang-Undanganya*, 3rd ed., (Ministry of Religion of the Republic of Indonesia, Directorate General of Islamic Religious Institutions, Directorate of Development of Islamic Religious Courts 2001), 139-50.

- (2) The respondent or defendant shall also be afforded the opportunity to confirm their objection in the same manner.

### Article 88

- (1) If the oath as stipulated in Article 87(1) is taken by the husband, the matter shall be resolved through *li'an*.
- (2) If the oath referred to in Article 87(1) is taken by the wife, the matter shall be resolved in accordance with the applicable procedural law.

From the provisions of Article 87(1) above, it can be understood that the *li'an* oath is classified as a supplementary oath (*suppletoire*), as stipulated in Article 155 of the *Herzien Inlandsch Reglement* (HIR):

### Article 155

- (1) If the truth of the claim or the defense is not sufficiently proven but is not entirely unproven, and no other means of proof is possible, the district court may order one of the parties to swear an oath before the judge. That oath shall then form the basis for deciding the case or determining the amounts of damages.
- (2) In this latter instance, the district court must establish the amount to which the plaintiff is entitled based on the oath.

When these provisions are placed within the historical context of the Qur'anic verses concerning adultery, a conceptual alignment can be observed between the *li'an* oath and the evidentiary function of oaths in civil procedural law. In the case of Hilal, the oath was imposed because no evidence was available and it was impossible to present the four witnesses required; thus, the *li'an* oath is more accurately analogous to what civil procedural law designates as a decisive oath (*decisoir*), as regulated in Articles 1930–1936 of the Civil Code in conjunction with Article 156 HIR.

Article 1930 of the Civil Code, however, stipulates that a decisive oath may not be ordered in cases where the parties are legally prohibited from entering into an agreement, or where their admissions may not be considered. Yahya Harahap explains that Article 1930 restricts disputes that may not be resolved through agreement, namely those involving the legal status of a person or matters of family law, such as disputes concerning marriage.<sup>8</sup> This interpretation is consistent

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<sup>8</sup> M. Yahya Harahap, *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, 12th ed., (Sinar Grafika 2012), 752.

with Article 208 of the Civil Code, which stipulates that divorce cannot occur solely through mutual consent.<sup>9</sup>

Although there is some alignment with the provisions regarding the supplementary oath (*suppletoir*) in civil procedural law, differences remain in the application of the *li'an* oath. Specifically, even if the petitioner or plaintiff has taken a supplementary oath in divorce cases on the grounds of adultery, the respondent or defendant is afforded the opportunity to confirm their objection in the same manner as stipulated in Article 87(2) of Law No. 7 of 1989. Furthermore, if the judge orders the husband to take an oath in a divorce case based on allegations of adultery, the settlement may proceed through *li'an*. However, if the judge orders the wife to take an oath, the settlement follows the applicable civil procedural law as regulated in Article 88 of Law No. 7 of 1989.

From this discussion, it is evident that the *li'an* oath constitutes a privilege granted to men, even within evidentiary law. This is because when the judge orders the wife to take a supplementary oath, a standard oath is used rather than the *li'an* oath, which does not contain any invocation of Allah's curse upon the wife should her denial be false.

The procedural provisions set forth in Articles 87 and 88 of Law No. 7 of 1989, on the one hand, seek to provide husbands and wives with equal opportunities to use supplementary oaths as evidence in divorce cases involving allegations of adultery, in line with Western civil procedural law. On the other hand, these provisions preserve the *li'an* oath as a privilege for husbands, in accordance with Islamic law. Such provisions reflect the legal compromise between Western procedural norms and the principles of Islamic jurisprudence.

Reforming the *li'an* oath by replacing it with DNA testing would eliminate the evidentiary privilege currently afforded to husbands under the *li'an* procedure. Such a reform would align the law of evidence with the principle of gender equality by ensuring that husbands and wives are treated equally before the law and that evidentiary standards reflect contemporary realities. This reform is also consistent with Article 28D (1) of the 1945 Constitution of the Republic of Indonesia (*UUD RI 1945*), which guarantees that: "Every person has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law." Following the reform, the application of *li'an* in cases where a husband denies the paternity of a child—whether unborn

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<sup>9</sup> The provision has implications in proving divorce cases. Although there is an admission by the defendant regarding the arguments for the reasons for divorce submitted by the plaintiff, the plaintiff is still burdened with proof to avoid mutual agreement in the divorce. In fact, to avoid legal smuggling and engineering by the parties, where the defendant was not present at the trial from the start, so that the court would issue a default decision, in court practice, the court still orders the plaintiff to prove the arguments for divorce, even though the defendant was not present at the trial. See Hensyah Syahlani, *Pembuktian dalam Beracara Perdata dan Teknis Penyusunan Putusan Pengadilan Tingkat Pertama*, (Yogyakarta, 2007), 31-2.

or already born—would become obsolete and should be abolished. Consequently, *li‘ān* would be limited solely to cases in which a husband accuses his wife of adultery as grounds for divorce.

To implement this reform, the Religious Chamber of the Supreme Court could formulate new provisions of procedural law regulating the evidentiary process in divorce cases based on allegations of adultery where the husband denies paternity. These provisions would require husbands to substantiate their claims through DNA testing. The Religious Chamber would then submit the proposed formulation to a plenary meeting of all Chambers at the Supreme Court. Based on the outcome of this plenary meeting, the formulation could be issued in the form of a Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung*, SEMA) to serve as guidance for judges in adjudicating such cases. Since the implementation of the chamber system at the Supreme Court, the conclusions of chamber plenary meetings have been routinely codified in SEMA in order to foster legal uniformity and avoid disparities in judicial decisions, particularly in relation to procedural law.

### 3.3.2 Compilation of Islamic Law

In the *Compilation of Islamic Law* (Kompilasi Hukum Islam, KHI), the provisions regarding *li‘an* are regulated in Articles 125 to 128, which state as follows:

#### Article 125:

*Li‘an* results in the irrevocable dissolution of the marriage between husband and wife.

#### Article 126:

*Li‘an* occurs when a husband accuses his wife of adultery and/or denies the paternity of the child she is carrying or has already given birth to, while the wife rejects the accusation and/or denial.

#### Article 127:

The procedures for *li‘an* are stipulated as follows:

- a. The husband must swear four times, affirming the accusation of adultery and/or denial of the child, followed by a fifth oath declaring, “May the curse of God be upon me if the accusation and/or denial is false.”
- b. The wife must then reject the accusation and/or denial with four oaths stating, “The accusation and/or denial is untrue,” followed by a fifth oath declaring, “May the wrath of God be upon me if the accusation and/or denial is true.”
- c. The procedures set out in points (a) and (b) constitute an inseparable process.
- d. If the procedure outlined in point (a) is not followed by the procedure in point (b), *li‘an* is deemed not to have occurred.

#### Article 128:

*Li‘an* is valid only if conducted before a Religious Court hearing.

From these provisions, it is clear that *li‘an* may be initiated for two reasons: (1) the husband accuses his wife of committing adultery, and/or (2) the husband denies the paternity of a child she is carrying or has already given birth to, while the wife rejects the accusation and/or denial.



Furthermore, *li'an* results in the irrevocable dissolution of the marriage, with significant implications for the rights of the wife and children. If the denial of paternity by the husband—which serves as the basis for divorce—is false, the outcome may be highly detrimental to women and children, as it results in the loss of marital and filial rights.

### 3.4 DNA Testing as Evidence

Deoxyribonucleic acid (DNA) is a chemical compound that carries the genetic information of a specific cell or an organism as a whole and transmits it from one generation to the next. DNA contains information related to heredity, which governs the genetic program of subsequent generations. Structurally, DNA is composed of three types of molecules: pentose sugar, phosphoric acid, and nitrogenous bases.<sup>10</sup>

DNA functions as the genetic material that encodes hereditary information. In human cells, DNA is located in both the cell nucleus and the mitochondria. Within the nucleus, DNA forms linear structures known as chromosomes. Each normal human somatic cell contains 46 chromosomes, which comprise 22 pairs of autosomes (somatic chromosomes) and of pair of sex chromosomes (XX in females or XY in males).<sup>11</sup> DNA-based paternity testing is conducted by collecting biological samples from an individual, such as hair, saliva, urine, vaginal fluid, semen, blood, or other bodily tissues, and comparing the genetic profiles with those of another person. DNA paternity testing carries legal weight because it is performed by qualified experts and provides a high degree of legal certainty; the genetic markers obtained remain constant throughout an individual's life.<sup>12</sup>

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This type of testing can establish paternity with a probability of over 99.99% if the DNA profiles of the alleged father and the child match. Conversely, if the DNA profiles do not match, the tested individual can be excluded as the biological father with 100% certainty. Confirmation is typically obtained by repeating the analysis using the same biological samples. In legal

<sup>10</sup> Taufiqul Hulam, *Reaktualisasi Alat Bukti Tes DNA Perspektif hukum Islam dan Hukum Positif*, 1st ed. (UII Press 2002), 88.

<sup>11</sup> Ahmad Yudianto, *Cell Free Fethal DNA Metode Non-Invasive Dalam Pemeriksaan Identifikasi*, (Scopindo Media Pustaka 2019), 2.

<sup>12</sup> *Ibid.*, 4.

<sup>13</sup> *Ibid.*

<sup>14</sup> Taufiqul Hulam, *op.cit.*, 89.

proceedings concerning lineage, DNA paternity testing can serve as primary evidence in determining biological relationships.<sup>15</sup>

The high cost of DNA testing may be a factor considered by judges when determining its use as evidence in divorce proceedings involving the husband's denial of paternity due to alleged adultery. Nevertheless, this financial burden is arguably outweighed by the potentially harmful consequences that the invocation of the *li'an* oath may have on women and children.

### 3.5 Rules of Evidence for Divorce on the Ground of Adultery Due to the Husband's Denial of His Child

Pursuant to Article 87(1) of Law No. 7 of 1989, a *supplementary oath (suppletoir)* may be administered by the judge *ex officio* (on the basis of judicial authority) to the petitioner (husband). This provision applies in cases where the petitioner is unable to present sufficient evidence, the respondent (wife) denies the alleged grounds, and the judge determines that the petition is not entirely without evidentiary basis, yet further corroborating evidence cannot be obtained from either party. Under such circumstances, the supplementary oath imposed on the petitioner takes the form of a *li'an* oath, as stipulated in Article 88(1) of the same law. Accordingly, this form of testimonial evidence is utilized in proceedings for divorce on the grounds of adultery.

As previously discussed, the oath of *li'an* is imposed on a husband who accuses his wife of adultery. In the case of Hilal bin Umayyah, this oath functioned as a form of *takhfif* (legal leniency), offering an evidentiary concession when the husband was unable to present the legally required four witnesses to substantiate the accusation. It also served to exempt him from the prescribed punishment (*hadd al-qadhf*) of eighty lashes for false accusation. This provision was highly contextual, given the difficulty of producing four eyewitnesses to an act of adultery, and it was directly related to mitigating the severity of the *hadd* punishments for both false accusation and adultery, which are notably harsh under Islamic law.

The imposition of the *li'an* oath at the time represented a progressive legal innovation aimed at curbing male arbitrariness. The prevailing patriarchal social structure assumed the superiority of men over women, which often led to husbands exercising unilateral control over their wives, including denying the paternity of children as a pretext for divorce or evasion of paternal responsibility. In this context, the oath of *li'an* functioned as a final evidentiary mechanism in situations where it was practically impossible for the husband to present scientific evidence, such as DNA testing, which was unavailable at the time.

With advancements in medical technology, it is now possible to establish a child's biological relationship with their alleged father through DNA testing. DNA test results, as a form of written evidence, possess a high degree of accuracy in demonstrating biological kinship and may serve as primary, standalone evidence in legal proceedings. In cases involving divorce on the grounds of adultery—particularly where a husband denies paternity of a child born to his wife—DNA test results may be regarded as having probative value with conclusive evidentiary strength. In the

<sup>15</sup> Lalila Wu, "Ini Rincian Biaya Tes DNA, Kamu Mau Coba." accessed October 8, 2024, <https://www.gramedia.com/best-seller/rincian-biaya-tes-dna/>.

Indonesian legal context, DNA testing has been employed in several cases to confirm biological paternity or determine a child's origin.

Moreover, the evidentiary role of DNA testing has been formally recognized in *Qanun Aceh No. 6 of 2014* concerning *Jinayat Law*, where it may substitute the traditional requirement of four witnesses. Article 44, paragraphs (2) and (3) of the Qanun state:

Article 44

- (2) A petitioner who accuses a named partner of committing adultery, as referred to in Article 42, in a case involving pregnancy, may substantiate the claim through a Deoxyribonucleic Acid (DNA) test of the child born.
- (3) The result of the DNA test, as mentioned in paragraph (2), substitutes the petitioner's obligation to present four (4) witnesses.

It is important to recognize that the right to initiate divorce on the grounds of denying paternity remains a legal privilege exclusive to men specifically, to the husband. This is because only the husband is legally permitted to repudiate the paternity of a child conceived or born during the marriage, whereas the wife, as the biological mother who gives birth to the child, holds no such right. Consequently, divorce claims based on the husband's denial of paternity require evidence of substantial probative value to ensure legal certainty. The evidentiary function of the *li'ān* oath, however, does not provide conclusive proof regarding the biological relationship between the child and the husband. It cannot definitively establish whether or not the child is the husband's biological offspring. In the case of Hilal bin Umayyah, the *li'ān* oath was accepted as a form of leniency, allowing Hilal to avoid the *ḥadd* punishment for *qadhf* (false accusation of adultery), due to his inability to present four witnesses.

In light of advancements in medical technology, particularly in the form of DNA testing to verify biological parentage, and with the aim of protecting the rights of women and children from the serious legal consequences of the *li'ān* oath is such as the irreversible dissolution of marriage and the child's legal disconnection from the husband (including loss of inheritance rights and paternal maintenance), it is appropriate to consider replacing *li'ān* oaths in such divorce cases with written documentary evidence in the form of DNA test results. This shift would represent a contextualized application of evidentiary standards within the framework of Islamic family law. The use of DNA evidence enables judges to base their rulings on tangible and verifiable facts presented during the trial (*zawāhir*). In contrast, reliance on oaths defers the determination of truth to divine knowledge (*sarā'ir*), particularly in situations where no additional supporting evidence is available.

#### 4. CONCLUSION

The supplementary oath of *li'ān*, traditionally used in divorce cases where a husband denies paternity of a child born to his wife, constitutes a legal privilege accorded to men. However, its application has become increasingly obsolete in light of advancements in medical technology,

particularly the availability of highly accurate DNA testing, which can reliably establish the biological relationship between a child and the alleged father. Written evidence in the form of DNA test results—owing to its scientific precision—can serve as primary proof with conclusive evidentiary value in cases of divorce initiated on the grounds of paternity denial, thereby supplanting the need for the *li'ān* oath.

The procedural rules governing divorce on the grounds of adultery—specifically when a husband denies the paternity of a child and invokes *li'ān*—require reform to incorporate DNA evidence as a legitimate and preferable form of proof. The Supreme Court of Indonesia, through a plenary session of its Chambers, holds the authority to formulate new procedural provisions that mandate the use of DNA testing in such cases. These procedural reforms could be formally issued in the form of a Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung*, or SEMA), providing binding guidance to judges across the judiciary.

Reforming the use of the *li'ān* oath by replacing it with DNA-based evidence would eliminate the gendered privilege currently embedded in evidentiary law and align the legal process with the principle of gender equality—ensuring that both husbands and wives are treated equally before the law and in accordance with current societal and technological realities. Such reform would also be consistent with the Indonesian Constitution (UUD 1945), particularly Article 28D(1), which guarantees that: “Every person has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law.” In light of these developments, the application of *li'ān* in cases of paternity denial—whether during pregnancy or after childbirth—should be considered irrelevant and thus eliminated. Accordingly, the scope of *li'ān* should be limited to instances where a husband accuses his wife of adultery as grounds for divorce.

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