

## **QARINAH AS EVIDENCE IN DECIDING CASE**

**Mukhsin Nyak Umar**

Islamic State University Ar-Raniry, Banda Aceh, Indonesia

Email: Nyak\_Umargmail.com

**Abstrak:** *Qarinah* as evidence leading to a conviction has been used by judges as the consideration basis in resolving a case. Its uses as evidence is still controversial especially in *Fiqh*. This is not the case in positive law as positive laws are regulated by a nation. The most important part of *qarinah* as evidence is how the results of technological advancements such as DNA could be used as *qarinah*. Positive law seems to have adopted DNA as *qarinah* so as to use it in imposing a legal decision. In reference to the Islamic law, can a DNA technology be used as *qarinah*? Apparently further research regarding this topic is required. This article discusses fundamental arguments for possible adoption of DNA as *qarinah* evidence.

**Keywords:** *Qarinah*, evidence, judge and DNA technology

### **A. Introduction**

In resolving a case, a judge requires foundations and consideration materials. This is to ensure that in resolving a case a judge sincerely refers to justice, giving everyone the right to get justice.

Evidence is one of the foundation or consideration materials in making a decision over a case. In *fiqh*, evidence is called *al-bayyinah*.<sup>1</sup> This terminology means information i.e. something that can be used to explain a phenomena or case. Using this information, the nature of a case can be explained. This indicates that evidence

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<sup>1</sup> The majority of Islamic scholars interpreted *al-bayyinah* in the narrow sense, i.e. testimony. However, Ibnu Qayyim interpreted it more broadly, that is everything that can be used to describe the right (right ) in front of the judges, in the form of testimony, witnesses, and a variety of proof that can be used as guidelines by the judges to restore the right to its owner. And testimony is one of the *al-bayyinah*. See Abdul Aziz Dahlan (ed), Encyclopedia of Islamic Law, (Jakarta: PT Ikhtiar Baru Van Houve, 1996), vol I, p. 207.

has a critical value in jurisdiction. Thus disputing parties are required to bring proof for the lawsuit or defence.

In Islamic jurisdiction, one of the proof is *qarinah* (proof or evidence).<sup>2</sup> Similar evidence is also known in Indonesian positive law, allegations (civil law) and indications (criminal law). Some people identify *qarinah* as allegations.<sup>3</sup> *Qarinah* evidence is accepted by some scholars as one of *ushul al-Shari'ah* in deciding a case. It may become legal proof together with other proof, or may also become independent proof when no other proof is found.

*Qarinah* evidence certainly has its own characteristics compared to other proof, both in term definition and strength as proof. This article aims to discuss the *qarinah* evidence, in terms of meaning, legal basis for its existence, usage prerequisites, and the strength level of the *qarinah* evidence. This is due to fact that *qarinah* evidence has its own distinctive characteristics compared to other proof.

## **B. Definition of *Qarinah* as Evidence**

In etymological term *qarinah* means relationship or bond. In terminological term *qarinah* can be found in the books of *fiqh* and *qanun*. In the books of *fiqh*, *qarinah* is defined as follows:

1. Sayid Sabiq's Definition

*Qarinah are signs leading to a conviction*

2. Wahbah al-Zuhaili's Definition

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<sup>2</sup> There are several kinds of evidence that can be used in judicial proceedings, i.e. confession (*iqrar*), witness (*shahadah*), oath (*yamin*), proof (*qarinah*).

<sup>3</sup> In Indonesia, the Islamic court in deciding cases refers to the civil law court proceedings (KUHPdt), because the area of the Islamic court is in the area of civil law. In KUHPdt, it is described in Article 1866 that the required proof include: written proof; proof with witnesses; allegations; confessions; oath that are the evidence that can be used

<sup>4</sup> Sayid Sabiq, *Fiqh al-Sunnah*, Chapter III, p. 454

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*Qarinah are clear signs (proof) related to something vague to which the signs point.*

3. Abd al-Karim Zaidan's Definition

*Qarinah are clues or signs indicating the presence or absence of something.*

The three definitions cited above show different emphases, although all of them refer to the same substances, the signs or indications. Sayid Sabiq definition emphasizes that these indications must come to the convincing level. Wahbah al-Zuhaili definition emphasizes that these indications have vague linkage between vague cases and clear cases. On the other hand, the definition of Abd al-Karim Zaidan explains that these indications become clues whether or not something exists.

Based on the aforementioned definition, Wahbah al-Zuhaili stated that *qarinah* must meet two conditions; 1) there is a clear and well known event to cling on; 2) There is a relationship between clear and vague problems.<sup>7</sup>

Meanwhile, in the procedural law of justice, the definition of *qarinah* is defined as follows:

1. The definition outlined in Code of Civil Law (KUHPdt).  
Allegation is the conclusion by which laws or judges were withdrawn from an event known by the public to the direction of an event that is unknown by the public.<sup>8</sup>
2. The definitions outlined in the Code of Criminal Law

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<sup>5</sup> Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, (Damsyiq: Dar al-Fikri, t.t), Chapter VIII, p. 396. Later called as al-Zuhaili, *al-Fiqh al-Islami*.

<sup>6</sup> Abd al-Karim Zaidan, *Nizham al-Qadhai fi al-Syari'ah al-Islamiyah*, (Beirut: Muassasah al-Risalah, 1989, p. 219

<sup>7</sup> al-Zuhaili, *al-Fiqh al-Islami*, p. 396.

<sup>8</sup> Article 1915 of the Civil Code (KUHPdt) used by the Religious Court of Indonesia in judicial implementation.

(KUHAP)

Indications are actions, events or circumstances due to its correspondence, either between one another, as well as with the criminal act itself, indicating that there has been a crime and someone responsible for it.<sup>9</sup>

3. Definitions outlined in the Draft Qanun of Aceh on *Jinayat* Procedure Law

Indications (*qarinah*) are actions, events, circumstances or objects which due to correspondence between one another and *jarimah* itself indicates that there has been *jarimah* and someone who is responsible for it.<sup>10</sup>

It can be seen that there are differences in the use of *qarinah* term in civil and criminal law. Civil law uses the term allegations while criminal law uses the term indications. Actually these two terms basically have the same meaning.

The aforementioned formulation suggests that there is a similarity in the meaning offered in positive law in which *qarinah* is a sign indicating a link between events or circumstances with an action. However, the definition of *fiqh* seems to emphasize more on the sign linking the two things. While the definitions offered by *qanun* looks more technical. The definition offered in *qanun* suggests that the sign indicates that *jarimah* has happened and someone is responsible for it.

In the draft *qanun* of Aceh, it appears that the definition of *qarinah* adopted the formulation of *qarinah* in the guidance of the Code of Criminal Procedure with a slight addition of a noun, which states that what can be *qarinah* including objects, in addition to acts, events and circumstances. The Criminal Procedure Code does not mention that the object could become *qarinah*.

Based on the aforementioned definition of *qarinah*, it is understood that essentially *qarinah* is a condition associated with a case where it could be a sign for the case. It is regarded as an indication with a logical characteristic that connect it to an event. For example, someone who came out of the empty house in a state

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<sup>9</sup> Article 188, paragraph 1, the Criminal Procedure Code (KUHAP)

<sup>10</sup> Article 184, paragraph 1, the draft Qanun of Aceh about Procedure Law on *Jinayat*.

of nervous, while a knife covered in blood is in his hand. This is a state. On the other hand, at the same time there was a person who died in the house covered in blood. This is a situation or an event. The state of the people who came out of the house can be a sign of verifying that the person is the killer.

Based on some readings, a few people differentiate *qarinah* into two types. First, *qarinah qanuniyah*, which is prescribed by law. The definition of allegations in legislation is an allegation based on a specific provision of law regarding or related to a particular act or event. Second, the *qarinah qadhaiyyah* that is *qarinah* which is the result of the judge after the conclusion of proceedings.<sup>11</sup> The definition of judge presupposition is an allegation based on the reality or facts derived from the facts proven at trial as the point of departure to organize the allegation. This allegation is then fully submitted to the judge consideration.<sup>12</sup>

In addition, there are a number of people who distinguish *qarinah* as *qarinah 'urfiah* and *qarinah syar'iyah*. *Qarinah 'urfiah* is a conclusion responded by the judge, using a well-known event (*makruf*) to an unknown event. While *qarinah syar'iyah* is some *qarinah* issued by *syara'* (Sharia Law), using a well-known event (*makruf*) to an unknown event. However, if it is seen from its substance, the division of *qarinah' urfi* and *syar'iyah* is equal to *qarinah qadhaiyyah* and *qarinah qanuniyah*. Only *qarinah qanuniyah* under the law, while *qarinah syar'iyah* is based on the Sharia law.

When traced to the source of the *qarinah* division, it seems that the writers refer to the explanation of the Civil Procedure Code regarding the explanation of the evidence in the form of prejudice, which can be found in Article 1915 and 1916 explaining that there are two allegations, i.e. the allegation which is based on the law and allegation which is not based on the law. The allegation based on the law is the allegation which is connected with certain acts or events under the provisions of laws. Such allegation include; 1) acts declared to be void by the law, because the acts were solely

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<sup>11</sup> Anshoruddin, *Rules of Evidence Based on Islamic Procedure Law and Positive Law*, (Yogyakarta: Pustaka Pelajar, 2004), p.88

<sup>12</sup>Rafiq Nasihddin, *Allegation in The Islamic Court Procedure Law*, <http://www.nasihudin.com/makalah/persangkaan-dalam-hukum-acara-peradilan-Islam/34/.html>, accessed on Januari 2, 2014.

based on the characteristics and forms, regarded to have been done to avoid a provision of the law; 2) the law statement which concludes the existence of property rights or debt relief in certain circumstances; 3) strengths granted by the law to a judge's decision that has a definite legal strength; 4) the strength granted by the law to the confession or the oath of one of the parties.<sup>13</sup> However, *qarinah* discussed in *fiqh* has more tendency to *qarinahqadhaiyah* as a conclusion of the judge.

As a conclusion of the judge, *qarinah* can be obtained from other evidence that suggests the existence of *qarinah*, such as a. the testimony of a witness; b. documents; c. the confession/ testimony of the defendant. This is confirmed in the Criminal Code Article 184. These sources were also adopted in the draft qanun of Procedure Law on *Jinayat* in Aceh, where the source of *qarinah* which can be obtained by the judge is explicitly mentioned in the Article 184. However, in article 311 *Herzien Inlandsch Reglement* (HIR), there are other sources of proof, i.e. the judge's own vision.<sup>14</sup> From the source of *qarinah*, it can be seen that the *qarinah* evidence is linked with other evidence.

Based on the explanation Wirjono Projodikoro stated that the so-called indication (allegation) is not evidence, but a mere conclusion drawn by using real evidence. Therefore, he considered the indication as not worth mentioning evidence and should be excluded from the chapter describing the indication as evidence. But by discharging this evidence from the list of evidence regulated by the law, he does not intend to put it aside. Indications can still be used after other evidence, i.e. the experience of judges. It can be understood from the proposal, that in the article of evidence, it is necessary to add 1) the experience of the judges in the trial, and 2) statement of the defendant in front of judges.<sup>15</sup>

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<sup>13</sup> See The Civil Code (KUHPdt), Article 1916

<sup>14</sup> *Herzien Inlandsch Reglement* (H.I.R), Article 311

<sup>15</sup> Wirjono Projodikoro, *Criminal Procedure Law in Indonesia*, (Bandung: Penerbit Sumur, 1992), pp. 127-128

### C. Basic Law *Qarinah* Evidence

*Qarinah* evidence has a legal basis, either in the Qur'an or the hadiths of the Prophet. In some verses of the Qur'an Allah makes the signs for something.

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*Behold! in this are Signs for those who by tokens do understand (Al-Qur'an, Al-Hijr: 75).*

( : )

*Had We willed, We could have shown them to you, and you should have known them by their marks, but surely, you will know them by the tone of their speech! And Allah knows all your deeds (Al-Qur'an, Muhammad: 30)*

However, *qarinah* mentioned above is still general in nature, not in relation to the realm of law. The basic law of *qarinah* as evidence in deciding cases in the Qur'an is a popular story of Prophet Yusuf revealed in Yusuf verses 25-27

*So they raced with one another to the door, and she tore his shirt from the back. They both found her lord (i.e. her husband) at the door. She said: "What is the recompense (punishment) for him who intended an evil design against your wife, except that he be put in prison or a painful torment?" He [Yusuf (Joseph)] said: "It was she that sought to seduce me," - and a witness of her household bore witness (saying): "If it be that his shirt is torn from the front, then her tale is true and he is a liar!" But if it be that his shirt is*

*torn from the back, then she has told a lie and he is speaking the truth!"*

This verse of the Qur'an reveals how Yusuf's shirt was torn becomes *qarinah* evidence, the truth of Yusuf or the queen who was in conflict with him. The torn shirt of Yusuf in front might become *qarinah* of the truth of the woman who claimed that Yusuf tried to molest her. Meanwhile, the fact that the Prophet Yusuf's shirt was torn from the back showed the *qarinah* leading to the truth of Yusuf and the untruth of the woman who had forced him to do such misconduct.

The expression of Qur'an about the *qarinah* evidence used to solve disputes between Yusuf and the wife of the king becomes relevant indications that *qarinah* can be used as one means of evidence. Even in the description of Qur'an above, *qarinah* becomes evidence to dismiss other evidence such as confessions.

In the hadith it is also found the basic law of *qarinah*, as the Prophet said.

*Abu Sa'id al-Khudhri reports that the Prophet sallallahu alehi wasallam said: "If you see a man goes back and forth to the mosque, then bear witness that he is a believer" (Recorded by Tirmidzi).<sup>16</sup>*

In this hadith, the Prophet made one of the signs of the faith is how often someone goes back and forth to the mosque to perform congregational prayers. The statement "bear witness that he is a believer" gives the sense that people may rely on these markers as a belief about someone's faith. It is certainly understandable that a signifier and signified have a very close relationship. In this case, the faith underlies the worships carried out by someone and vice versa, the intensity and quality of worships reflect someone's faith.

In addition, *qarinah* evidence has been used by prophets before Prophet Muhammad, as well as by the Prophet Muhammad himself, and also by his friends. Many narrations illustrate that a judicial decision has been made based on *qarinah* evidence as it will be revealed in the next section of this paper.

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<sup>16</sup> Muhammad ibn Isa Abu Isa al-Tirmidzi, *Sunan al-Tirmidzi*, (Beirut: Dar Ihya al-Turats al-Arabi, t.t), Chapter V, p. 12



#### **D. Strength of *Qarinah* Evidence**

In positive law, the use of indications or allegations and their strengths are clearly defined as evidence. In Article 296 HIR, it is stated that the evidence, either individually or together can be used to set judge's conviction. This means that each of that evidence has the law enforcement to prove the truth behind a case independently. It means that by using one piece of evidence, the judge can make a decision.

On the other hand there is also a statement in Article 298 HIR that there is no evidence binding the judge. With this restriction, meaning that evidence, including indications/ allegations are relative in the front of the judge. The judge may set his belief on a case based on the evidence above.

With regard to indications or allegations, R. Supomo stated that the allegation (judge) as evidence has the strength of independent evidence, i.e. it depends on the discretion of the judge, how far he will evaluate the strength of evidence over a lot of prejudice obtained in the proceedings. The presuppositions of legislation (*wettelijke vermoedens*) mentioned in Article 1916 B.W. have the strength of coercive evidence (*dwingende bewijskracht*).<sup>17</sup>

According to the explanation of R Soepomo, it can be seen that the law enforcement of indications and allegations appears in two categories. Allegations as the conclusion of a judge have relative strengths and depend on the judge. While the presuppositions of legislation are coercive. Therefore, the evidence against the presupposition of legislation is not permitted, unless the evidence for resistance is permitted by the law itself.

In *fiqh*, some scholars establish that *qarinah* as evidence must have certain requirements. This implies that *qarinah* as evidence cannot be directly used. It is set so as the use of *qarinah* as evidence is expected to uphold justice in deciding a case. *Qarinah* which can be used as evidence must be conclusive *qarinah* which is acceptable to the rationale and indisputable. In addition *qarinah* does not contradict Islamic law either.

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<sup>17</sup> R. Soepomo, *Civil Procedure Law of District Court*, Jakarta: PT Pradnya Paramitta, 1994,) p. 83

It seems there is no disagreement about *qarinah* as evidence in the court. However, concerning the extent to which *qarinah* has the strength as evidence, there are different opinions, both in which issues *qarinah* can be used as evidence and whether *qarinah* as evidence can stand alone without other evidence.

Scholarly, as expressed by Wahbah al-Zuhaili that *qarinah* cannot be used in all judicial matters, such as *hudud* and *qishas* because *qarinah* is obtained by doubts (*syubhat*). In *qasamah* issue, the majority of Islamic scholars argued that *qarinah* can be used as evidence with care in the matters of injuring and depriving another person's life based on the presence of the murderer, either for the presence of weapons only or for those who require it. *Qarinah* can also be used in the property disputes and family problems in the absence of other evidence to enforce someone's rights.<sup>18</sup>

In the matter of determining adultery, Abu Hanifah, Shafi'i, and Ahmad, do not use a pregnant woman and a woman without a husband as *qarinah* which can set the relevant decision on adultery against her. Ahmad said, the pregnancy may be forced pregnancy, or may not be caused by adultery, but the entry of sperm into the uterus due to its own actions or the actions of others. Therefore, such *qarinah* is in doubts (*syubhat*). While *hudud* cannot be determined by a doubtful issue. While Malik stated that *qarinah* can be used as evidence if supported by the woman's condition which is a *muqim* and not isolated as well as not forced at all. In the case of theft, the stolen goods which are on someone's hand cannot be *qarinah* to make decision on the theft case. Similarly, the case of drinking alcohol cannot be decided based on *qarinah* such as the relevant intoxicating smell of the person's mouth or of his vomit.<sup>19</sup>

Most of Maliki's *fiqh* scholars such as Ibn Farhun and Hanbali's *fiqh* scholars such as Ibn al-Qayyim consider that *qarinah* can be used as evidence despite in the problem of *hudud*. Therefore, the judge may assess the adultery of a pregnant woman while she does not have a husband, the act of drinking alcohol of someone whose mouth smells of alcohol, the stealing for people with the

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<sup>18</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adilatuhi*, Chapter III, p. 701

<sup>19</sup> Ahmad Fathi Bahnisi, *Nazhariyat al-Istbat fi al-Fiqh al-Jinai al-Islami*, (al-Qahirah: Dar al-Syuruq, 1983), p. 197

stolen goods, and the owners who clearly know the typical features of the missing items.<sup>20</sup>

In the case of self-reliance of *qarinah* evidence, the majority of scholars consider that if only *qarinah* is used as evidence, the judge cannot decide the case. Thus, *qarinah* as evidence cannot stand alone. It is supporting evidence for other evidence. But Ibn al-Qayyim turns *qarinah* into strong evidence that can stand alone without other evidence. He refers his view to some of the Prophet's practice in deciding cases based on *qarinah*.

Prophet Sulaiman for example, is narrated to have used *qarinah* in deciding the case when two women fighting over a baby came to him asking for a decision. Sulaiman decided to split the baby. The plaintiff agreed, while the defendant disagreed and acknowledged that the baby is the son of the plaintiff. But in the end, Sulaiman decided that the baby is the son of the defendant. Sulaiman took *qarinah* as evidence in deciding the case. The willingness of the plaintiff to divide the baby indicated that she was not the mother of the baby. While the disagreement of the defendant to divide the child and recognizing him as the son of the plaintiff shows that she is the mother of the baby. It is caused by the fact that a mother who expected and gave birth must have affection given by Allah in her heart towards her child who was conceived and brought forth. She could not physically hurt her own child.<sup>21</sup>

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<sup>20</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adilatu*, Chapter III, p. 701

<sup>21</sup> Ibnu Qayyim al-Jauziyah, *al-Thuruq al-Hukmiyah fi al-Siyasah al-Syar'iyah*, (t.t.p; Dar al-Ilmi al-Fawaid, t.t), Chapter I, p. 8. Ibn Qayyim cited the narration of Abu Hurairah about the Prophet sallallahu alehi wasallam. There were two women who has small sons. One of their children was eaten by wolves. One of them said, "The child eaten by the wolf is yours". Another woman denied and said, "Your son is eaten by the wolf." Then the two women brought his case before Sulaiman by telling the problems. Then Sulaiman said, "Give me the knife, I'll divide this child for you. The younger woman said, "No, the child is belonged to the woman." Then Sulaiman finally decided that the child was the son of the younger woman. See Muhammad ibn Isma'il Abu Abdullah Al-Bukhari, *Shahih al-Bukhari*, (Beirut: Dar Ibn Katsir al-Yamamah, 1997), Chapter III, p. 1260; Muslim Ibn al-Hajjaj, *Shahih Muslim*, (Beirut: Dar al-Jail, t.t), Chapter V, p. 133; Muhammad Ibn Hibban al-Haitami, *Shahih Ibn Hibban*, (Beirut: Muassasah al-Risalah, t.t), Chapter XI, p. 453

Prophet Muhammad is also narrated deciding a case according to *qarinah*. For example, the prophet took *qarinah* i.e. the ability of the owners to specify the characteristics of the lost items. Similarly, in the case of the dispute of Afra's two children, Rasulullah convicted the murderer on the basis that there was a sword with blood on it, the blood is *qarinah* to determine there was a crime of murder (*al-qital*). Umar also judged adultery on a pregnant woman while she did not have a husband.

According to the two views above, it is shown that *qarinah* as evidence has been used in the Islamic court. But its strength as evidence is still debated. The first view looks very careful in using *qarinah*. Most *qarinah* is inconclusive because there are other possibilities following such *qarinah*. The Prophet himself reminded that *hudud* is not enforced based on doubts. In today's modern world, an event or situation may be created by a chemical process. Smoke for example in the classic world is seen as a strong *qarinah* (*qarinah qathi'iyah*) for the presence of the fire, but in the modern world, the presence of smoke will no longer be regarded as *qarinah* for the fire. Because the smoke can be created without fire. Hence, the used *qarinah* does not contain any doubt.

On the other hand, the second view has confirmed that the use of *qarinah* as evidence that can be considered convincing needs to get attention. If not, it will be a lot of legal issues that cannot be decided fairly. Today, the technological advancement has created compelling scientific signs. Fingerprint, electronic recordings, Deoxyribo Nucleic Acid (DNA) tests for example, can be used as strong scientific *qarinah* evidence. When such *qarinah* is ignored, there will be a lot of legal issues that cannot be decided on the basis of truth and justice. Fingerprints, DNA tests have been proven to give many clues in diverse cases. They have connected between two problems, clear and vague problems.

Constitutional Court Decision No. 46/PUU-VIII/2010 which states that a child outside of marriage can be proved by science and technology or other evidence if he has a blood relationship with his father. If proven, then he will obtain a civil relationship with his father.<sup>22</sup> Technological evidence that can prove the blood

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<sup>22</sup> See Constitutional Court Decision No 46/PUU-VIII/2010

relationship at the moment is DNA tests. DNA tests have become *qarinah* evidence (indication) that there has been the birth of the child derived from his biological father if the child is born outside of marriage. *Qarinah* evidence in the form of a DNA test is believed to be 90 % accurate.

## E. Conclusion

It seems that *qarinah* is important evidence in establishing the judicial verdict. Either in positive law (*al-fiqh al-wadh'i*) or in Sharia law (*al-Sharia al-Islamiyah*), *qarinah* has been used as evidence in establishing the legal decisions. This means that although *qarinah* is regarded as the conclusion of the judge, it is considered important and can prove some legal cases in the court. In fact, in certain cases, *qarinah* can be more convincing compared to other evidence.

However, its use as evidence is still debated, particularly in *fiqh*. It is not debated in positive law, as positive law is enacted by the state. The debate is around the issue of the strength of *qarinah* evidence, whether the *qarinah* evidence can be used in all legal issues. In addition, it is related to whether this *qarinah* evidence can be used independently or used in conjunction with other evidence.

But, apparently the most important thing is the development of technology, both informational and genetic technology that should be examined by experts especially by the *fiqh* scholars. DNA technology for example has led people by scientifically giving convincing clues about a person's patrilineal genealogy. The positive law has adopted the DNA technology as *qarinah* that can bring down a verdict.

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