

Testimony: First Source of Proof of Right or Crime

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ABSTRACT:

It is unanimous opinion of all the jurists that administration of justice is the basic responsibility of a state because without justice and its proper administration survival of a society and a state is impossible. It is also an established fact that all human beings are not equal, there are good as well as bad people, and it is quite possible that disputes will arise among them. All disputes whether of civil nature or criminal nature need proof in an authorized court. Among all sources of proof testimony carries a central position in the judicial system because a judge first of all seeks testimony to decide a case according to its merit. Islamic law lies burden of proof on the plaintiff. It has laid down some conditions for the validity of testimony like a witness must be adult and sane and adil. There should be no enmity between a witness and a party against which he/she is giving evidence. In this article the issue of a non Muslim as a witness and evidence women has been elaborated., while in the last part quantum and conditions of evidences have been discussed.

Introduction:

It is an established fact that societies and states do not prosper without peace and cannot survive without justice and its proper administration.

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Administration of justice means enforcement of good and right, it is suppression of evil and wrong.¹

Similarly, establishing justice in a society consists of removing injustice. Injustice occurs when a thing is put in a place where it does not rightly belong to an act of justice thus consists in putting everything at its right and proper place. By the same token the recompense should not be less than what a person deserves and for the same reason the penalty for a wrong should not exceed the transgression committed.²

The gist of the Islamic teachings is the dispensation of justice is the responsibility of everyone in the whole society. It has been clearly mentioned and stressed in the Holy *Qurān* and *Sunnah* (Tradition of the prophet (P.B.U.H)). Both of them associated justice with reward while injustice with punishment. For the dispensation of justice and to prove the facts that evidence carries, has an important place in judicial proceedings. Because unless it is not proved beyond reasonable doubt that the accused has committed the crime or the defendant has taken the right of the plaintiff, one cannot be punished for the crime or the restoration of the right. The Holy *Qurān* has emphasized on giving of evidence and condemned its concealment. It has laid down the criterion of evidence for different crimes and rights. The *Sunnah* (traditions) of Holy Prophet (P.B.U.H) has also laid down great emphasis on evidence and has explained the conditions of testimony, confession and admission as well as the witness and has elaborated other sources of proof of a crime³ and a right such as other sources of proof are circumstantial evidence, Evidence by expert, oath and personal knowledge of the judge and the lot etc.⁴ In this article testimony would be elaborated in the light of the *Qurān* and *Sunnah*.

It is mention worthy here that most material on the subject is available in Arabic language while in English some scholars have a valuable contribution in this regard, however, much work has to be done in order to make easy comprehension of the Islamic Law for those who cannot benefit from the original sources directly.

Meaning of Testimony (*Shahādah*):

Literally it carries several meanings for instance: Providing information of what has been seen or witnessed is called *Shahādah*.

Similarly its meanings are the declaration of what one knows. Its another meaning is to be present on the sight of some happening.⁵ While technically it has been defined by several ways:

“To give true information before a court of what one has seen or known for the purpose of proving or disproving a right or a crime with pronounciation of the word testimony (*al Shahadāh*)⁶.

In *Sharh al- Majalah* it has been defined as:

“Testimony is giving of information by pronouncing the word *al shahadāh* in front of a *hakim* (Judge/ruler) and in the presence of the parties for establishing a right of someone due on the other one”⁷

It is obvious from the above definitions that basically testimony is for the establishment of a right due on someone, this may be in civil matters as well as in criminal cases, while its another element is giving the testimony in an authorized court and in the presence of the parties, it means that if someone gives testimony outside the court or in the absence of the disputed parties then such testimony will carry no weight.

Burden of proof:

In Islamic law ‘burden of proof’ lies on the plaintiff and oath is taken from the defendant. This principle has been derived from the following Hadith (tradition) of the Prophet (P.B.U.H)

“Burden of proof lies on the plaintiff / complainant and the oath is on the person who denies.”⁸

Importance of Testimony (Al shahadāh):

Testimony (*Al-Shahadāh*) is of great importance in the process of administration of justice..⁹

In every system of jurisprudence it is recognized that, before a fact is accepted and acted upon, it must be proved.¹⁰

Islamic law has given great importance to Evidence.

The Holy Qurān says:

“O believers! Do stand up for the sake of God a witness of justice, and never do leave justice for the hatred of nation (People).”¹¹

In another place it says:

“O believers! Stand for justice; give witness of the side of God though there is a loss to you or to your parents or to your kinsmen”¹²

“O believers! When you contract a debt amongst yourselves for a fixed period, write it down. And let a writer write it down between you justly and refuse not the writer to write as God taught him, so must he write down, and the debtor may dictate and fear God his Lord and diminish not an aught of it. And if the debtor is insane or weak or unable to dictate himself then let his guardian dictate justly. And call in two witnesses to witness from your men; if there are not two men then one man and two women from such folk as you like them as witnesses that if one of the two women forgets the other may remind her”¹³

*“And take witness when you enter into a transaction”.*¹⁴

*“Such of your women, who commit indecency, call four of your men as witness against them”.*¹⁵

*“And those who cast (imputation) upon the guarded (chaste) women and then bring not four witness Scourge them (with) stripes and do not accept their testimony ever”*¹⁶

*And take witnesses, two men of equity (reliable) from among yourselves and perform straight the witnessing for God’s sake.*¹⁷

*“Then when they (women divorced) reach their term, retain them according to law or leave them according to law and take witnesses two men of equity (reliable), from among your selves and perform straight witnessing for God sake.”*¹⁸

When a case is brought before a court it requires evidence for giving decision, and it is compulsory for a witness in such case to give evidence before the court,¹⁹

The Holy *Qurān* says:

*“And the witness should not refuse when they are summoned.”*²⁰

But this evidence must be clear and explicit in respect of the facts for which it is given. The Holy Prophet said,

*“If you see a thing like the sun, give evidence on that and not otherwise”.*²¹

Conditions for a witness:

There are two stages of testimony (*al Shahadāh*):

1: *Tahammul Shahadāh*: It means the capability of a person to acquire knowledge about a case.

2: *Qadai Shahadāh*: It means the capability of a person to appear before an authorized court for giving evidence.

As for as the first category is concerned in this regard the jurists have laid down the following conditions.

- 1: A witness must be sane during acquiring knowledge of the case.
- 2: A witness must have the capacity of seeing; the reason is that, voices may resemble with each other²². This is the point view of *Shāf'ī* jurists also.²³ While *Hanbalī* jurists are of the opinion that a witness must have the capacity of seeing as well as hearing during acquiring knowledge of an event.²⁴
- 3: A witness must have witness the event by itself, however that case is excluded in which a decision is admissible on the bases of hearsay (*tasamua'*)²⁵

To acquire knowledge about a case, adulthood, freedom, Islam and *Adālat* (a man of irreproachable character) are not necessary as these are condition for the eligibility of giving evidence in a court²⁶.

The conditions for the second category are as under:

1: A witness must be adult and sane:

According to jurists a witness must be adult and sane. This view is based on the following saying of the Holy Prophet (P.U.B.H).

*“Three persons have been exempted (from every kind of obligation) (1) The minor until he attains puberty (2) The insane until he recovers (3) sleeping person until he awakes”*²⁷

2: A witness must be “Adil”:

“Adil” means a person of irreproachable and serious character who is not liable to suspicion.²⁸

It also means a person who abstains from capital sins and does not insist on minor sins and thus models his conduct for his contemporaries and fellow countrymen.²⁹

So in the light of these definitions it can be said that it means a person who is generally considered a reliable person in his society and is not notorious.³⁰

3: Freedom:

According to *Hanafi*, *Māliki* and *Shaf'ī* jurists a witness must be free; giving evidence of a slave is not permissible while according to *Hanbali* jurists the testimony of a slave is also permissible except in *Hudūd* and *Qisās* cases.³¹

4: Islam:

According to Imam Malik and Imam Shaf'ī the evidence of non-Muslim is not admissible neither for and against a Muslim nor for against a non-Muslim.³²

While *Hanāfi* and *Hanbali* jurists allow the evidence of a non-Muslim when a Muslim and a non-Muslim travel together and a Muslim witness is not available.³³

However, a renowned scholar of modern day time Dr. Anwarullāh opines that “the situation in the present day has greatly changed. Many Muslims reside in non-Muslim states and many non-Muslims reside in Muslim states, and all the countries of the world are connected and tied with one another through mutual contracts and different international and territorial organization under which every state is bound to give rights to all its residents which are available to the residents of the other states. More over all the nation of the world specially all Muslim countries follow Geneva convention, the charter of human rights, which obliges them to treat non-Muslims like Muslims to a possible stage keeping in view the laws of Islam. Thus depriving non-Muslims of giving evidence for and against one another is not fit in the

present day circumstances. It will be in the interest of the present day situation in muslim countries to allow non-Muslims to give evidence for and against one another in matters other than *Hudūd*. As for as *Hudūd* crimes are concerned, their evidence for and against each other will be acceptable but the accused shall not be punished with hadd but will be punished with *Ta'zir* (punishment other than *Hadūd*). Moreover the evidence of a non-Muslim may also be accepted for and against a Muslim in matters other than *Hudūd* because there is no Verse of the holy *Qurān* and hadith of the holy prophet which prohibit the acceptability of the evidence of a non-Muslim. On the contrary according to verse 5:106 of the Holy *Qurān*, the evidence of two non-Muslims for a Muslim is acceptable in connection with his will at the point of his death during a journey when Muslims are not available there.³⁴

5. Power of Seeing:

According to *Hanāfi* and *Shāfi* jurists a witness must possess the power of seeing as voices may sometime resemble with each other, while *Maliki* and *Hanbali* jurists allow it, subject to the condition if he can differentiate well amongst voices.³⁵

6. Power of speaking:

According to *Hanāfi*, *Shāfi* and *Hānbali* jurists a witness must possess the quality of speaking as making gestures is not an authentic means of proof while *māliki* jurists permit his testimony if he understands well gesture and signs.³⁶

7 Evidence by Women:

According to the majority of the jurists including Imam Malik, Imam Abu Hanifa, Imām Shāfi, and Imām Ahmad, a witness in *Hudūd* and *Qisās* must be male and thus the evidence of a woman is not admissible in the *Hudūd* and *Qisās*. In other than *Hudūd* and *Qisās*, the evidence of two women and one man is admissible. Only in matters which are generally known to woman like virginity, menstruation, suckling etc., the evidence of women alone is admissible. However according to some other Hanafi and Hanbali jurists, the evidence of one woman is also sufficient in these matters and according to Imam Shafi the evidence of four women is necessary in these matters.³⁷

While according to Imām Ibn Hazm, the evidence of a woman is admissible even in *Hudūd* and *Qisas* if her evidence is otherwise authentic.³⁸

8. Witness in *hudūd*³⁹ and *Qisas*⁴⁰:

According to Imam Abu Hanifa a witness in *Hudūd* and *Qaisās* must possess the power of seeing and the faculty of speaking. Thus the evidence of a blind and a deaf and dumb is not admissible in *Hudūd* and *Qisās*. However, according to Imam Malik, Imam *Shafi* and Imam Ahmad ibn Hanbal the evidence of dumb and deaf is acceptable in *Hudūd* and *Qisās* if he can write his evidence or his signs are intelligible.⁴¹

9. Blood relation:

There are two kinds of opinions of the jurists about this issue.

Majority of the jurists do not allow testimony of families for each other. While others say that in matters like marriage, divorce and property their testimony is acceptable if they are *adil* (just and fair)⁴²

10. Enmity:

The majority of the jurists agree that enmity between a witness and a party to a case arising out of worldly matters disqualifies the witness. Enmity by reason of matter involving the rights of *Allah* does not disqualify a witness if he possesses the quality of a “*adil*” (justness or fairness).⁴³

11: Suspicion.

A claim of suspicion exists when there is any kind of relationship between the witness and one of the parties which suggests suspicion or a personal interest that may be advanced by the witness through his testimony.⁴⁴

But except these, the evidence of relatives is admissible on behalf of one another.

Likewise, the evidence of a man who subsists on the food of someone and of a person employed privately on hire, is not admissible. Therefore the evidence of partners for one and other in respect of partnership, property, and of a surety for the payment of the thing, for which he was surety, by the principle are not admissible. But in other matters their evidence on behalf of one another is admissible.⁴⁵

12. False accusation of adultery.

All the jurists concur that the testimony of a person who accuses another person of committing adultery and then fails to produce four witnesses on his accusation and is punished with *Hadd al-Qadhf*⁴⁶ is not acceptable

This is based on the following verses of the Holy *Qurān*:

*“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) Flog them with eighty stripes; and reject their evidence even after: for such men are wicked transgressors, unless they repent thereafter and mend(their conduct)For Allah is oft forgiving, most Merciful .”*⁴⁷

There is a difference of opinion among the jurists that whether the testimony of a such person after repentance is admissible or not? In this regard Imam Mālik, Imam Shāfi'i and Imam Ahmad say that after repentance and mending his ways his testimony is acceptable while according to Imam Abu Hanifa despite his repentance and mending his ways his testimony is not acceptable.⁴⁸

Quantum of evidence:

According to Islamic injunctions in all civil and criminal disputes other than adultery the number of witnesses are two males or one male and two females.

The Holy *Qurān* Says:

*O believers! When you contract a debt amongst yourselves for a fixed period, write it down. And let a writer write it down between you justly and refuse not the writer to write as God taught him, So must he write down, and the debtor may dictate and Fear God his Lord and diminish not an aught of it .And if the debtor is insane or weak or unable to dictate himself then let his guardian dictate justly. And call in two witnesses to witness from your men; if there are not two men then one man and two women from such folk as you like them as witnesses that if one of the two women forgets the other may remind her.*⁴⁹

Other relevant verses of the Holy *Qurān* are as under in which number of witnesses has been prescribed.

1. *Such of your women, who commit indecency, call four of your men as witnesses against them.*⁵⁰
2. *And those who cast (imputation) upon the guarded (chaste) women and then bring not four witnesses scourge them (with) eighty stripes.*⁵¹
3. *Then, when they reach their term, retain them according to law or leave them according to law and take witnesses two men of equity (reliable), from among your selves and perform straight witnessing for God' sake.*⁵²
4. *O believers! The testimony between you when any one of you is visited by death, at the time of bequeathing, shall be two men of equity among you, or there should be two others beside you, if you have journeyed in the land then the affliction of death befalls you.*⁵³

However, it has been also related that the Holy Prophet (P.B.U.H) decided on the evidence of one witness along with the oath of the plaintiff⁵⁴.

Conditions for the evidence:

- (1) The evidence must be in conformity with the claim / complaint in respect to the subject matter. But any difference between evidence and the claim/complaint which can be reconciled dose not render the evidence inadmissible.⁵⁵
- (2) Testimony to be relevant.⁵⁶
- (3) The Evidence must be before a judge in the court .It is necessary for giving evidence that it should be given before a judge and as the evidence given outside the court is not acceptable.⁵⁷

(4) The Evidence must be conclusive.

This means that the evidence must clearly and explicitly prove the occurrence of the criminal act or violation of a right without any need of explanation or interpretation.⁵⁸

(5) The Evidence not to be delayed.

It is a condition that the presentation of evidence should not be delayed. Some jurists have raised the issue of delay of evidence as equivalent to doubtful evidence which is sufficient to preclude punishment for *Hudūd* crimes. However other jurists opine that delay in testimony is not effective if is based on a reasonable ground like long distance from the court, serious illness etc.⁵⁹

Tazkiyat al-shuhūd:

It is the way of inquiry which the court adopts to satisfy itself about the credibility, fairness and truthfulness of a witness. According to Imam Abu Hanifa it is not required except in hudud and qisas But according to Imam Al-Shaf'i *Tazkiat al-shuhūd* is necessary in every case. However according to Imam shaf'i if the court is otherwise satisfied of the witness or witnesses as being *adil* then *tazkiyat al-shuhūd* is not required in any case.⁶⁰

Conclusion:

The above mentioned discussion shows that Testimony is an important part of the judicial system of Islam. If testimony is solid and strong then it is very helpful in the dispensation of justice, which is a prerequisite for the establishment of a peaceful society. However, it is a dynamic and multifaceted topic and it is the need of the hour to introduce comprehensive syllabi of Islamic Law in all Law Institutions in order to well equip our coming generation with it as introduction and

implementation of Islamic Law was the purpose of the creation of Pakistan.

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- ⁶ Islamic law of evidence :04,
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- ¹⁰ Ibid.
- ¹¹ The Quran 5:8
- ¹² The Quran 4:135
- ¹³ The Quran 2:282
- ¹⁴ The Quran 2:283
- ¹⁵ The Quran 4:15
- ¹⁶ The Quran 24:4
- ¹⁷ The Quran 65:2
- ¹⁸ The Quran 65:2
- ¹⁹ Islamic law of Evidence :05
- ²⁰ The Quran 2:282
- ²¹ Al-Bahaiqi, *sunnal al-Kubra*, 8:132.
- ²² -Ibn al-Nujaim, Shaykh Zain al-Din, *al-Bahr al- Raiq* (Quetta, Maktaba Rashidiyyah, n.d.) 7:56
- Fath al-Qadeer, 6:44
- ²³ Al-Zuhaily, Wahba, *al- Fiqh al Islami wa Adillatuh* (Beirut, Dar al-Fikr,1984) 6:558
- ²⁴ Ibn al Qudama, Abu Muhammad abd al-Allah b. Ahmad, al- Mughni with *al- sharh al- Kabir* (Riyadh, Maktaba al-Riyadh al-Hadithiyyah n.d.) 12:04
- ²⁵ Tasamua': According to Abuhanifa it means spreading of news about an event known by a large number of people

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- ³⁶ Ibid.
- ³⁷ Ibn al-Qayyam, al-Jawziah, Muhammad b. Abu-Bakr, *al-Turuqal Hukmiyyah*(Beirut, Dar al-Fikr n.d.): 151-155.
- ³⁸ Ibid:37
- ³⁹ Hadd: It means punishment ordained by the holy Quran and Sunnah.
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- ⁴⁰ Qisas: It means punishment by causing similar hurt at the same part of the body of convict as he has caused to the victim or by causing his death if he has committed Qatle amad in exercise of the right of the victim or a wali (a person entitled to claim Qisas).
See for details al –Tashri' al-Jannai, 2:06
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- ⁴¹ Awda, Abdul Qadir, *Al-Tashri-Janai -al-Islami*, 2: 408
- ⁴² Islamic law of Evidence :13
- ⁴³ Ibid :14
- ⁴⁴ Awda, Abdul Qadir, *Al-Tashri-Janai -al-Islami*, 2: 408
- ⁴⁵ Islamic law of Evidence :16
- ⁴⁶ Qazf: Qazf—Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will bar, the reputation, or hurt the feelings, of such person, is said, except in the cases hereinafter, to commit Qazf.
See for details, *al-Tashri' al-janai* 2:455
-Enforcement of Hadd Ordinance, 1979.
- ⁴⁷ The Quran 24:4,5

- ⁴⁸ Islamic law of Evidence :18
⁴⁹ The Quran 2:282
⁵⁰ The Quran 4:15
⁵¹ The Quran 24:4
⁵² The Quran 65:2
⁵³ The Quran 5:106
⁵⁴ Islamic law of Evidence :22
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⁵⁶ Ibid :28
⁵⁷ Wahba Zuhaili,Dr, Al Fiq Al Islamic Wa addalitutuh , 6 : 25
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