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Competence of a Witness in Islamic Law and Pakistani Law: A Comparative Analysis

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Abstract: In Law of Evidence, the rights of the individuals are protected by various methods of proof including testimony. Testimony is given a vital weightage in the judicial system of Islam as well as in all the legal systems of the world after admission or confession. The subject matter of a cause or cause of action consists of a bundle of facts if proven; a person is to have a favorable decision from a court of law. Islamic Law attaches great importance to the testimony and the role of a witness for the dispensation of justice is very crucial. Receiving the evidence and then recording it before the court of law is considered a collective duty of those who have the information or knowledge of the facts of an incident. Keeping the evidence upright for Allah is recommended and concealing it is considered as a sin explicitly in the Qur'ān. Law of Evidence forms a foundation for every legal system for the administration and dispensation of Justice. Islamic Administration of justice is concerned, the main sources are the Qur'ān and Sunnah of the Prophet (peace be upon him). The current paper explores the qualification of a witness under Islamic Law and the legal system of Pakistan. This paper focuses on the competency of a witness to depose the facts before the court of law. This paper finally concludes that a competent witness as required by Islamic law could ease the path of justice.

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Introduction

In Islamic Law of Evidence, there are various modes of proof, namely, admission, confession, the testimony of a witness, circumstantial evidence, and an oath. All the methods are practiced and recognized in the judicial system of Islam and practiced in the legal system of Pakistan.[1] Evidence of a witness is considered essential and fundamental evidence after confession. The principles and rules of evidence are mounted in the light of the sources of Islamic law. A witness is not permitted to deny for giving testimony in the court of law and sometimes giving testimony becomes a primary duty of a witness and concealing it assigns him as sinful.[2] The basic purpose of the testimony is that rights of the individuals must be maintained and defended. Witness must bear the testimony for the sake of Almighty Allāh[3] only even if it is against his close relatives,[4] and must be free from bias and prejudice.

Abdur Rahim highlights the issue of false evidence in the judicial system and indicates that although testimony is a juristic act, and a witness is to bear the correct information before the court of law, but it is not practiced either due to error of observations or some moral deviations. He also confers that the law enforcement agencies must take care of the issue and correct and true information must be recorded in the courts for the sake of administration of justice, so can be avoided from false and fake evidence.[5]

The decision of any court depends on the evidence provided for proving the facts of the relevant case. The important objective of the evidence is to verify and authenticate the facts of the case or matter in dispute. The testimony of a witness is considered a core mode of proof after admission or confession. For the sake of the administration of justice in the judicial system of Islam, Sharīʻah has signified some of the qualifications and conditions as a witness to become a competent witness before the court. Pakistani law of evidence is also denoting the same terms,

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1- Shaikh, Shahzado, *Introduction to Islamic Law*, 2015. See, https://www.law.uh.edu/assignments/spring2015/22657-v2.pdf. Accessed on 19-04-2021.

2- Al Qurʼān 2: 283.

3- Al Qurʼān 65: 2.

4- Al Qurʼān 4: 135.

5- Abdur Rahīm, *Muhammadan Jurisprudence*, (London: Luzac Co. 1911), 374-376.

conditions and qualifications for a competent witness as prescribed by Sharī'ah except one difference i.e. Qanun-e-Shahadat Order, 1984 does not explain legal capacity of a witness in detail and just confers that a component witness must fulfill the criterion as laid down in the Qur'ān and Sunnah of the Prophet (peace be upon him). The current paper discusses various conditions from several aspects in the light of provisions of Pakistani law of evidence and Islamic Law.

Competence of a Witness in Pakistani Law

Pakistani Law of Evidence i.e. Qanun-e-Shahadat Order, 1984, is based on the commands of the Qur'ān and Sunnah of the Prophet (peace be upon him).[6] Terms and conditions of witness are not well explained in law of Evidence because the details left of the interpretation of the several verses and traditions regarding several issues. Qanun-e-Shahadat Order, 1984 states regarding qualifications of a witness as:

> "*All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind.*"[7]

This article signifies that a person to whom a court of law considers competent to testify as witness are capable to bear the testimony and criterion for such witnesses is that they understand the questions put to them and give rational answers. Law of Evidence does not permit the evidence of a witness who has been convicted for false evidence and perjury until repentance, however, court of law is to be satisfied as stated:

> "*Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence. Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways.*"[8]

6- *Qanun-e-Shahadat Order, 1984*, The Preamble.

7- M. Mahmood, *Qanun-e-Shahadat Order, 1984*, (Lahore: Pakistan Law Times Publications, 2007), 129.

8- Ibid.

In the last part of Article 3 of Qanūn-e-Shahadāt Order, 1984 expressly describes that the Court of Law has to define the competency of a witness in accordance with Sharīʻah as states:

> *"Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Qur'ān and the Sunnah for a witness, and where such witness is not forthcoming the Court may take the evidence of a witness who may be available."*[9]

An explanation is added in the article that a lunatic is considered a competent witness in his lucid intervals, if he can understand the questions put to him and gives rational answers;[10] otherwise he is incapable to give testimony due to insanity as states:

> *"A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."*[11]

Article 3 of this order, 1984 lays down two tests of a witness for his competence; first one is the capability of a person to understand the questions and give rational answers. Here issue of a child testimony also arises because in court of law particularly in civil cases the testimony of a child is accepted.[12] Secondly, this article indicates that court of law has to determine terms and conditions being a trustworthy witness in accordance with the commands of Sharīʻah as prescribed in the Qurʼān and Sunnah of the Prophet (peace be upon him) but the court is advised through the law that rights of the parties must be protected and where a competence witnesses are not available then the evidence of all available witnesses is to be recorded. However, a man who is sentenced of perjury and false testimony is not considered a reliable witness until the court is satisfied with his repentance and thinks competent witness. This proviso is based on the verses of Surah Al-Noor as Almighty Allāh states:

9- Ibid.

10- 1971 PCr.LJ 1031.

11- M. Mahmood, *Qanun-e-Shahadat Order, 1984*, 129.

12- 1985 PSC 1407.

﴿وَالَّذِيْنَ يَرْمُوْنَ الْمُحْصَنٰتِ ثُمَّ لَمْ يَأْتُوْا بِاَرْبَعَةِ شُهَدَآءَ فَاجْلِدُوْهُمْ ثَمٰنِيْنَ جَلْدَةً وَّلَا تَقْبَلُوْا لَهُمْ شَهَادَةً اَبَدًا ۚ وَاُولٰٓئِكَ هُمُ الْفٰسِقُوْنَ ۙ اِلَّا الَّذِيْنَ تَابُوْا مِنْۢ بَعْدِ ذٰلِكَ وَاَصْلَحُوْا فَاِنَّ اللّٰهَ غَفُوْرٌ رَّحِيْمٌ﴾[13]

"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterwards) accept their testimony - They indeed are evil-doers - Save those who afterward repent and make amends. (For such) lo! Allāh is Forgiving, Merciful."

Justice Khalil-ur-Rahman explains that if a person does not understand the question and unable to give a reasonable answer is considered an incapable person; whatever the reason may be of his deficiency such as disease, old age, unconsciousness and insanity etc.[14] He further elaborates that the evidence of a lunatic is accepted when he gives the rational answers to the question put to him. He also applies this principle on a person who is partially insane, when he is in the state of normality, he is to be graded a competent witness.[15]

Conditions for a Competent Witness in Islamic Law

There are several stages of a testimony in Islamic Law of Evidence. First one is that who is legally capable to bear the testimony and acquire the knowledge of the matter. Second one is that who is having the full and complete capacity to be a witness before the court of Law. Finally, when testimony is to be recorded and given before the Court in the matter of dispute. In Islamic Law of Evidence, Muslim Jurists have preserved some of the terms and conditions as qualification for being a trustworthy witness before the court for administration of justice. Generally, there are three types of conditions[16] with different aspects for a witness to bear, observe and give the testimony; they are as under:

I. Conditions for receiving testimony (*Shurūt Taḥammul al-Shahādah*)

13- Al Qur'ān 24:4, 5.

14- Justic Khalīl-ur-Rahmān,*Qanun-e-Shahadat Order, 1984*, (Lahore: PLD Publications), vol. 1: 57.

15- Ibid.

16- Al-Jaṣṣāṣ, Aḥmad Abū Bakr al-Rāzī, Aḥkām al-Qur'ān (Bayrūt: Dār al-Kutub al-'ilmiyyah, 1994), vol. 1, p. 605.

II. Conditions for a competent witness (*Shurūt Ahliyyat al-Shāhid*)
III. Conditions for giving testimony (*Shurūt Adāʼ al-Shahādah*)

I. Conditions for Receiving Testimony

Receiving a testimony by a witness depends upon the close observation of the facts in dispute himself and recording it before the court of law. Generally, Muslim jurists describe three conditions for a witness who bears the testimony.[17] These three conditions are; i) Sanity, ii) Power of seeing; and iii) Observing by himself.

1) Sound Mind

In Islamic Law, it is necessary for a witness who receives the testimony must be sane and *ʻāqil* person. Insane is not eligible to receive the testimony and a child who has not attainted age of puberty and his intellect is not fully developed is not legally capable to acquire and observe the knowledge about any issue properly. A witness is having capacity to observe, understand and protect the evidence.[18]

2) Power of Seeing

The power of seeing is one of the pre-requisite of a witness, who can observe the knowledge of the fact. The blind person is not legally capable to bear a testimony and his testimony is not admissible.[19] Ibn-e-Nujaym points out the reason of non-acceptance testimony of a blind due to resemblance of voices with each other.[20] Shāfiī, Mālikī and Hanbalī jurists opine say that the evidence of a blind person will be admissible when he believes and assures the voice of a person without any doubt particularly in contracts and marital matters.[21]

17- Al-Kāsānī, ʿAlā Uddīn Abū Bakr Ibn Masʿūd, *Badāʼiʿal-Ṣanāʼiʿfi Tartīb al-Sharāʼiʿ;* (Karachi: H.M Saeed Company, 1980), vol. 6: 266.

18- Ibid.

19- Al-Marghinānī, Abu al-Ḥasan Burhānuddīn, *Al Hidāyah,* Trns. Charles Hamilton, (Karachi: Dārul Ishᾱat), vol. 1: 779; See also, Al-Kāsānī, *Badāʼiʿal-Ṣanāʼiʿ,* 6: 228; See also, Al-Muṣilī, ʿAbdullah Ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār Litaʿlīl al-Mukhtār,* Muḥaqqiq Abdullah Al-Manshāwī, (Al-Qāhirah: Dār al-Ḥadīth, 2009), 1: 472

20- Ibn-e-Nujaym, Imām Zain-ud-Dīn, *Al-Baḥr Al-Rāʼiq,* (Quettah: Maktabah Rāshidiyyah, n.d.), vol. 7: 56.

21- Al-Shāfiī, Muhammad Ibn Idrīs, *Al-Umm,* (Beirūt: Dār al-Maʿrifah, 1990), 7: 48. See also: Ibn-e-Qudāmah, Abdullah Ibn Aḥmad, *Al Mughnī, (*Beirūt: Dār ul Fikr, 1984), vol. 10: 163. See also: Mālik Ibn

3) Seeing by Himself

Testimony must be observed and seen by the witness himself and it is not depending on hearsay evidence.[22] This advice is explicitly stated by the Prophet (peace be upon him) as:

إذا علمت مثل الشَّمْس فاشهد وَإِلَّا فدع.[23]

"When you know a thing like a sun then give testimony otherwise leave it."

Another ḥadīth is narrated by Ibn ʻAbbās:

عن ابن عباس أن رجلا سأل النبي صلى الله عليه وسلم عن الشهادة، فقال: هل ترى الشمس؟ على مثلها فاشهد أو دع.[24]

*"A person asked a question about testimony? The Prophet (*peace be upon him*) replied: Do you see Sun, when you see a thing like a sun then give the testimony otherwise avoid giving it."*

Wahbah Al-Zuḥaylī explains this ḥadīth in a way that the knowledge like a Sun is not possible except you see or observe the matter in controversy by yourself.[25] Justice Khalil-ur-Rahman comments on the issue of bearing testimony that a competent witness who receives the testimony must be capable to see, observe and protect the testimony as well as record it before the court of law beyond any suspicion. [26]

II. Conditions for a Competent Witness

There are several conditions for a component witness in Islamic law. Muslim Jurists have contemplated the capacity of a witness before giving the testimony in the court of law. The following are the main conditions and qualifications for a competent witness:

1) Intellect (*ʻAql*) (Sane and Sound Mind)

All the Muslim Jurists e.g. al-Nuwawī, al-Qayrwānī and al-Simnānī, agreed on the issue that a witness must be sound mind

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Anas, *Al-Mudawwanah,* (Beirūt: Dār al-Kutub Al-ʻIlmiyyah, 1994), 2: 93.

22- Al-Kāsānī, *Badāʼiʻal-Ṣanāʼiʻ,* 6: 667.

23- Al-Suyūṭī, Jalāl al-Dīn, *Al-Jāmiʻ Al-Kabīr* (Cairo: Azhar University, 2005), vol. 1, p. 449.

24- ʻAlā-ud-Dīn bin Ḥuṣam-ud-Din, *Kanzul ʻUmmāl Fi Sunan al-Aqwāl wa al-Afāl,* Muhaqqiq: Bakrī Hayani, (Beirūt: Muʼassasah Al-Risālah, 1981), Ḥadīth No. 17782, vol. 7: 23.

25- Al-Zuḥaylī, Wahbah, *Al-Fiqh Al-Islāmī wa Adillatuh,* (Damuscus: Dār al-Fikr, 1984), vol. 6: 559.

26- Justice Khalīl-ur-Rahmān, *Qanun-e-Shahadat Order,1984,* vol. 1: 59.

person.[27] The testimony of an insane person is not admissible and accepted due to his unsoundness and he is not considered legally capable to give the testimony. Insanity is an obstacle to performing the duties and obeying the commands of the lawgiver as the Prophet (peace be upon him) states:

رُفِعَ الْقَلَمُ عَنْ ثَلَاثَة: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وعَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ، وَعَنِ الْمَجْنُونِ حتى يعقل.[28]

"There are three (persons) whose actions are not recorded: a sleeper till he awakes, a boy till he reaches puberty, and a lunatic till he comes to reason."

2) Puberty (Bulūgh) (Adult)

A witness must be an adult person according to the majority of Muslim Jurists. The classical jurists make puberty a pre-requisite for legal capacity of a witness;[29] however, they have diverse views regarding child testimony in financial matters and other bodily injuries.[30] Imām Mālik makes admissible the testimony of a minor in murder and other bodily injuries.[31] This condition is also on the basis of the *ḥadīth* mentioned above that three persons have been exempted from every kind of obligation and one of them is a minor until he attains puberty.[32] The majority of the jurists also support their opinion on the basis of a verse of surah al-Baqarah as states:

﴿وَٱسۡتَشۡهِدُواْ شَهِيدَيۡنِ مِن رِّجَالِكُمۡ﴾[33]

"And get two witnesses out of your men"

They are not considering child as adult man and his testimony is not accepted. In legal system of Pakistan, children are a most untrustworthy class of witness but sometimes their testimony is considered as corroborative evidence to support the facts in

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27- Al-Zuḥaylī, Wahbah, *Al-Fiqh Al-Islāmī wa Adillatuh*, vol. 6: 562.

28- Al-Satistānī, Abū Dāwūd, *Sunan Abī Dāwūd*, Kitāb al-Ḥudūd, Bāb fī al-Majnūn Yasriq aw Yusīb Ḥaddan, (Beirūt: Al-Maktabah al-ʻAṣriyyah, n.d.), Ḥadīth No. 4403, vol. 4: 141.

29- Al-Nawawī, Abū Zakariyyā, *Al-Majmūʻ Sharḥ Al-Muhadhab,* (Cairo: Dār Al-Taḍāmun al-Akhawī, 1347H), 13: 102.

30- *Al-Mawsūʻah al-Fiqhiyyah al-Kuwaitiyyah*, (Kuwait: Ministry of Awqāf and Islamic Affairs, 1427 AH), 27: 33.

31- Ibn-e-Rushd, *Bidāyah Al-Mujtahid,* Trans. Nyazee, (Garent Publishing Limited), vol. 2: 557.

32- *Sunan Abī Dāwūd,* Ḥadīth No. 4403, vol. 4: 141.

33- Al-Qurʼān 2: 282.

dispute[34] but in some cases a boy who has attained the age of 13 years, his testimony is not weighted as child testimony.[35]

3) Eye sight in case of facts capable of being seen

Muslim Jurists have varied opinions on the point that a blind person's testimony is accepted or not. Imām Abū Ḥanīfa, Imām Muhammad and Imām al-Shāfiʻī opine that the evidence of a blind one is not admissible at all because he is unable to observe the facts properly.[36] But Mālikī and Ḥanbalī Jurists opine that a blind person is legally capable to give the testimony when he recognizes the voices of the persons beyond any doubt.[37] Imām Abū Yusuf from Ḥanafī school of thought has a different view that previous status of the blind person is to be checked, if he was able to see and observe the facts at the time of happening the dispute then he can give the testimony even if he is a blind right now.[38]

4) Capacity to speak or communicate

Muslim jurists from Ḥanafiyyah[39], Shāfiïyyah[40] and Ḥanābilah[41] have opined that evidence of a person who is unable to speak is not admissible.[42] Because pronouncing testimony with the word of *shahādah* or other forms is a pre-requisite and a dump person is unable to pronounce testimony. But some of the Mālikī jurists[43] accept the testimony of a mute person when he is understood to concerned person and his signs are well known and recognized without any doubt particularly in family matters such as *nikāh* and *talāq*.[44]

5) Probity and rectitude (*ʻAdālah*)

The witness, who becomes capable to give the testimony before the court of law is to be qualified as serious character and truthful. *ʻAdālah* is recommended by the Muslim jurists and *fisq*

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34 - PLD 1985 Lah. 18.

35 - 1985 PSC 1407.

36- Al-Zuḥaylī, Wahbah, *Al-Fiqh Al-Islāmī wa Adillatuh,* vol. 6: 563.

37- Ibid.

38- Al-Kāsānī, *Badāʼiʻal-Ṣanāʼiʻ,* 6: 268

39- Ibid.

40- Al-Shīrāzī, Ibrāhīm bin ʻAlī, *Al-Muhadhab,* (Beirūt: Dār Al-Kutub Al-ʻIlmiyyah, n.d.), 3: 436.

41- Ibn-e-Qudāmah, *Al Mughnī,* 10: 171.

42- Ibid.

43- Al-Qarāfī, Shahāb al-Dīn, Al-Dhakhīrah (Bayrūt: Dār al-Gharb al-Islami, 1994), 10 : 338.

44- Al-Zuḥaylī, Wahbah, *Al-Fiqh Al-Islāmī wa Adillatuh,* vol. 6, 563. See also, *Al-Mawsūʻah al-Fiqhiyyah al-Kuwaitiyyah,* 4: 280.

is considered as an obstacle in giving the testimony.[45] They support their view from the verse No. 2 of *Surah Al-Talāq* as Almighty Allāh states:

﴿وَّاَشْهِدُوْا ذَوَیْ عَدْلٍ مِّنْكُمْ وَاَقِیْمُوا الشَّهَادَةَ لِلّٰهِ.﴾[46]

> *"And make two just men from among you witnesses (of your either decision). And (O witnesses,) keep your testimony upright for the sake of Allāh."*

The orthodox Muslim Jurists, for example, al-Sarakhsī and al-Shīrāzī, unanimously agreed that a witness must be a person who is generally considered a reliable, just in the society and not notorious. A person who is not abstaining himself from commission of capital sins is called *fasiq* and his testimony is inadmissible due to the words of the Exalted as states:

﴿یٰۤاَیُّهَا الَّذِیْنَ اٰمَنُوْۤا اِنْ جَآءَكُمْ فَاسِقٌۢ بِنَبَاٍ فَتَبَیَّنُوْۤا اَنْ تُصِیْبُوْا قَوْمًۢا بِجَهَالَةٍ فَتُصْبِحُوْا عَلٰی مَا فَعَلْتُمْ نٰدِمِیْنَ﴾[47]

> *"O you who believe, if a sinful person brings you a report, verify its correctness, lest you should harm a people out of ignorance, and then become remorseful on what you did."*

6) Male witness in cases of *Ḥudūd* and *Qiṣāṣ*

The Orthodox Muslim Jurists have disagreement on the acceptance of women's testimony in *Ḥudūd* and *Qiṣāṣ* cases.[48] This is the unanimous view of the majority from all schools of thought that a witness must be a male in such cases and woman's testimony is inadmissible in *Ḥudūd* and ***Qiṣāṣ*** cases at all, whether she tenders it alone or along with men.[49] But there are some other classical Muslim jurists like Imām Ibn-e-Ḥazm, Imām Ibn-e-Taymiyyah, Imām Ibn-e-Al-Qayyim and some contemporary Muslim scholars like Mahmood Ahmad Ghazi, Mawlana Umar Usmani have the opinion that a woman's

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45- Ibn-e-Ḥazm, Abū Muhammad Alī bin Ahmad, *Al-Muḥallā, (*Beirūt: Dār Aḥyā' Al-Turāth Al-ʻArabī), vol. 9*:* 264. See also, Ibn-e-Rushd, *Bidāyah Al-Mujtahid*, (Al-Qāhirah: Dār al-Ḥadīth, 2004), 4: 245.

46- Al-Qur'ān 65: 2.

47- Al-Qur'ān 49: 6.

48- Al-Ẓāhirī, Ibn Ḥazm, Al-Muḥallā bil ʻĀthār (Bayrūt: Dār al-Fikr, N.D), vol. 8, p. 480.

49- See, Al-Marghinānī, *Al Hidāyah,* (Karachi: IDārat Al-Qur'ān wa Al-ʻUlūm Al-Islāmiyyah, nd.); 5: 417, Ibn-e-Rushd, *Bidāyah Al-Mujtahid*, (Beirūt: Dār ul Fikr, nd.), 2: 48; Al-Nawawī, *Al-Majmūʻ Sharḥ Al-Muhadhab*, 20: 252; Ibn-e-Qudāmah, *Al Mughnī*, 10: 155.

testimony is accepted in all types of cases including *Ḥudūd* and *Qiṣāṣ*.[50]

7) Not sentenced in *Hadd-e-Qadhaf*

Muslim Jurists unanimously agreed that a witness must be a person having a good character in the society and not penalized in *Ḥadd*–e-*Qadhf* otherwise his testimony is not admissible.[51] Infact, making false accusation of adultery is a major sin and becomes obstacle in making testimony acceptable on the basis of verse No. 4 of Surah Al-Noor as Almighty Allāh States:

﴿وَٱلَّذِينَ يَرۡمُونَ ٱلۡمُحۡصَنَٰتِ ثُمَّ لَمۡ يَأۡتُواْ بِأَرۡبَعَةِ شُهَدَآءَ فَٱجۡلِدُوهُمۡ ثَمَٰنِينَ جَلۡدَةٗ وَلَا تَقۡبَلُواْ لَهُمۡ شَهَٰدَةً أَبَدٗاۚ وَأُوْلَٰٓئِكَ هُمُ ٱلۡفَٰسِقُونَ إِلَّا ٱلَّذِينَ تَابُواْ مِنۢ بَعۡدِ ذَٰلِكَ وَأَصۡلَحُواْ فَإِنَّ ٱللَّهَ غَفُورٞ رَّحِيمٞ﴾.[52]

> *"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers - Save those who afterward repent and make amends. (For such) lo! Allāh is Forgiving, Merciful."*

Imām Ibn-e-Rushd demonstrates that Muslim Jurists have agreed that a person convicted in Hadd-e-Qadhaf is considered as *fāsiq* that's why his testimony is not accepted.[53] Muslim Jurists have diverse opinions if a penalized person repentances then his testimony is accepted or not? Mālikī, Shāfiī, and Ḥunbalī jurists opine that convicted person's evidence is admissible after his repentance because the last part of verse indicates the same but

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50- See for detail, Ibn-e-Ḥazm, *Al-Muḥallā*, (Beirūt: Dār Al-Āfāq Al-Jadīdah, nd.), 9: 399; Ibn Al-Qayyim, Abū ʿAbdullah Muhammad bin Abī Bakr, *Al-Ṭuruq Al-Hukmiyyah*, (Egypt: Dār Al-Madanī, nd.), 170; Hudhlī, Abū Al-Qāsim Najmuddīn, *Sharā'iʿ Al-Islam*, (Najaf: Al-Ishraf, 1969), 4: 136. 55; Ghazi, Mahmood Ahmad, "Ḥudūd awr Qiṣāṣ key Muqaddamāt men ʿAwratun kī Gawahī", *Fikr-o-Nazar* (Jan-Mar, 1993), 18: 56; Usmanī, Mawlānā ʿUmar Ahmad, *Fiqh-ul-Qur'ān*, (Karachi: IDārah Fikr Islāmī, 1984), 3: 118. 57; Gamidi, Javed Ahmad, *Burhan*, (Lahore: Al-Mawrid, nd.), 33. 58; Mawlānā Muhammad Taseen, "The Testimony of women in the light of Qur'ān and Ḥadīth", *Fikr-o-Nazar*, (Jul-Sep, 1990), 154.

51- Ibn-e-Rushd, *Bidāyah Al-Mujtahid*, 4: 245; See also, *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaitiyyah,* 14: 132.

52- Al-Qur'ān 24: 4.

53- Ibn-e-Rushd, *Bidāyat Al-Mujtahid,* Trans. Nyazee, (Garent Publishing Limited), 2: 556.

Imām Abū Ḥanīfah opines that his testimony is not acceptable at all even if he repentances.[54]

8) Testimony for the purpose of any worldly gains and benefits

Muslim Jurists usually do not accept the testimony of a person who is having some relations with others due to allegations and blames of favour. Due to this, the evidence of close relatives and enemy is not made admissible.[55] The testimony of relatives is considered a favourable in granting some benefits and enemy's evidence is inadmissible due to his enmity. In this regard the Prophet (peace be upon him) states as:

لاَ تَجُوزُ شَهَادَةُ خَصْمٍ وَلاَ ظَنِينٍ.

"The testimony of an enemy and suspicious person is in admissible".[56]

Imām Al-Nawawī further elaborates that that evidence of a *Muṣi* (bequest maker) for orphan and a *Wakil* (agent) for *Muakkil* is not accepted due to suspiciousness.[57]

9) A witness must be a Muslim

The Classical Muslim Jurists have a consensus that a witness to be a Muslim in the matters of Muslims but they disagree regarding acceptance of a testimony of a disbeliever in bequest.[58] The testimony of a non-Muslim is not accepted, except the disagreement of the jurists regarding bequest made during a journey on the basis of a verse of the Qur'ān as states:

﴿يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ شَهَـٰدَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ ٱلْمَوْتُ حِينَ ٱلْوَصِيَّةِ ٱثْنَانِ ذَوَا عَدْلٍ مِّنكُمْ أَوْ ءَاخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنتُمْ ضَرَبْتُمْ فِى ٱلْأَرْضِ فَأَصَـٰبَتْكُم مُّصِيبَةُ ٱلْمَوْتِ تَحْبِسُونَهُمَا مِنۢ بَعْدِ ٱلصَّلَوٰةِ فَيُقْسِمَانِ بِٱللَّهِ إِنِ ٱرْتَبْتُمْ لَا نَشْتَرِى بِهِۦ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا نَكْتُمُ شَهَـٰدَةَ ٱللَّهِ إِنَّآ إِذًا لَّمِنَ ٱلْـَٔاثِمِينَ﴾[59]

54- Ibid. See also, *Al-Mawsūʻah al-Fiqhiyyah al-Kuwaitiyyah,* 14: 132-33.

55- Al-Nawawī, *Al-Majmūʻ Sharḥ Al-Muhadhab*, 20: 232.

56- Imām Mālik bin Anas, *Muwaṭṭa' Imām Mālik*, Muhaqqiq: Musṭafā Aʻzami, (Abu Dhabi: Mu'assasah Zaid bin Sultan, 2004), Bāb Fī Al-Shahādah, Ḥadīth No. 2667, 4: 1043; ʻAlā-ud-Dīn, *Kanzul ʻUmmāl Fi Sunan al-Aqwāl wa al-Afāl,* Ḥadīth No. 17778, vol. 7 : 22.

57- Al-Nawawī, *Al-Majmūʻ Sharḥ Al-Muhadhab*, 20: 232

58- Ibn-e-Rushd, *Bidāyah Al-Mujtahid,* 4: 246; see also, *Al-Mawsūʻah al-Fiqhiyyah al-Kuwaitiyyah,* 26: 222.

59- Al-Qur'ān 5: 106.

> *"O ye who believe! when death approaches any of you, (take) witnesses among yourselves when making bequests— two just men of your own (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus). If ye doubt (their truth), detain them both after prayer, and let them both swear by Allāh: "We will not take for it a price even though the (beneficiary) be our near relation: we shall hide not the evidence We owe to Allāh: if we do then, behold! the sin be upon us!"*

The testimony of a non-Muslim is accepted in bequest and other such issues as mentioned in a verse of the Qur'ān according to Imām Abū Hanīfah but Imām Mālik and Imām Al-Shafiī do not agree with Imām Abū Hanīfah and made non-Muslim's testimony inadmissible and consider the verse abrogated.[60]

10) Enmity

General principle of Islamic Law of evidence is that the testimony of an enemy against any person who is a party in any case is inadmissible due to his enmity.[61] Because he always tries to hurt and put injuries to the enemies and this principle is on the basis of saying of the Prophet (peace be upon him) as states:

لاَ تَجُوزُ شَهَادَةُ خَصْمٍ وَلاَ ظَنِينٍ.

"The testimony of an enemy and suspicious person is not accepted."[62]

Because justice is not provided if enemy is a witness in any issue of controversy. Here, we have to observe that how Islam is protecting the rights of the parties and for the sake of justice, Islamic Law is taking preventive measures by making the testimony of the enemy inadmissible.

11) Kinship Ties

Islamic Law disapproves the evidence of close relatives for each other in their respective families. Muslim Jurists do not make permissible the testimony of close family members in their favour.[63] Because family member's evidence is suspicious and evident from the *Ḥadīth* of the Prophet (peace be upon him) in which He (peace be upon him) said that the evidence of

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60- Al-Muznī, Isma'il, *Mukhtaṣir al-Muznī* (Bayrūt: Dār al-Fikr, 1983), 8 : 414.

61- Al-Baghawī, Al-Tahdhīb (Dār al-Kutub al-'Ilmiyyah, 1997), 8 : 277.

62- Imām Mālik bin Anas, *Muwaṭṭa' Imām Mālik*, Bāb Fī Al-Shahādah, Ḥadīth No. 2667, 4: 1043; See also, ʿAlā-ud-Dīn, *Kanzul ʿUmmāl Fi Sunan al-Aqwāl wa al-Afāl,* Ḥadīth No. 17778, vol. 7: 22.

63- Al-Nawawī, *Al-Majmūʿ Sharḥ Al-Muhadhab*, vol. 20, 231.

suspicious and enemy is not acceptable.[64] The evidence of blood relations such as father and son in favour of each other is prohibited on the basis of a principle laid down by the Prophet (peace be upon him) as:

لا تجوز شهادة الولد لوالده.

> *"The testimony of son in favour of father or a father in favour of a son is not to be accepted."*[65]

In another Ḥadīth the testimony of a father concerning son or a son concerning father is in admissible as stated:

لاتقبل شَهَادَة الْوَلَد لوالده وَلَا الْوَالِد لوَلَده

> *"The testimony of a son concerning his father or a father concerning his son is not acceptable"*[66]

Generally, the testimony of close relatives or blood relations recorded for the worldly gain and benefit. This is the core reason for the prohibition of their non-acceptance of evidences and such testimonies considered suspicious.[67] Imām Muznī and Imām Abū Thawr allow the testimony of family members of close relationships in their favours on the basis of a verse of the Qur'ān as Allāh Almighty has stated:

﴿وَٱسۡتَشۡهِدُواْ شَهِيدَيۡنِ مِن رِّجَالِكُمۡ﴾.[68]

> *"And call to witness, from among your men."*

Imām Muznī and Imām Abū Thawr argue that this verse explains a general rule and makes admissible the testimony of all men without specifying to any particular group of men, so, the evidence of close relatives is to be accepted.[69] But non-acceptance of the testimony of blood relation is a well-established principle applies in Islamic Law due to its deviousness. The reason is that there are so many traditions of the Prophet (peace be upon him) expanded it and by nature blood relations cannot give testimony against their close

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64- ʻAlā-ud-Dīn, *Kanzul Ummāl Fi Sunan al-Aqwāl wa al-Afāl,* Ḥadīth No. 17778, vol. 7: 22.

65- Ibid. Ḥadīth No. 17790, vol. 7: 25; See also, Ḥadīth No. 17795, vol. 7: 26.

66- Al-ʻAsqalānī, *Al-Dirāyah fī Takhrīj Al-Aḥādīth Al-Hidāyah*, (Beirūt: Dār Al-Maʻrifah, n.d), Kitāb Al-Shahādah , Ḥadīth No. 831, vol. 2 :172.

67- Al-Marghinānī, *Al Hidāyah,* Trns. Charles Hamilton, vol. 1: 781.

68- Al Qur'ān 2: 282.

69- Al-Nawawī, *Al-Majmūʻ Sharḥ Al-Muhadhab,* vol. 20: 234.

relatives, so, for the sake of justice, accepting testimony of a relative is prohibited.

12) Husband and wife

The testimony of any spouse in favour of another is made unacceptable by the Muslim jurists[70] due to dubiousness and argued by the saying of the Prophet (peace be upon him) as states:

لاتقبل شَهَادَة الْوَلَد لوالده وَلَا الْوَالِد لوَلَده وَلَا الْمَرْأَة لزَوجهَا وَلَا الزَّوْج لامْرَأَته

> *"The testimony of a son concerning his father or a father concerning his son or a wife concerning her husband or of a husband concerning his wife is not credited."*[71]

Justice Khalil-ur-Rahman comments on the issue as:

"This doctrine of the inadmissibility of the evidence of husband and wife in favour of each other prevails only amongst the Sunnis and has given rise to much contention with the Shi'as who maintain the opposite doctrine."[72]

Some of the Jurists including Imām Shafiī and Imām Aḥmad make the evidence of spouses in favour of each other admissible particularly in contracts and family issues.[73] Shīah jurists opine that the evidence of a spouse in favour of another is acceptable when supported and corroborated by the evidence of other witness.[74]

13) Freedom (Hurriyyah)

The *Jamhūr Fuqahā* including Imām Abū Ḥanīfah, Imām Al-Shafiī, and Imām Mālik opine that freedom is pre-requisite for the giving testimony before the court of law.[75] Imām Al-Kāsānī argues regarding issue of non-acceptance of slave's testimony with reference to verse No. 75 of Surah al-Naḥl that a slave is in someone possession and has no power of any sort. He is considered the property of the owner and obeys his order.[76]

70- Ibn-e-Qudāmah, *Al Mughnī*, 10:174.

71- Al-'Asqalānī, *Al-Dirāyah fī Takhrīj Al-Aḥādīth Al-Hidāyah*, (Beirūt: Dār Al-Ma'rifah, n.d), Kitab Al-Shahādah , Ḥadīth No. 831, vol. 2: 172.

72- Justice Khalīl-ur-Rahmān, *Qanun-e-Shahadat Order, 1984*, vol. 1: 67.

73- Ibn-e-Qudāmah, *Al Mughnī*, 10: 174.

74- Hudhlī, *Sharā'i' Al-Islam*, vol. 4: 130.

75- Ibn-e-Rushd, *Bidāyah Al-Mujtahid,* 4: 246; see also, *Al-Mawsūah al-Fiqhiyyah al-Kuwaitiyyah,* 23: 81.

76- Al-Kāsānī, *Badā'ī' Al-Ṣanā'ī',* 6: 267.

Imām Ibn Ḥazm[77] said that the evidence of slave is admissible in all type of matters and the main concern is his truthfulness, if he is *ʿĀdil* than no objection for making his testimony permissible. The majority of the jurists argue that if slave is a non-believer than disbelief must be effective in the rejection of his testimony.[78] Because they also recommend Islam as a core and fundamental condition for admissibility of evidence. Imām al-Marghīnānī describes the reason for non-accepting the evidence of a slave that any person who is property of someone has no authoritative approach. In fact, testimony is rendered as authority and slave is having no authority over himself so, his testimony is not to be accepted.[79] Ibn-e-Qudāmah said that the evidence of a slave person is accepted in every matter of dispute except Ḥudūd cases.[80]

The diverse views of the Muslim Jurists are due to several Aḥadīth of the Prophet (peace be upon him) on the issue; one of the traditions He (peace be upon him) stated as:

لاتقبل شَهَادَة الْوَلَد لوالده وَلَا الْوَالِد لوَلَده وَلَا العَبْد لسَيِّده وَلَا الْمولى لعَبْدِهِ

> *"The testimony of a son concerning his father or a father concerning his son or a slave concerning his owner or of an owner concerning his slave is not accepted."*[81]

In another Ḥadīth, that is narrated by Hazrat ʿAlī (RA) as said:

عن علي شهادة الصبي على الصبي، وشهادة العبد على العبد جائزة

> *"The testimony of a child in favour of a child or of a slave in favour of slave is admissible."*[82]

In one of the traditions, there was a dispute of a shield between Hazrat Ali (RA) and a Jew. This issue came to the court of Qaḍi Shurayḥ. Both were claiming the ownership of the shield. Qaḍi

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77- Ibn Ḥazm, *Al-Muḥallā*, 8: 920.

78- Ibn-e-Rushd, *Bidāyah Al-Mujtahid,* Trans. Nyazee, vol. 2: 557-558.

79- Al-Marghinānī, *Al Hidāyah,* Trns. Charles Hamilton, vol. 1: 780.

80- Ibn-e-Qudāmah, *Al Mughnī*, 10:175; See also, *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaitiyyah,* 23: 81.

81- Al-ʿAsqalānī, *Al-Dirāyah fī Takhrīj Al-Aḥādīth Al-Hidāyah,* (Beirūt: Dār Al-Maʿrifah, n.d.), Kitāb Al-Shahādaḥ , Ḥadīth No. 831, vol. 2: 172.

82- Alā-ud-Dīn, *Kanzul ʿUmmāl Fi Sunan al-Aqwāl wa al-Afāl,* Ḥadīth No. 17791, vol. 7: 25.

Shurayḥ demanded two witnesses from both parties. Hazrat ʻAlī called for a testimony his slave Qanbar and son Hazrat Ḥassan (RA). Qaḍi Shurayḥ accepted the testimony of a slave and rejected testimony of Hazrat Ḥassan (RA) on the basis that son's evidence is not admissible in favour of a father.[83]

III. Conditions for giving Testimony before the Court of Law

There are some conditions with regard to give the testimony before the court of law. In fact, here the criterion and mechanism is prescribed to record the testimony, when and what time he has to come for testimony. The main conditions in this regard are as under:

a) Existence of a Claim or Complaint

The very first condition for recording the evidence is that there must be a case in dispute before the court of law in which testimony is given. If any complaint, claim or any other dispute is not existed or filed in the court then no need for any evidence. The testimony of a witness must be relevant to facts in a case before the court of law. Any variance in the evidence and the claim of the party does not render the evidence inacceptable. The testimony against a fact which is definite and admitted before the court is not recommended.[84]

b) Testimony before the court of law

In the legal system of Pakistan or any other legal system, generally the evidence is weighed if recorded before the judge in court of law, otherwise testimony outside the court is not contemplated and having no value until beard in the court before a judge.[85]

c) Personal Observation and Direct Knowledge

The prime duty of the witness is to get the knowledge directly by his personal observation and direct information of the facts to be stated and should give testimony on the basis of his personal observation and not on hearsay evidence except in cases where hearsay evidence is admissible.[86]

d) Uttering the Word *Shahādah* (Testimony)

83- Ibid., Ḥadīth No. 17795, vol. 7: 26.

84- Dr. Anwārullāh, *Islamic Law of Evidence,* (Islamabad: Sharīʻah Academy IIU, 2007), 28.

85- Ibid., 30

86- ʻAbdul Mālik Irfani, *Islamic Law of Evidence,* 41.

The Muslim Jurists (Hanafiyyah, Shāfiīyyah and Ḥanabilah) state that statement given by the witnesses before the court of law must utter the word "*Shahādah*", for example; witness has to say: I give *Shahādah* or I bear witness or I testify that I have seen this and that by uttering word of *Shahādah*.[87] Mālikī jurists opine that testimony is given by using all those words and phrases understood, recognized and explain the facts of the case such as I know and I believe.[88]

e) Remembrance of the Facts

It is a primary duty of a witness to record the testimony with full observation and protect without any ambiguity and doubt. A person who has not strong memory and remains in a state of unconsciousness or forgets. His testimony is not accepted according to the Muslim jurists.[89] ʿAbdul Mālik Irfani states that a witness can easily identify the person against whom giving testimony and knew the facts of the case without any doubt.[90]

f) The Unity of Time and Place (The Forum)

It is generally that the whole testimony should be completed in one and same meeting. If various witnesses to the same issue, instance, matter or event give testimony on different times and at different places, it would not be acceptable. Imām Abū Ḥanīfah, Imām Mālik, and Imām Aḥmad opine that the witnesses to adultery must present their testimony at the same legal session while Imām Shafiī is of the view to accept it in different sessions.[91]

g) Conformity of Statement with the Claim

A witness has to record the statement that is to be relevant to the facts of the case filed in the court of law not irrelevant statements of some other disputes. All other irrelevant details are discouraged and denied but sometimes warned for wasting the time of the court.[92]

h) Without Contradictions

One of the important conditions for giving testimony before a court of law is that evidence of all witnesses must be

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87- Al-Kāsānī, *Badāʾiʿal-Ṣanāʾiʿ,* 6: 273.

88- Ibn Farḥūn, *Tabsirah al-Hukkam fī Uṣūl al-Aqaḍiyyah wa Manāhij al-Aḥkām* (Cairo: Maktabah al-Kulliyyāt al-Azhariyyah, 1986). 1: 164.

89- *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaitiyyah,* 14: 93.

90- ʿAbdul Mālik Irfani, *Islamic Law of Evidence,* 41.

91- ʿAbdul Qādir ʿAwdah, *Al-Tashrīʿal-Jināʾī al-Islāmī*, (Beirūt: Dār al-Katib Al-ʿArabi, n.d.), vol. 2: 417-418.

92- Dr. Anwārullāh, *Islamic Law of Evidence,* 28.

corroborated each other's statements. The conflicting statements are denied and change the decision of the court.[93]Dr. Anwārullāh indicates in this regard that evidence of a witness must have relevancy to the facts of the case in dispute.[94]

i) Prior Claim

The offences relate to the rights of human beings like *Qiṣāṣ, Diyah, Ḥadd Al-Qadhf, Ḥadd Al-Sariqah* and as well as civil rights there must be a claim from the victim, his heirs or his guardians in the court.[95] If there is no prior claim in such offences it would be presumed that the victim or his heirs might have pardoned the offender and no evidence is then required. This is the view of Imām Abū Ḥanīfah, Imām Shafiī and Imām Aḥmad but Imām Mālik has the view no prior claim is required for the evidence in offences and rights and any offence and right can be proved by the evidence without prior claim in the court.[96]

j) The Testimony not to be Delayed

According to the Muslim Jurists, testimony should not be delayed because it leads to preclude the punishment on the base of doubt especially in *Ḥudūd* cases.[97] Ḥanafī jurists said that the delay in testimony without any reasonable ground renders it doubtful which removes *Ḥadd* punishment from the accused except *Ḥadd Al-Qadhf* where delay in testimony is not effective.[98] They further elaborate that delay in testimony is not effective if it is based on a reasonable grounds like serious illness, long distance etc. Ibn Abī Laylā is of the view that delay renders testimony as well as confession inadmissible. But according to Imām Mālik, Imām Shafiī and one of the two opinions of Imām Aḥmad the delay in testimony does not render it inadmissible if there are sufficient and authentic proofs even in *Ḥadd* punishment.[99]

93- ʿAbdul Mālik Irfani, *Islamic Law of Evidence,* 42.

94- Dr. Anwārullāh, *Islamic Law of Evidence,* 28.

95- Ibid.

96- Ibid.

97- Al-Kāsānī, *Badāʾiʿal-Ṣanāʾiʿ,* 6: 281.

98- Ibid.

99- ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī,* 2: 415-417; See also, *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaitiyyah,* 17: 137.

Conclusion

Islamic law permits and in certain cases obligates every Muslim to give testimony before the court of law for administration and dispensation of justice and resolution of the disputes in the society. It provided criterion for holding and giving the testimony, for example, people with complete legal capacity are eligible for recording testimonies which is a religious obligation to them and they will be held accountable for it. This paper has also discussed the terms and conditions for the criterion as well, for the purpose of providing competency of the witness in Islamic law. Those terms and conditions have also been adopted by the Pakistani legal system. Moreover, Islamic Law focused not only on the legal capacity of the testimonial but identified the person who can bear or hold the information for the purpose of testimony because of importance of the responsibility in this regard. It was made clear that Islamic Law has prohibited the testimonies of the people having any close blood and family relations for the administration of justice and avoiding any type of favour and partiality. Further, Islamic Law obligates that the evidence must not be delayed whenever it is necessary to provide. By this, Islamic law of evidence can be called as unique and quite comprehensive in terms of its substance. The Legal System of Pakistan is based on the Qur'ān and Sunnah of the Prophet (Peace be Upon Him) as mentioned in Qanūn-e-Shahadāt Order, 1984. So, it can be extracted that, all the disputes, the qualifications of a competent witness and the legal capacity must be measured as per instructions of Qur'ān and Sunnah of the Prophet (Peace be Upon Him) for the administration of justice in the legal system of Pakistan.

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