The Rules of Testimonial Evidences *(ahkām al-bayyināt)*

Ahmad ad-Da'our

(R*ahimahullah*)

From the publications of
Hizb ut-Tahrīr

1385 AH – 1965 CE

Contents

بسم الله الرحمن الرحيم

The Rules of Testimonial Evidences

The rules of testimonial evidences like the rest of the Islamic rules are *Sharī'ah* rules deduced from their detailed evidences *(adillah tafSeeliyyah).* Evidences are either presented with regards to transactions *(mu'amalaat)* or punishments *('uqubaat),* but the 'Ulama did not separate the rules of testimonial evidences in transactions (*mu'amalaat*) from the rules of testimonial evidences in punishments *('uqubaat)* and hence they mentioned all of them in the book of testimonies *(Kitaab ash-shahadaat).* They discussed some of their subjects in the book of decrees *(Kitaab al-aqdiyah)* and book of law suits *(Kitaab ad-da'waa)* and testimonial evidences. When discussing some of the punishments they clarified some of the testimonial evidences because they happened to be a condition or relevant part of their discussions.

The testimonial evidence *(bayyinah)* is anything which clarifies the court case and it is the proof of the plaintiff for his case. It has been narrated by 'Amr b. Shu'ayb on the authority of his father who narrated from his grandfather that the Prophet (saw) said:

'The burden of proof lies on the plaintiff and the oath is to be sworn by the defendant.' Al-Bayhaqi reported with a sound *Isnād* that the Prophet (saw) said:

'The burden of proof lies on the plaintiff and the oath is to be sworn by the person who denies.' Thus, the evidence is the proof of the plaintiff which proves his lawsuit. It is the proof which is presented to establish the lawsuit. And it cannot be admissible as proof unless it is definite and decisive. It is not correct for anyone to testify unless it is based on certain knowledge i.e. certainty *(yaqīn).* It is not correct for the testimony to be based on least amount of doubt *(Zann).* That is why the Prophet (saw) said:

'If you've seen it like the sun then bear witness otherwise desist.' Whatever has come by way of sensation, or its like such as the five senses, and it is certain because the senses distinguished it, and this was done on the basis of knowledge i.e. certainty *(yaqīn),* then it is

allowed for a person to give testimony. However, if he did not bear witness in this manner, then he is not allowed to testify, because only the decisive proof is admissible. If it has been given on the basis of certainty such as testimony through hearing, wherever testimony on that is valid, such as marriage, lineage or death and the like, then it is allowed for a person to be witness because he is certain. However, this matter is not explained by his testimony, because certainty is necessary for him so that it becomes valid for him to give a testimony.

Similarly, the oath *(yameen)* must be sworn on the basis of certainty. When the plaintiff takes an oath to prove his case when he has only one witness in financial lawsuits and their like, and when the defended takes an oath because of the plaintiff's inability to prove his lawsuit, then both of them must take the oath on the basis of certainty. If taking an oath was based on least amount of doubt (zann),,then it will not be correct for any one of them (the plaintiff and the defendant) to take an oath. That is why Allah (swt) has given great warning against the forged oath. It has been narrated on the authority of Abu Hurayrah that the Messenger of Allah (saw) said:

'Five things have no atonement *(kaffara):* association a partner with Allah (shirk), illegal killing of a person, slandering a believer, fleeing from the battlefield, and a forged oath by which property is taken illegally'.

Bukhari reported the Hadeeth of Ibn 'Umar: **A beduin came to the Prophet (saw) and said: O Messenger of Allah, what are the grave sins (kabaa'ir)? He said: 'Associating a partner (shirk) to Allah, killing a soul without right, slandering a believer, fleeing from the battlefield, and the forgerd oath (al-*yameen al-ghamoos*"** This is an evidence that the oath should be taken only on the basis of certainty.

The example of the testimony and oath applies to the rest of the testimonial evidences; which are the admission *(iqraar)* and the records of traders and other written documents. So, they must be certain, and allowed to be based on least amount of doubt *(zann).* This is because the testimonial evidences are proofs to establish the lawsuit and it is the proof of the claimant for his claims. The proof or evidence cannot be a proof and evidence unless it is

definite.

Although the testimonial evidences must be definite, this does not mean the judgment according to it is based on certainty and nor does it mean the judge is obliged to give judgement according to it. Rather, the issue is that the testimony itself must be definite. But as for the judgement itself, this is a different issue. This is because the judgement is based on the least amount of doubt *(ghalabat uz-Zann)*. This is because Allah (swt) said to the Messenger:

…….', ie according to your view. This includes the opinion which is based on certainty *(yaqīn)* and the opinion based on least amount of doubt *(zann)*. The Messenger (saw) gave judgement regarding an issue and spoke in a way which indicates that his judgement was based on least amount of doubt. It has been narrated by Umm Salamah that the Prophet (saw) said: **'I am only a human being, and you refer to me in your disputes. It might be some of you are more eloquent in presenting their proof better than the others, so I give a judgement based on what I hear. Whoever I judged to his favour some of his brother's right; he must not take it, because I am giving him a piece of fire'**. This is evidence that the judge gives judgment based on the least amount of doubt. Furthermore, the Messenger (saw) has stated that the judge gives judgement based on the least amount of doubt. It has been narrated by 'Amr b. 'Aas that he heard the Messenger (saw) say: **'If the judge made a judgement, where he made his effort *(ijtihad)* and was right, then he would have two rewards. If he however made a judgement, so made his effort but was wrong, then he would have one reward'**. All of this indicates that the fact that the testimony must be based on certainty does not mean the judgment must be based on certainty; rather it is based on least amount of doubt.

As for the fact that the testimony is definite does not mean the judge is obliged to give judgement according to it. This is because it is based on certainty for the witness, but the judge might have a reality that contradicts this testimony. He might even have a definite

text, which contradicts this testimony, or the witness is likely lying, in his view. Therefore, the judge is not obliged to judge according to a testimony even if it was given on the basis of certainty, rather he has the choice to accept it or reject it.

Types of testimonial evidences

The testimonial evidences are of four types and they are the following: confession *(iqraar),* oath *(yameen),* testimony *(shahaadah)* and authentic written documents *(mustanidaat khattiyyah).* There is no testimonial evidence other than these four categories. As for circumstantial evidences they are not considered part of the testimonial evidences by the *Shari'ah*, since no evidence has been presented that indicates they are part of the testimonial evidences. The proof for confessions has come in the Qur'an and Hadeeth. He (swt) said:

……..…… [Baqarah: 84],

ie you have confessed of knowing and acknowledging the validity of this covenant. Thus, Allah has considered their confession; so it became evidence against them. And in the Hadeeth of Ma'iz narrated on the authority of Ibn 'Abbas that the Prophet (saw) said to Ma'iz b. Malik: **'Is it true what I have heard about you? Ma'iz said: what have you heard? He (saw) said: I have heard that you had intercourse with the slave girl of such and such family. He said: Yes. So he gave witness four times. The Messenger (saw) instructed (that he be stoned) and so he was stoned.** And in the Hadeeth of Abu Bakr regarding the story of Ma'iz it was mentioned that Ma'iz confessed four times and so the Prophet (saw) ordered that he be stoned. And in the Hadeeth it is mentioned that the Prophet (saw) said:

'O Unays – a man from Aslam- go to this woman and if she confesses then stone her.'

The evidence for oaths has come in the Qur'an and Hadeeth, He (swt) said:

…….[al-Maa'idah:89] And he (saw) said:

'The burden of proof lies on the plaintiff and the oath is to be sworn by the person who denies.'

The evidence for testimony *(shahaadah)* has come in the Qur'an and Hadeeth. He (swt) said:

'And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.' [Baqarah:282] And it has been narrated the he (saw) said:

'(Bring) your two witnesses or (accept) his oath'.

And the evidence for written evidence was mentioned in the Qur'an, He (swt) said:

……[al-Baqarah:282] This indicates the use of written documents, which include records of the traders, and receipts etc. The evidence for all these testimonial evidences came in the Kitaab and Sunnah. As for circumstantial evidences, there is no evidence for them whether in the Kitaab or the Sunnah. They are not considered to be part of the testimonial evidences regardless of whether they call it is the decisive circumstantial evidence or not. This is because no evidence has been mentioned to consider it as a testimonial proof. Testimonial evidence is not considered legally as a proof unless there is evidence to this; or it comes under one of the evidences. Thus, the person that follows the tracks and dog that follows the tracks etc have nothing to do with testimonial evidences. It is correct that circumstantial evidences, and following the tracks etc can be taken into account. However, there is difference between taking something into account and using it as a testimony. Therefore, these matters can be taken into account, such like when a victim says that such and such person has killed him, though this is cannot be a testimony upon a lawsuit. The Messenger (saw) has asked the slave girl about the person that killed her, and two persons were mentioned to her. But she pointed to the Jew. He (saw) he did not depend on her words as a testimony. He (saw) rather took that into account, for the Jew was brought, was asked, so he confessed and thus killed. These circumstantial evidences and their like can be taken into account, but not used as testimonies.

As for the reports of detectives and the testimony of experts and examination reports etc they are not part of the testimonial evidences; they are rather reports. They can be based on least amount of doubt, and the single narrator is enough for this. They are not used to prove a lawsuit, but rather to demonstrate one of the aspects of the lawsuit; such as clarifying the price of land, price of a car, financial maintenance of children, the sanity or illness of the defendant and the like. These and other such examples are proven by reports and they do not require a testimonial proof. The detective can base his report on the least amount of doubt and here a single report is sufficient.

Confessions (*Iqraar*) and oaths *(aymaan)*

Confessions *(Iqraar)* and oaths *(aymaan)* are both from the testimonial evidences, but the jurists *(Fuqaha)* have discussed each one of them in its own specific chapter, beside the chapter of the testimonial evidences. Thus, one has to refer to their respective chapters in the recognised sources of Fiqh, especially those which have come with the hukm and its evidence. However, we should give attention to the issue of confessions and oaths. As for the issue of confessions, the judge should not be content simply with the confession of the defendant. He rather needs to examine the confession so as to realise whether or not the person has really confessed while understanding that which he has confessed to is the subject of the lawsuit, or it is the subject that obliges punishment. He must ask him about what he has confessed to and he should exaggerate in his questioning. Thus, when the Messenger of Allah (saw) accepted Ma'iz confession of adultery *(zina),* he asked him three times regarding his confession and he asked his family about him. The Messenger (saw) used to ask the one who has confessed to explain his confession by asking him explicitly, without using the indirect language, in matters that are not preferable to mention. It has been narrated on the authority of Abu Hurayrah that:

'A man from Banu Aslam came to the Prophet of Allah (saw) and bore witness against himself that he had

unlawful sex with a woman, repeating his witness four times. Each time the Prophet turned away from him. He approached him before the fifth time and said: Did you have sexual intercourse with her? He said: Yes. He (saw) asked: Like the stick that goes into the Kohl jar and the rope that goes down the well? He said: Yes. He asked him: Do you know what is Zina (adultery)? He said: Yes. I approached her unlawfully as a man would approach his wife lawfully.' This indicates the extent to which the enquiry must take place by the judge. It is not correct for him to accept his mere confession without checking it to make sure it is certain.

As for the issue of taking an oath, it means taking an oath for the past and not for the future. The oaths for the future for which expiation *(kaffaarah)* is accepted have nothing to do with the testimonial evidences. Rather oaths which are part of the testimonial evidences are those which are for the past and these are known as forged oaths (*yameen ghamoos*), because they immerse the one who made them into the fire. Attention needs to be drawn to the fact that when the judge demands an oath from either the defendant or the plaintiff that it must be taken in accordance with the intention *(niyya)* of the adjurer *(muhallif)* of the oath, ie the intention of the judge. So, it would be invalid to use the allusion *(tawriya)* when taking an oath. It is narrated from Abu Huraira, he said: The Messenger of Allah (saw) said:

'Your oath is that which your companion deems you credible by it'. According to the narration of Muslim, he (saw) said:

'An oath is taken in accordance with the intention of the adjurer'.

This is evidence that an oath is taken based on the intention of the adjurer, whether he is the judge or the plaintiff, whether the adjurer was the wrong-doer or the wronged, and whether trustworthy or a liar. At all times, an oath is taken based on the intention of the adjurer rather than the intention of the swearing person. As regarding that which was narrated from Swayd b. Hanzala, he said:

'We went out aiming to meet the Messenger of Allah (saw). Wa'il b. Hajar was with us, but an enemy to him took him. The folk refrained from taking an oath (regarding him). However, I took an oath that he was my brother,

so he was released. We reached the Messenger of Allah (saw) and I mentioned the matter to him. He said: You were most righteous and truthful amongst them, for the Muslim is the brother of the Muslim'. Though this hadith indicates the oath was based on the intention of the swearing person, and it is valid to use in it allusion *(tawriya)* and indirect meaning *(ma'aareed)*. However, this applies to oaths not requested by the judge or the plaintiff; otherwise it is taken on the intention of the adjurer rather than the swearing person if it was requested by the judge or the plaintiff. In order that the judge does not enable anybody to resort to allusion and indirect meaning for taking the rights of the people or for escaping punishment, he must not accept from the plaintiff or the defendant to embark on taking an oath before he was asked to do so. Rather, the judge must ask the one requested to take an oath to take it after asking him to do so. Through this approach there will be no possibility *(shubha)* that the oath was taken on the intention of the adjurer rather than the intention of the swearing person, because he was asked by the judge to take the oath.

Testimonies (*Shahadaat*)

The origin of testimonial evidences is the testimonies. The Kitaab and Sunnah have brought explicit and detailed rules for testimonies. He (swt) said:

'And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.' [Baqarah:282]

He (swt) said:

'And take for witness two just persons of you.' [Talaq:2]

He 'Azza wajall said:

'But take witnesses whenever you make a commercial contract.' [Baqarah:282]

It has been reported by Tirmizi on the authority of Waa'il b. Hajar who said:

'A man from Hawdarmawt and a man from Kinda came to the Prophet (saw). The Hadrami man said: O Allah's

Messenger! This man has seized land belonging to me, and the Kindi said, 'It is my land and it is in my possession; he has no right to it.' The Prophet (saw) asked the Hadrami if he had any proof, but he replied that he had none, so he told him that he would have the Kindi swear an oath. He replied, 'O Allah's Messenger! The man is a reprobate who would swear to anything and stick at nothing.' The Prophet told him that it was his only recourse. The man emarked to take an oath to him, and when he had turned his back, the Messenger of Allah (saw) said: If he had sworn about the property to take it unjustly, he will certainly find Allah turning away from him when he meets Him.'

Abu Dawud narrated on the authority of Rafi' ibn Khadij:

'A man of the Ansar was killed at Khaybar and his relatives went to the Prophet (saw) and mentioned that to him. He asked: Have you two witnesses who can testify to the murderer of your friend? They replied: O Messenger of Allah! There was not a single Muslim present, but only Jews who sometimes have the audacity to do even greater crimes than this. He said: Then choose fifty of them and demand that they take an oath; but the Prophet (saw) paid the blood-money himself.'

Bearing a testimony and its presentation are collective duty *(kifaya),* because commanding of it was not decisive. Allah (swt) says:

'And do not conceal the testimony; for whoever conceals it, his heart is sinful'.

He (swt) said also:

'Let not the witnesses abstain (from giving testimony) if they were called (to do so)'.

Therefore, if a Muslim was called to bear a testimony over marriage, a debt and the like, he is obliged to undertake it if there were no others to undertake it. If he ahd a testimony and was called to present it he is obliged to do so. If two people took the responsibility of bearing and undertaking the testimony, then others will be relieved of it; but if all of them abstained, then all of them will be sinful. However, the one that abstains from undertaking it will be sinful only in case there was no harm on him because of it. If there was harm to him, then he is not

obliged of it due to the saying of Allah (swt):

'Neither the recorder (of the debt) and nor (its) witness has to be harmed'.

Beside the Prophet (saw) said;

'Neither harm and nor responding with harm are allowed'.

This applies only if a person is requested to give a testimony. However, if he was not requested to give a testimony, the matter is examined; if the testimony was a right to Allah (swt) then it is preferable for him (*mandoob*) to give the testimony without being requested to giving it. This is due to the hadith narrated by Muslim that the Prophet (saw) said:

'Do you want me to tell you of the best witnesses? He is the one that gives his testimony before being asked to give it'.

However, if he had a testimony for the sake of a human (right), then he is not allowed to give it unless he was requested to do so. This is due to the hadith narrated by Bukhari that the Prophet (saw) said:

'The best generation is my generation, then those that follow them, and then those that follow them, and then there will come people that promise but do not fulfil, they give testimony without being asked to do so, and they betray (the trust) and are not trusted'.

It is also narrated from Ibn Umar, he said:

'Umar gave us a speech while we were in al-Jabiya. He said: O people! I stand amongst you like the Messenger of Allah (saw) stood amongst us. He (saw) said: I commend to you my companions, then those that follow them, and then those that follow them. Then after that lie spreads till a person takes an oath without being asked to do so, and the witness gives a testimony without being asked to do so'. (hadith)

This is evidence that the witness should not advance his testimony before he is requested to do so.

Definition of Testimony *(shahaadah)*

The testimony is a report of truth to establish a right *(Haqq)* by using

the word testimony in the courtroom of a judge. This is the definition of testimony. The term testimony *(shahaadah) is* derived from the word *mushaahadah* (observation) which means viewing *(mu'aayana).* The presentation (of the report) was called *shahaadah* because viewing *(mu'aayana)* was its cause. Thus, a testimony takes place only when there is viewing or one of its types such as hearing or sensing and other things similar to viewing. Since the general cause of presenting the report is viewing, the presentation (of the report) was testimony; and the Prophet (saw) has pointed to that in his speech to the witness:

'If you've seen it like the sun then bear witness otherwise desist.'

This is evidence to say it is not correct for anyone to testify unless it is on the basis of sure knowledge ie based on certainty. So, the testimony should not be based on least amount of doubt *(ẓann).* Whatever has come via viewing or its types such as through any one of the senses, besides this was on the basis of sure knowledge ie based on certainty *(yaqīn),* then it is allowed for a person to testify to it. If it however did not come in this way, then it is not allowed to testify to it, because testimony is invalid unless it is based on certainty.

Therefore, it is not allowed to give witness based on hearsay ie it is not allowed for a witness to give testimony by saying 'I heard it from the people or I heard people say such and such. However, there are 9 subjects that are exempted from this; and thus it would be allowed to give testimony based on hearsay, are: marriage, lineage, death, judiciary *(qadaa).* There is no dispute with regards to these four matters. However, as for dowry *(mahr),* consummating marriage (with his wife), freeing of a slave ('itq), guardianship *(walaa'),* and endowment *(waqf);* these matters are disputed. However, the preponderant view is that one can give testimony in these 9 matters based on what one has heard from the people. This is not from the angle of giving testimony based upon another testimony, ie one testifies based on the testimony of someone else. Rather, this is from the perspective of testifying based on his knowledge. So hearing the people say so and so has died gives certainty that that person has died or that so and so is a Qadi etc This is a testimony based on certainty, since repetition and proliferation has made the matter a certain fact, and so the testimony is based on sure knowledge. However, he should not say to the qadi that he is testifying based on

hearsay. If he said that, his testimony would not be accepted. Rather he should testify about the matter as if he saw it. This is because it is not allowed for the judge to accept the testimony based on hearsay. The hearing in these 9 situations is only for allowing the witness to testify. This means one of the ways of knowing what you testify to is the hearing in these nine matters only, and anything other than these is invalid, because the reality of these 9 matters would not be heard by all unless they were certain and widely known. As for anything else, this reality does not apply to it.

From this, the meaning of a testimony as a report of truth becomes clear, and it becomes clear that it is truly a report of truth; so it is the report of someone who is certainly trustworthy. As for the issue of establishing the right (haqq), this is because the testimony has been legislated to demonstrate the rigth. Based on this, the testimony of pure negation is not accepted. The testimony of negation is not accepted because it contradicts with the definition of testimony. However, the negation that can be interpreted to indicate attestation/affirmation can be used to testify with. This is because in that case, it would not be pure negation, rather a testimony of affirmation. This is the reason they disallowed the testimony with pure negation, and not negation only, because the negation that can interpreted to indicate affirmation is allowed to testify with.

Testimony must be by using the verb of 'I testify' *(ashhad),* in the present form of tense. So, if the witness did not say 'I testify' *(ashhad),* he rather said 'I know such issue is so' or 'I inform of this' or the like, then he would not have given a testimony. This is because in that case the definition of testimony did not apply to it, so it is not testimony. Moreover, the texts have pronounced the term of testimony *(shahaada), so* no other terms can replace it. Furthermore, testimony includes an oath; it is rather of the expressions of oath; so the meaning of oath has to be observed in it. Stipulation of the present tense in it is for indicating the witness testifies for the present. Had he said 'I testified' *(shahidtu),* it would not be allowed, because it is possible he speaks about something in the past, thus not testifying about the present time. However, if he testified with other than the expression of testimony *(shahaada),* and the judge asked him 'do you testify with such?', and he replied 'yes, I testify as such', then he would have presented the testimony.

Testimony is not considered (valid) unless given in a courtroom session, because the condition of testimony is the courtroom of judge. The definition of the testimony stipulates it is a report of truth in the courtroom of the judge. So, if the witness reported in other than the courtroom of the judge, even using the expression of 'I testify', and even before the judge, but not in judicial proceedings, then it would not be considered a testimony, because the courtroom of a judge is a fundamental condition for its consideration. This however does not apply to the arbitrator *(muhakkam);* for a testimony is allowed to be given before him outside a session of judicial proceedings. So, if the witness testified before the arbiotrator in any place then his testimony is considered (valid). This is because the arbitrator is not restricted with any courtroom for issuing a verdict; rather any place he gives a verdict in it is considered his courtroom. This is different to the judge, who must be restricted to his courtroom designated to him by the Imam/Khaleefah together with the place of his authority. Thus, the courtroom is one of the conditions of the verdict of the judge, and this courtroom is designated to him by the Imam; so a testimony given before him would not be valid unless it is in a courtroom proceeding.

Testimony is to prove a lawsuit against the claimant; therefore it is given regarding a lawsuit before the judge. However, this does not mean the precedence of the lawsuit is one of the conditions of the testimony. Rather, there is a difference between the human right and the right of Allah. If that right was for a specific person, such as the financial rights, marriage, trade and other contracts and actions, and like retaliation as one of the punishments, and like endowment on a specific person and the likes, then the precedence of the lawsuit is one of the conditions of the testimony. This is because it is stipulated that the lawsuit precedes the testimony in the rights of the people. So, the testimony is not taken except after the lawsuit, for the testimony is about the right of a person, and thus it is not sought except after his request, and permission. Moreover, testimony is a proof and evidence to the lawsuit, so it should not precede it.

If however the testimony was for unspecified person, such as endowment for the poor and needy, or a will for the poor and needy, or the road used by people, or it was one of the rights of Allah such as defined punishments (hudood) and zakah and their likes, then

giving a testimony dose not require the precedence of the lawsuit. This is because this right has no specific person to make a claim to it and to press it. Therefore, Abu Bakra and his companions testified against al-Mughira, Al-Jarood and Abu Hurayra testified against Qudama b. Mazoon of drinking khamr, and others testified against Al-Walid b. Uqbah of drinking khamr as well; all of these testified without presenting a lawsuit, and their testimony was accepted.

Hence, as long the courtroom of the judge was one of the conditions of the testimony; the precedence of the lawsuit is necessary regarding the rights of the people, while the precedence of the lawsuit is not stipulated regarding the rights of other than the people. In both cases, in order to be considered a testimony and to be considered a proof, it has to be in a court proceeding.

Conditions *(shuroot)* of the witness

What is stipulated regarding the witness is the same that is stipulated regarding the rest of the obligations. This means he must be mature *(baaligh)* and sane *('aaqil)* due to the Hadeeth:

'The pen has been lifted regarding three people; the child until he becomes mature and the insane until he regains his sanity.'
It is also because Allah (swt) said:

'And get two witnesses out of your own men'. [Baqarah:282]

The ayah mentioned men only, which indicates that the condition of the witness is that he is a man ie a mature person *(baaligh)*. In addition to this, it is stipulated that he is trustworthy ('adl). *No* testimony of either men or women can be accepted unless they are trustworthy. This is because the description of trustworthiness has been linked by Allah to the witness in more than one ayah; a matter that indicates that it is a necessary attribute and this indicates that that it is one of the conditions of testimony. He (swt) said:

'O you who believe! Let there be witnesses between you when death draws to one of you, at the time of bequest, two witnesses, 'adl (trustworthy) from among you'. [al-Maa'idah:106]

And He (swt) said:

'And take for witness two trustworthy persons of you.' [Talaq:2] Thus, trustworthiness *('adl)* is a condition in testimony.

Trustworthiness means that transgression *(fisq)* does not appear from him. The one who is faasiq that shows his transgression (fisq); his testimony is not accepted. But the one whose fisq was not apparent, his testimony would be accepted. There is a disagreement regarding the definition of *'adl*. It is said that *'adl* refers to a person who is **not known to have** committed any *kabeerah* (grave) sin or openly committed a (minor) *sagheerah* sin. This definition is ambiguous because the definition of kabeerah sin is not agreed upon. It is not even agreed that there is something called kabeerah and sagheerah sin because no sin is small. The violation of Allah's command is big whether it is lying or giving false testimony. As for what was mentioned in the text that there are kabeerah sins, what's meant is to stress the prohibition. Otherwise we find there are sins which are bigger but we do not find them being described as kabeerah. It has been stated in the text that false testimony is kabeerah, but it has not been stated that highway robbery is kabeerah. False testimony is one type of a lie, but to give a lie to the Messenger of Allah (saw) was not mentioned within the kabeerah sins. So, there is no defining limit to the kabeerah or the sagheera sin such that one can say someone is known to have committed a kabeerah sin or displayed a sagheerah sin. Thus, the definition is not clear. What is better is that we should say *'adl is* the person who restrains himself from that which the people would consider in breach of upright behavior. This is because the word *'adl* in respect to witnesses has been mentioned in two verses of the Qur'an:

'Then take the testimony of two just men of your own folk.' [5:106]

'And take for witness two just persons of you.' [Talaq:2]

It is one of the expressions used by the Qur'an and therefore, so it is not given a technical or an arbitrary explanation, rather it should be interpreted the way other words and sentences of the Qur'an are interpreted. Thus, it is explained by its linguistic meaning if it does not have another shar'i meaning mentioned in the Kitaab and Sunnah. If it has a shar'i meaning then it is interpreted according to the shar'i meaning. Upon scrutiny we do not find a special meaning mentioned by the Legislator for the word 'adl in respect to

witnesses other than its linguistic meaning, and hence it needs to be explained according to its linguistic meaning. The word 'adl in respect to witnesses means in the Arabic language someone who is known by the people to be of upright character. It says in alQamoos al-Muheet: 'al-'adl is the opposite of jawr (injustice), and it is that which is established in the souls of people as being upright (mustaqeem), such as reliability ('adala), and relaiable ('adool). It comes from 'adala, ya'dilu, so he is 'aadil (he was just, so he is just). 'Adala al-hukm (he established the judgenment). 'Adal a person (he commended him). 'Adala the balance (he levelled it)'. This text which gives the meaning of 'adl in respect to witnesses indicates that the 'adaalah is istiqaamah (to be of upright character). Defining 'adl as that which is established in the souls of people as being upright (mustaqeem) is an ambiguous speech. This is because there is no limit by which uprightness is known, for the situations of the people differ, and the people's habitats also differ in their view to uprightness. Though uprightness means proceeding on the straight path, but this straight path is technical and neither is it linguistic or shar'i. Therefore, it is necessary to refer the explanation of the meaning of the word of uprightness (istiqaama) to the view of the people in accordance with their habitats and societies. This is the approach followed by the linguistic dictionaries specialized in the explanation of the linguistic words that were mentioned regarding the ahkam shar'iyyah. Al-Misbah alMunir mentioned: ('Addaltu ash-shahid 'I commended the witness' means 'I ascribed him to 'adaala (trustworthiness) and portrayed him with it). The term of 'dl applies to one or more, and its plural as 'udool, as it came in poem of Abul Abbas as mentioned by Ibn al-Anbari:

Ta'aaqada al-'aqda al-watheeqa wa-ashhada
Min kulli Qawmin Muslimeena 'udoola

They convened the strong covenant and sought witness

From every folk, Muslims and trustworthy

In the feminine, it might be said imra'ah 'adlah (a trustworthy woman). Some scholars said that *'adaala* is an attribute which requires abstaining from anything that usually violates the sense of honour (*muroo'a*) openly. However, one small mistake and twisting

the words once does not violate the sense of honour openly, for it is possible that was because of forgetfulness or interpretation. This is different to the case when this became widely known and repeated, then violation becomes open. The norm ''urf' of every person is that which he is used to in terms of dress, dealings in trading and carrying his luggage and the like; so if he did that which is impropriate to him, unnecessarily, then he violated his muroo'a, otherwise not). This text from this dictionary differs according to the people habitats. This is because the word of uprightness is ambiguous, thus leading to this difference. However, it might be referred to the linguistic explanation of the word of ('adl) and thus adopt the meaning of the explanation. So, their saying: (That which is established in the souls as being upright) would mean the one that is not known about him of openly violating that which the people consider impropriate. Therefore, it is better to say 'adl is the one that abstains from that which the people considers violation of uprightness, whether he was a Muslim or non-Muslim. This is because 'adaala was stipulated in the testimony of the Muslim as well as in the testimony of the non-Muslim, by using the same word without distinguishing one from the other. Allah (swt) said:

'O you who believe! Let there be witnesses between you when death draws to one of you, at the time of bequest, two witnesses, 'adl (trustworthy) from among you, or two others from other than you'. [TMQ 5: 106]

He (swt) meant non-Muslims by saying other than you. He said 'two 'adl witnesses from Muslims or two 'adl from other than Muslims. So, how can the 'adaala be defined to be not committing a kabeera (major) sin and insistence on committing a sagheera (small) sin regarding a non-Muslim? How we can also reject as witness the one who disobeyed his parents once, but accept as witness the spy, just because spying is not from kabeera sins? Therefore, the valid meaning of 'adl is the one that abstained from that which the people consider violation to the uprightness. Whoever was characterised with that he is 'adl, because he is one of those that was established in the souls that he is upright. The one that is known (amongst the people) to be insolent in doing haram or committing sin openly, or reckless about committing it, or known of being not upright, he would be fasiq. Thus 'adl is opposite to fasiq, and 'adaala is opposite to fisq. Thus, the fasiq is the one that does not abstain from haram, or known to be not

upright. 'Adl is the one that abstains from haram, or not known to be lacking uprightness.

The fact that *'adaala* (reliability) is a condition for accepting a testimony is confirmed in His (swt) saying:

'O you who believe! If an evil-doer (fasiq) brings you news, verify it, lest you smite some folk in ignorance and afterward you become regretful for that which you have done'. [TMQ 49: 6]

Rejecting the news/report of the evil-doer means acceptance of the report of the 'adl (trustworthy). It means if other than the evil-doer, ie the 'adl brought you news do not investigate it, rather accept it. Rejection of the news of the evil-doer is evidence that the fact he is not an evil-doer, ie 'adl, is a condition for accepting his testimony.

A Muslim is considered 'adl in origin until evil doing (fisq) is proved regarding him. This is because embracing Islam makes the one that embraces it 'adl in origin. 'Umer wrote to Abu Mousa: 'Muslims are 'udool (pl. of *'adl)* towards each other except the one experienced to have made a forged testimony, the lashed in a punishment, and a stingy *(Daneen)* regarding guardianship *(walaa')* or kinship'. This means the Muslim is originally 'adl; and so any thing that came in its original status does not evidence. Rather, evidence is legislated to prove the status contrary to the origin. Therefore, it is not enquired about a Muslim witness, whether he is 'adl or not, because a Muslim is in origin 'adl. If, however the opponent discredited him he is asked to prove that which breaks his 'adaala, ie his claim that the witness is evil-doer. If he proved that, ie the witness has been punished over a hudd (a legal fixed punishment), then his testimony will be rejected. If however the opponent could not prove his discredit to the witness, then his opinion will be disregarded, and decision is taken based on the origin, ie the witness is 'adl.

As regarding the non-Muslim, if he was known to abstain from that which people consider violation to uprightness, then he is in origin 'adl. He would not be investigated, because the one that is known as such he is 'adl. If however, his testimony was discredited, then the one that discredits it has to prove his discredit. However, if this non-Muslim was known to be of those that do not abstain from that which the people consider violation to uprightness, then the judge would

ask the opponent about him. If he did not discredit him, then his testimony is accepted, because the lack of discredit to him means acceptance of his testimony. If however he discredited him, then the judge has to enquire about without asking the opponent to prove his discredit. This is because 'adaala (reliability) dies not exist here in origin. The judge has to enquire about the testimony of the witness, because the view of the people regarding the one that does not abstain from that which the people consider violation to uprightness is judgement of his evil doing (fisq); so the judge has to enquire about him. If the non-Muslim was however anonymous but known to embrace a religion, then he in origin abstains from that which is considered prohibited in his religion, because a person is supposed in origin to proceed in accordance with his creed; so he would abstain from that which the people consider violation to uprightness.

Thus, the judge enquires about the witness in one case, which is when the known non-Muslim does not abstain from that which the people consider violation to uprightness. The judge does not enquire about the witness in any other case. If discrediting him was proved, then his testimony will be rejected without enquiry; but if it was not proved, then his testimony will not be rejected. In the case of enquiry about the witness, the judge investigates by himself verbally about the witness in any style he finds fitting so as to believe in or reject the testimony. As regarding the so called secret and open attestation (of the witness), this is an action that has no basis in shar'. Besides this does not lead to knowing the witness, it might make the testimony of the evil-doer (fasiq) accepted. Therefore, it is invalid to follow the style of secret attestation absolutely.

Retention (DabT) is stipulated in the testimony the same as the 'adaala. Retention means the good hearing, understanding and memorization (of the testified report) until the time of its presentation. Thus, retention is stipulated in testimony as it is stipulated in a report, because testimony is a report given by the expression of testimony, so retention must be verified in it.

The testimony of a non-Muslim

The stipulation that the witness must be a Muslim in an unrestricted manner contradicts the *Shari'ah* texts. The permissibility of a non-Muslim to give a testimony in respect to bequests has been

mentioned in the ayah:

'O you who believe! Let there be witnesses between you when death draws to one of you, at the time of bequest, two witnesses, 'adl (trustworthy) from among you, or two others from other than you'. [TMQ 5: 106]

The permissibility of non-Muslims giving witness in murder cases is understood from the Hadeeth of Basheer b. Yasaar regarding those killed in Khaybar. Therefore, it is not correct to make unrestricted stipulation that the witness has to be a Muslim. Similarly, it is not correct to apply the permissibility of non-Muslim witnesses generally, because that contradicts the *Shari'ah* texts. The stipulation of a witness being Muslim is mentioned regarding financial matters in the following ayah:

'And get two witnesses out of your own men.' [Baqarah:282]

It has also been stipulated that the witness in divorce and raj'ah (reversing divorce) be a Muslim in the ayah:

'Either take them back in a good manner or part with them in a good manner. And take for witness two just persons of you.' [Talaq:2]

Thus, it is not correct to permit non-Muslims to give testimony in an unrestricted manner in all incidents. One must look to the details regarding the testimony of non-Muslims and adhere to the texts from the Kitaab and Sunnah without resorting to interpretation.

When we scrutinise this subject we find that testimony is one of the actions mentioned in the speech of the Legislator. It is one of the *Shari'ah* duties. The Kaafir is addressed by the speech of the legislator exactly as the Muslim is addressed. This is because Islam has come for all people. He (swt) said:

'And We have sent you (O Muhammad SAW) not but as a mercy for the 'Alamin (mankind, jinns and all that exists).' [21:107]

Just as the kafir is entrusted with the Usool ie the Islamic 'Aqeedah he is also entrusted with the branches (furoo') ie the *Shari'ah* rules. This is evidenced by the fact that Allah (swt) addressed them with the branches (furoo') in many verses. He (swt) said:

'O mankind! Worship your Lord (Allah), Who created you.' [2:21] He (swt) said:

'And Hajj (pilgrimage to Makkah) to the House (Ka'bah) is a duty that mankind owes to Allah.' [3:97]

He (swt) said:

'And woe to Al-Mushrikun those who give not the Zakat.' [41:6-7] He (swt) said:

'So he (the disbeliever) neither believed (in this Qur'an, in the Message of Muhammad SAW) nor prayed!' [75:31] besides others.

Since giving testimony is from the branches (*furoo'*) and since it was mentioned in the speech of the legislator then the Muslim and Kafir are undoubtedly entrusted with it. As regards the kaafir performing (adaa') of the branches: those things such as prayer, zakah and Hajj that have come with the condition of being Muslim then their performance by Kaafir will not be correct. This is because embracing Islam is a condition in the validity (SiHHah) of its performance. Thus, things in which Islam has not been stipulated such as Jihad, sale, renting etc, these can be performed by kafirs whilst he is a kafir. That is why Quzman fought alongside the Messenger (saw) while he was a kaafir and the Messenger (saw) had dealings with the Jews such as loaning his armour out to a Jew. Thus, any action, contract or dealing ie anything brought by the speech of the legislator can by performed by the kaafir as long as there is no text stipulating the embracing of Islam. This is general and it includes the testimony and the rest of the branches. Therefore, we need to study the subject of testimony and see if Islam is stipulated as in salah and zakah or if it hasn't been stipulated as in Jihad and sale. If Islam is stipulated then it cannot be performed by the Kafir. If there is no such stipulation then its performance would be correct. And by studying the texts in the Kitaab and Sunnah we do not find any text that stipulates the embracing of Islam in the testimony as is the case with Salah and Hajj. As for the verses in which it has been stipulated that the witness be a Muslim, these are specific verses regarding subjects and not general. They are specific to the topic in which they were mentioned, and not general. So the stipulation that the witness be a Muslim is specific to that subject in which the stipulation came. It cannot serve as evidence for stipulating Islam in testimony but it is evidence for the topic regarding which it came such as the ayah of raj'ah (return to one's wife after divorce) and Talaq (divorce).

Therefore, the *Shari'ah* rule allows for a kaafir to be a witness in everything except where the text has come to stipulate Islam. Those matters in which the texts have stipulated Islam then the testimony of a kafir will not be valid. But those matters in which the text did not stipulate Islam then the testimony of a kafir will be valid as is the case in Jihad, sale, mortgaging, hiring etc and other such legal duties.

As for the evidence that Islam has been stipulated in specific subjects only and not as a general stipulation it is the verses that state the condition of Islam in testimony. They have come specific to certain subjects. He (swt) says:

'O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuses to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate in justice. And get two witnesses out of your own men.' [Baqarah:282]

The subject matter of this ayah is debt, financial and trade matters for it says:

'When you contract a debt' , 'Let him (the debtor) who incurs the liability dictate', 'But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then…','save when it is a present trade which you carry out.'

So all rules mentioned in the ayah are specific to financial rights and cannot be applied outside the subject matter. This is because if the text has come regarding a subject, then this text is linked to this subject. The text which is said regarding a specific incident and the text which is an answer to a question; these must be specified to the subject matter of the incident or answer and cannot be generally applied to everything. This is because the question is repeated in the answer, and because the speech is regarding a specific subject, so the hukm must be restricted to that subject. This is because the wording of the text which clarifies the hukm of the incident or question is exclusively linked to that incident or question. Thus, the hukm is linked to the incident or question, ie to the discussed issue or the matter asked about, but does not cover anything beyond the subject matter; it is rather specific to it. As for what came in the

ayah it is the issue of financial rights. And the discussion is about financial rights, so the hukm is linked to financial rights and does not cover anything else other than financial rights. It becomes clear from this that the stipulation that the witness has to be a Muslim mentioned in the ayah:

'And get two witnesses out of your own men.' [Baqarah:282] is specific to financial rights because the subject matter of the ayah is financial rights, and therefore it cannot be a general condition for a witness, but rather a condition for testimony regarding financial rights.

Based on this ayah it has been stipulated that the witness has to be a Muslim in all financial rights in respect to debts, trade etc. Also examples such as claiming the price of a sale, the rent for a house, compensation for damages or seizure of wealth and other such financial rights. This is because the stipulation if Islam in the ayah is explicit:

'…out of your own men.' [Baqarah:282] ie from the Muslims. And the fact that the subject matter is to do with financial rights is very clear to see. So there is no argument regarding the stipulation of a Muslim witness in financial rights.

However, one should know that financial rights are different to contracts and dispositions. That is why the ayah does not stipulate Islam in sale, renting, wakaala (representation), rahn (security) and other such contracts, and nor in tasarrufaat (dispositions) such as gifts and the like. These are not part of the financial rights. Rather they are contracts and tasarrufaat (dispositions) that are excluded from financial rights since the ayah defined the right by saying:

'(The debtor) who incurs the liability'. 'When you contract a debt'.

'Save when it is a present trade which you carry out.' So the issue relates to the prices of trade and debts i.e. money, ie wealth in the sense of money and not the financier. That is why the ayah has been called the ayah of debt (aayat ud-dayn). Contracts and tasarrufaat (dispositions) are not financial rights but part of the societal transaction (mu'amalaat). However, demanding the prices and wages are from the financial matters. Contracting a sale does not come under the subject of the financial rights, but claiming the price of a sale is part of the financial rights. In this way the rest of the contracts and tasarrufaat (dispositions) are conducted. So the stipulation that the

witness be a Muslim is like claiming the price of a sale, while anything else such as contracting the sale, it is not stipulated the witness must be Muslim. Thus, it becomes clear that the ayah is specific to a certain subject matter and the ahkams in it are specific to this subject. And the ayah of bequests (wasiyyah) has stipulated that the witness be a Muslim:

'O you who believe! When death approaches any of you, and you make a bequest, then take the testimony of two just men of your own folk' [al-Maa'idah:106]

The subject matter of this ayah is bequests. It discusses bequests. Thus, it is specific to the subject matter of bequests. Everything the ayah includes is specific to the subject of bequests. This is because the testimony of non-Muslims in contracts such as sale and *tasarrufaat* (dispositions) such as gifts is allowed. Bequests are part of the *tasarrfufaat* (dispositions). Had there been no text for it then the testimony of a non-Muslim would be allowed. But the text has come and stipulated that the witness be a Muslim in bequests:

'Let there be witnesses between you when death draws to one of you, at the time of bequest, two witnesses, 'adl (trustworthy) from among you, [al-Maa'idah:106] So, the condition for the witness is that he is a Muslim. The meaning of the ayah is: when one of you is close to death and he wishes to make a bequest, the lawful testimony between you, ie between the Muslims, is the testimony of two of your just men, where the bequeathing Muslim assigns them witnesses upon his bequeath. This means the legitimate testimony between Muslims in bequests is the presence of two just Muslim witnesses. It seems this stipulation is because it is particular to the Muslims. That is why He (swt) said:

'take the testimony among you' The word 'bayn' (among) is a relative particle that gives the meaning of a link between two things in terms of time, place, condition or action. They said it is used for linkage and separation. Its indication for separation is their saying: *'zaat al-bayn'*, ie the hostility and hatred. He (swt) said:

'And adjust all matters of difference among you,'[8:1] meaning the hostility or viciousness between you. This is a significative (ma'nawi) matter between individuals. Thus, His (swt) saying:

'Take the testimony of two just men of your own folk', means the testimony among you or the hukm of what takes place among you in

terms of the testimony, ie among the Muslims. This usage indicates that it is particular to the Muslims, and hence it has been stipulated that the witness be a Muslim.

The legislator has excluded from the bequest the situation of travel only; and in this situation it allowed the testimony of non-Muslims in bequests: He (swt) said:

'or two others (witnesses) from other than you, if you are traveling through the land and the calamity of death befalls you.' [5:106] It means if you have travelled on the land and you have been afflicted by the prospect of death, so take two witnesses from a folk other than you. The ayah stipulated in bequests the presence of two Muslim witnesses, and added to that a specific situation of bequests, where it allowed the testimony of non Muslims, which the situation of travelling; as if it excluded the situation of travelling from the situations of bequest. This is because the word 'in' (if) is conditional and gives the meaning of conditionality. It is linked to the saying: *'or two others (witnesses) from outside'*. The meaning is: the lawful testimony among you at the time of bequest is that two just witnesses from among you have to be present. And if you are travelling on the land then others can be witness. The evidence to say that this is the meaning of the ayah is the fact that the testimony of a Muslim whilst travelling is allowed whether one was travelling or not. There is no meaning to linking *'if you are'* with *'then take the testimony of two just men of your own folk',* since there is no reason for saying this, and there is no need to mention the state of travelling in respect to the witness of a Muslim. So His (swt) saying: *'if you are traveling through the land' is* solely linked to His (swt) saying: *'or two others (witnesses) from other than you'* and not with His (swt) saying: *'then take the testimony of two just men of your own folk.' So* the usage of the ayah is: *'or two others (witnesses) from other than you, if you are traveling through the land.'* Thus, the saying of Allah (swt) *:'or two others (witnesses) from other than you'is* evidence to allow the testimony of a non-Muslim for bequeath in state of travel. This is evidence to one state from the states of a specific subject, rather than being evidence to the testimony of a non-Muslim generally. One should not say it is evidence for testimony of non-Muslims in financial matters, because such a view contradicts the text of the ayah and its indication. The text of the ayah refers to a specific condition regarding a specific subject, which is the subject of bequests whilst travelling. Its meaning

as a bequest whilst travelling is that it is one of the tasarrufaat (dispositions) and not a financial right. It is not like a debt, but rather like the gift. And therefore it does not apply to financial rights.

From all of this it appears clearly that the ayah is specific to a certain subject and that the ahkam that it includes, which is the stipulation that the witness should be a Muslim is specific to this subject. One state has been excluded from it, which is travelling, where the testimony of a non-Muslim is allowed in bequests when travelling:

'or two others (witnesses) from other than you, if you are traveling through the land.' [5:106]

The ayah of raj'ah and divorce mentions the condition that the witness be a Muslim. He (swt) said:

'O Prophet (SAW)! When you divorce women, divorce them at their 'Iddah (prescribed periods), and count (accurately) their 'Iddah (periods)' [Talaq:1] until

'Then when they are about to fulfill their term appointed, either take them back in a good manner or part with them in a good manner. And take for witness two just persons from among you (Muslims).' [Talaq:2] They discuss raj'ah (return to one's wife after divorce) and Talaq. They are special permission regarding the subject of Raj'ah and Talaq. It is evidence for stipulating in testimony for Raj'ah and Talaq that the witness be a Muslim. But this does not serve as evidence to say that a non-Muslim cannot give witness in subjects other than Raj'ah and Talaq. So the evidence is specific for a specific subject and not general. As for the stipulation that the witness in marriage be a Muslim, that is taken from the ayah by implicit indication (dalaalatul Fahwa). It means that since it is stipulated in Raj'ah that the two Muslims be Muslims, then by greater reason the witnesses in respect to marriage must be Muslims. Not to mention that the Raj'ah itself is marriage to one's divorced wife and thus it is considered a marriage and the ayah has indicted marriage. Thus, the ayah is specific to a particular subject. As for the stipulation that the witness be Muslim, this is specific to the subject in which it was mentioned, which is Raj'ah and Talaq, where marriage comes under raj'ah .

The Hadeeth of sighting the moon has stipulated that the witness be a Muslim. It has been narrated on the authority of Ibn 'Abbas that:

'A Bedouin came to Allah's Messenger (saw) and said: I have seen the moon (ie of Ramadan). He (saw) asked: Do you bear witness that there is no god save Allah? He said: Yes. He said: Do you bear witness that Muhammad is the Messenger of Allah? He said: Yes. So he said to Bilal: O Bilal, stand and give the azan to the people so that they fast tomorrow.'

The subject matter of this hadith is the sighting of the moon and the hadeeth discusses this subject. What the Messenger said when he asked the witness if he was a Muslim does not apply to all witnesses. Rather it is specific to the sighting of the moon of Ramadan. It is evidence to stipulate that the witness be a Muslim in the subject of sighting the moon. However, it does not indicate that the witness has to be a Muslim in other than the issue of sighting the moon. It is evidence to say the witness must be a Muslim in the subject of sighting the moon, but not stipulating that witnesses must be Muslims.

From this it becomes clear that non-Muslims can bear witness in everything because they are addressed by the *Sharī'ah* duties (*takaleef*). It is valid for them to testify if no text has come making Islam a condition. Testimony is part of the duties (*takaaleef*) because it has come in the speech of the legislator which is directed to all. Indeed, no text has come to make Islam a condition, and hence it is valid to be given by a non-Muslim such as in Jihad. It also becomes clear that there are incidents in which the testimony of a non-Muslim is not acceptable; it is rather stipulated that the witness is a Muslim. These incidents are those which have come in the texts that the witness must be a Muslim, which are the financial rights and bequests, except when travelling, where the testimony of a non Muslim is accepted in this situation only; this is besides the testimony of a Muslim is stipulated in raj'ah, divorce and marriage, which is included in raj'ah. In any incidents other than these which the text has stipulated that the witness be a Muslim,„the testimony of non-Muslims would be allowed. Thus, it is allowed for a non-Muslim to be a witness in Hudood. He can be a witness in zina. As for His (swt) saying:

'And then they did not provide four witnesses'. [……]

This did not stipulate Islam. Rather it left it unrestricted by using the indefinite: witnesses (*shuhadaa'*), ie any witnesses. It is allowed for a

non-Muslim to be a witness in theft, defamation of chaste women (*qaZf*), drinking alcohol and other *hudood*. It is allowed for him to be a witness in *jinayaat* (murder). The testimony of a non-Muslim in *jinayaat* (murders) has been confirmed by specific evidence beside the general one. This has come in the hadith of Basheer b. Yasaar. Bukhari reported from Basheer b. Yasaar who claimed:

'That an Ansari man known as Sahl b. Aby Hatmah told him that few people of his folk departed to Khayber where they dispersed in it, and then they found one of them murdered. They said to the people where they found their mate, you killed our mate. They said, we neither killed and nor knew who killed. So they went to the Prophet (saw) and said: O Messenger of Allah! We departed to Khayber and found one of our folk killed. He (saw): It is a great sin, it is a great sin. He said to them: Do you have evidence about his murder? They said: We do not have evidence. He said: Then they (the Jews) have to take an oath. They said: We do not accept the oaths of Jews. The Messenger of Allah (saw) disliked his blood be unavenged, so he paid his blood money, 100 of the camels of sadaqah'.

This hadith indicates the Messenger asked them to provide evidence about the murdered with Jews, for they said: 'We departed to Khayber, and found one of us killed'. Though the Messenger knew the incident was in Khayber, with Jews and in their tribe, he left the evidence unrestricted without specifying it has to be from Muslims. The context (qareenah) is that the incident was with the Jews, which indicates had evidence came from Jews he would have accepted it. This is confirmed by the fact that he (saw) offered the claimants to accept the oath of Jews. This is because it was narrated by Sahl b. Aby Hatmah:

'*Jews* would clear themselves from guilt by fifty oaths; so they said; how we accept oaths of disbelieving people', understanding that oath is one of the testimonial evidences. This indicates it is accepted in the testimony of the jinayaat to have a non-Muslim witness and his oath.

Also the testimony of a non-Muslim is allowed in (transactions) mu'amalaat except the financial rights, contracts, tasarrufaat

(dispositions) except the bequests (wasiyyah), raj'ah, divorce and marriage. It is not allowed in sighting the moon due to the text, but it is allowed in technical matters, such as medicine etc. There is no difference in this matter between zimmi or musta'min (under covenant). As for the kafir harbi, one needs to examine this matter. If there is a state of war between us and them, ie there is a state of war with his people then it is not allowed for him to give testimony due to the hostility between us and them. But if there is no actual state of war then the testimony of a kaafir harbi is allowed because he comes under the general speech of duties. One should not say there is hostility between us and them, because this is hostility of religion; and the hostility of religion does not prevent acceptance of the testimony; rather that which prevents its acceptance is the worldly hostility.. The kafir with whom there is a state of actual war; there is a worldly hostility between us and them, which is the war itself.

This is in relation to non-Muslims testimony against non-Muslims. As for non-Muslim testimony against non-Muslims, that is allowed. It is allowed for Kuffar to testify against each other due to what was reported by Ibn Majah on the authority of Jabir that the Prophet (saw):

'Permitted the people of Zimmah to testify against each other.' And the musta'min is like the Zimmi.

The minimum number (*niSaab*) of Testimony

The one who examines the *Shari'ah* texts of verses and hadith will see that the minimum number for testimonies is two witnesses. He (swt) said:

'And get two witnesses'. [2:282]

'When death approaches any of you, and you make a bequest, then take the testimony of two just men of your own folk or two others from other than you.' [al-Maa'idah:106] And He 'Azza wa jall said:

'And take for witness two just persons of you.' [Talaq:2] These are in terms of the ayaat. As for the Hadeeth: It has been narrated on the authority of al-Ash'ath b. Qays who said:

'There was a dispute between me and another man over a well so we took our complaint to the Messenger of Allah

(saw); so he said: (Bring) your two witnesses or (accept) his oath'.

Ahmad reported on the authority of 'Iyaad b. Himar who said that the Messenger of Allah (saw) said:

'The one who find a lost property let him get it witnessed by two just witnesses.' 'Aisha narrated that the Messenger of Allah (saw) said:

'There is no marriage without *wali* (a guardian) and two just *witnesses.'* All of these texts corroborate that testimony requires two witnesses. Even though they have not come in a general form, and each text has come specifically for a specific subject, but their abundance and their cover to most of the issues of mu'amalaat (transactions) indicates they are general, or this is their case in origin, or they apply at least to the issues mentioned in these texts, which include the financial rights, tasarrufaat (dispositions), contracts, confiscation, lost property; and these are the great majority of the transactions (mu'amalaat), This indicates that the minimum number (nisab) of testimony is two witnesses. This is because the legislator mentioned a number with regards to testimony, ie an amount has been assigned in testimony like the amount of water which does not pollute and the amount of gold and silver which obliges zakah etc. The amounts in the *Shari'ah* are either to prevent the increase or decrease. Such as:

'The adulterers, male or female, lash each one of them one hundred lashes'. [……] It might also be for preventing the increase but not the decrease, such as:

'When the water (quantity) reaches qullatayn (two jugs), it would not carry impurity.'

It might also be for preventing the increase but not the decrease, such as the maximum period of menstruation. Thus, the measures in the *Shari'ah* have their own indications. In other words, they have their meaning (mafhoom), so the mafhoom of number is acted upon. The number is the counted amount. Therefore, the fact that a number has been mentioned in these texts means it is mention of amount (number) for testimony. So here it is to prevent the decrease as opposed to the increase just as it is the hadith:

'When the water reaches qullatayn (two jugs), ….'

It is like the saying of the Messenger (saw) regarding the number (nisaab) of gold and silver:

'If you have a hundred dirhams and a year has passed over them, then you should pay five dirhams. But there is no obligation on you to pay, meaning regarding gold until you have twenty dinars.'

Mentioning the amount of two hundreds and twenty is mention of the amount, which prevents the decrease but not the increase. In the same way mentioning the two witnesses constitutes mentioning the minimum number of witnesses, which prevents the decrease but not the increase. Therefore, the minimum amount (nisaab) for testimony is two witnesses. This is what has been indicated by the abundant texts from the Kitaab and Sunnah.

Type of the Two Witnesses

The one who studies the *Sharī'ah* texts from the Kitab and Sunnah finds that the legislator had clarified the witnesses with different descriptions. He (swt) clarified that they are two men. He (swt) said:

'And get two witnesses out of your own men.' [Baqarah:282]

And He (swt) clarified that the witnesses are one man and two women:

'And if there are not two men (available), then a man and two women.' [2:282] Also Abdullah b. Umar narrated that the Messenger (saw) said:

'The testimony of two women is equal to the testimony of one man.' And Abu Sa'eed al-Khudri narrated that the Messenger (saw) said:

'Is not the testimony of a woman half the testimony of a man? We said: yes O messenger of Allah!'

He also clarified that it is testimony of a witness and the plaintiff's oath. Ibn 'Abbas narrated:

'That the Messenger (saw) judged on the basis of an oath and a witness.' Jabir narrated:

'That the Prophet (saw) judged on the basis of the oath and the witness.'

Ja'far b. Muhammad narrated from his father who narrated from the Ameer al-Mu'mineen Ali b. Abi Talib:

'That the Prophet (saw) judged by the testimony of one witness and the oath of the plaintiff, and Ameer ul-Mu'mineen, Ali judged by it in Iraq'. Rabee'ah b.Suhaylb. Abi Salih narrated from his father who narrated from Abu Hurayrah who said:

'Allah's Messenger (saw) judged by the oath and one witness.' Sarruq narrated that:

'The Messenger of Allah permitted the testimony of a man and the oath of the plaintiff.'

Az-Zubayb b. Tha'labah narrated a story in which he mentioned that he (saw) said to him:

'Do you have proof that you embraced Islam before you have been seized these days? I said: Yes. He said: What is your proof? I said: Samurah, who is a man from Bany al-'Anber, and another man, which he gave him his name. That man testified, but Samurah refused to testify. The Messenger of Allah (saw) said: He refused to testify to you, so take an oath beside your other witness. I said: Yes. He asked then to swear by Allah that we embraced Islam on such and such day'. He mentioned the whole story, which contained:

'That the Prophet (saw) acted upon the witness and the oath'. Abu Omer Namri said about this hadith 'it is hadith hasan'.

All of these texts clarify that the Legislator did not confine to mention in the texts the two witnesses only, but expalined that the two witnesses have to be men, one man and two women, or women equal to two men, where every two women are equal to one man, or a single witness and the plaintiff's oath. These details are considered a clarification to the two witnesses. This is because the expression of 'two witnesses' is mujmal (summed) like the word Zakah, Salah, Hajj etc. The texts have come and clarified that the two witnesses are two men, one man and two women, four women or one witness and one oath by the plaintiff. This is a clarification of the nature of the two witnesses, ie clarification of their minimum number (nisaab). Therefore, the nisaab of testimony is two witnesses. One of the two

witnesses can be an oath, because it is considered testimony. One of the two witnesses can be two women, because the hadith has stated they are equivalent to one witness. As for the oath being a witness, this is because it has been established by the text of the Qur'an. The Qur'an has called the oaths of the spouses a testimony (shahaadah). He (swt) said:

'Let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth.' [Nur:6]

Thus, the oath is a testimony and it stands in the position of a witness. So the oath with another witness will make two witnesses. As for two women being equal to one witness, this is because the Messenger (saw) said:

'The testimony of two women is equal to the testimony of one man.'

So, four women witnesses constitute two witnesses. From this it appears that whatever are the types of the two witnesses, they are still considered two witnesses. What has come with respect to the second witness is to clarify the type of the witness and not another nisaab. Therefore, the types of two witness are four: two men, a man and two women, four women or one male witness and one oath of the plaintiff.

One might say that Allah (swt) mentioned the nisaab of the testimony as being two men or one man and two women by the clear text: He (swt) says:

'And get two witnesses out of your own men. And if there are not two men (available), then a man and two women.' [2:282]

Its pronounced meaning (manTooq) and implicit meaning (mafhoom) indicates that this is the nisaab of testimony. The acceptance of the hadith which speaks of one witness and plaintiff's oath means the hadith has abrogated the ayah because the ayah brought one hukm and the hadith brought another, so it must have abrogated it. But the hadith cannot abrogate the Qur'an, especially when the hadith in question is khabar Ahaad. So how can we say the nisab of testimony is one male witness and the plaintiff's oath? The answer to this question is from two angles: The ayah is specific (khaaS) to a specific subject. It does not cover any other subject and therefore it is not general ('aamm). If we assumed that it clarified the

nisab, then it will be a clarification of the nisab in that subject only which is the financial rights. Secondly, the hadith regarding the single witness and the plaintiff's oath does not invalidate what came in the ayah in terms of the testimony being two witnesses. Rather it is an extra clarification on the ayah. The ayah has clarified that the two witnesses are two men or one man and two women. And the hadith has clarified that they are also one witness and the plaintiff's oath; so this is a second clarification. Thus, the hadith has come as an addition to the ayah, but it did not come with a new hukm different to the first hukm. Rather it brought the first hukm and then added to it another hukm. The Hadeeth which includes an addition to what has come in the Qur'an is not considered an abrogation. Rather it is an independent addition to an independent hukm. If its sanad (narration) is proved authentic, then we must adhere to it. Abrogation is abolishing a ruling, while there is no abolition in the addition. The addition is like the specification (takhsees). Just as specification of the Kitab by the Sunnah is allowed, the addition to it is allowed as well. The evidences for this are many. Allah (swt) mentioned the women to whom marriage is prohibited:

'And it was allowed to you whatever is beyond that'……

But the Sunnah came and prohibited the marriage to a woman and her maternal aunt. Allah (swt) said:

'The thief, male and female, amputate theirhands'. ……

But the Sunnah allowed abstaining from amputating the hand that would lead to decomposition, and so on and so forth. Therefore, acting upon the ahadeeth that allow the acceptance of one witness and oath of the plaintiff is obligatory whilst still acting upon the ayah. So the ayah and ahadeeth clarify the types of the two witnesses.

This is the minimum number for testimony which is two witnesses. And the following are the types of the two witnesses allowed: two men, a man and two women, four women, a witness and an oath by the plaintiff. The plaintiff's oath is considered a witness because Allah (swt) has called this testimony and made two women equal to one man due to the authentic Hadeeth. This minimum number along with its types of witnesses is the nisaab of testimony in all cases, with no difference between societal transactions (mu'amalaat) and punishments ('uqubaat). It is the nisaab in cases of theft, killing,

drinking of alcohol and other hudood. It is the nisaab of testimony in murder, broken nose, fractured head other types of jinayaat. It is the nisab of testimony in sale, hiring, sponsorship (kafaalah) and other such contracts. It is the nisab in of testimony in endowment (Waqf), gift (Hibah) and other tasarrufaat (dispositions). This is the nisab of testimony in mu'amalaat, because it has come in the text regarding contracts and tasarrufaat; so it includes all transactions (mu'amalaat). As for it being the nisab of testimony in punishments ('uqubaat), this is because Allah (swt) did not designate a specific nisaab for punishments except the crime of fornication. If there was a specific nisab for punishments other than zina then it would have been clarified as it was clarified for zina. However, it has not been clarified and this indicates that the nisab of testimony in transactions (mu'amalaat) is the nisaab of testimony in punishments ('uqubaat). Especially the ahadith that came regarding the acceptance of testimony and the plantiff's oath has come in general form, as follows:

'He issued judgment based on an oath and a witness'.

'He issued a judgment with the oath and the witness'.

'He issued a judgment with one witness and the plaintiff's oath'.

'He issued with the oath together with the one witness'.

'He allowed the testimony of the man and the oath of the claimant'.

Thus, it includes the 'uqubaat (punishments) because it is general; and this applies to the other types of the two witnesses.

From this it becomes clear that there is no perfect or imperfect nisaab. And nor is there a nisaab for necessity and a nisaab when there is no necessity. Rather the nisab of testimony is the same in all incidents unless the *Sharī'ah* text has excluded some subjects from this nisab. In that case, the *Sharī'ah* text that clarified a nisab different to this nisab for a specific incident is followed.

The exceptions from the nisab of the testimony

The legislator has mentioned a nisab for testimony, which is more than two witnesses and it has brought a nisab for testimony in specific incidents, which is les than the two witnesses. So the crime of

fornication must have four trustworthy witnesses. He (swt) said:

"And those who accuse chaste women, and produce not four witnesses, flog them eighty stripes, and reject their testimony forever; they indeed are the Fasiqun (transgressors)". [An- Nur: 4]

And He (swt) said:

'Why did they not produce four witnesses? Since they (the slanderers) have not produced witnesses! Then with Allah they are the liars.' [Nur:13]

And it has been reported that the Prophet (saw) said:

'(Bring) four (witnesses), otherwise your back will be lashed'.

These evidences are explicit in that the nisab for testimony in zina is four witnesses. These texts that have stated a specific nisab for a specific subject matter, which is the subject of fornication (zina), had excluded the nisab of fornication from the general nisab, and thus assigned a specific nisab to it. It is not enough to have two witnesses; rather it has been stipulated that there be four witnesses. So this nisab is only for zina and it does not cover anything else, because it has come for a specific subject matter, which is zina and hence it is specific to that subject. This nisab is more than the nisab of testimony. So this is the nisab for the subject for which it has come and that is zina.

The Legislator has come with that which is less than the nisab of testimony, ie less than the two witnesses in specific subjects. An example would be the sighting of the moon where it is allowed to have a single, Muslim witness. This is due to what was narrated on the authority of Ibn 'Abbas that:

'A Bedouin came to Allah's Messenger (saw) and said: I have seen the moon (ie of Ramadan). He (saw) asked: Do you bear witness that there is no god save Allah? He said: Yes. He said: Do you bear witness that Muhammad is the Messenger of Allah? He said: Yes. So he said to Bilal: O Bilal, stand and give the azan to the people so that they fast tomorrow.'

This hadith is evidence that it is allowed to have one Muslim witness for sighting of the moon, whether it is the moon of Ramadan or Shawwal. Another example is the areas where only women are

familiar. In these areas, it is allowed to have one woman witness due to what has been narrated via az-Zuhri:

'It was sanctioned by tradition (Sunnah) [madat us-Sunnah] that the testimony of women is allowed in matters only they are familiar with.' Even though the expression 'madat as-Sunnah' does not indicate that this is a hadith since the word Sunnah can mean the practise they followed. However, when this is linked to a sound hadith, then it is taken into consideration. This report has been linked to a sound hadith, which has been narrated by 'Uqbah b. Abi Harith. Ibn Mulaykah said I heard it from 'Uqbah b. Abi Harith, but I memorise better hadith of 'Ubayd, who said:

'I married a woman, and then a black woman came and said: I suckled you both. So, I went to the Messenger of Allah (saw) and said, O Messenger of Allah (saw): I married a woman and a black lady came and said; 'I suckled you both (you and your wife)', and she was lying. He turned away from me. So I came to him from his face side, and said she is lying. He (saw) said, how (you say that) when she claimed that she suckled both of you. So desist from her (his wife)'. In another narration from 'Uqbah b. Abi Harith:

'That he married Umm Yahya, the daughter of Abu Ihab. A black slave woman came and said: 'I suckled you both (you and your wife).' I mentioned that to the Prophet (saw), but he turned away from me. I stepped aside, and mentioned that to him. He (saw): But how after she claimed she had suckled both of you? So he forbade him from her.'

In this hadith, the Prophet (saw) instructed the man to leave his wife based on the testimony of a single woman that she had suckled them. Since he said to him: **'leave her'** and in another narration: **'and so he forbade him from her.'** And in a third narration: **'There is no good for you in her.'** When this is linked with the hadith '*madat usSunnah*' mentioned before, it becomes clear that it is allowed for the single woman to give testimony in matters only women are familiar with. This is because it has been proven that a single woman can be a witness in suckling. The *'illah* (legal cause)

here is the fact that only women are acquainted with the subject of suckling. This *illah* has been deduced because the subject matter of the testimony is suckling, and also from the hadith:

'It was sanctioned by tradition (Sunnah) [madat us-Sunnah] that the testimony of women is allowed in matters only they are familiar with.' From this we understand that it is permissible for a single woman to testify in suckling, because only women are acquainted with these matters. This is supported by another hadith which is the hadith of Mujahid, Sa'eed b. Nusayyab, Sa'eed b. Jubayr, 'Ataa b. Abi Rabah, Tawus (ra) who said:

'The Messenger of Allah (saw) said that the testimony of women is allowed in matters, which men cannot look at.'

This is also supported by what was reported by Huzayfah:

'That the Messenger of Allah (saw) allowed the testimony of a mid-wife (qaabilah) regarding childbirth. He said: the testimony of women is allowed in matters, which men cannot look at.'

All of this indicates that the ahadith do not intent suckling or childbirth specifically. Rather they are reasoned by an 'illah in relation to matters only women are familiar with. Thus, the testimony of a single woman is the nisab of testimony in matters only women are familiar with.

Therefore, the legislator has exempted three subjects from the nisab of testimony, which are: Firstly, Zina for which the legislator assigned a minimum number greater than the nisab of testimony. The second is sighting of the moon. And the third is those matters only women are familiar with. Here the nisab is less than the nisab of testimony. So the nisab of the first is four witnesses, the second is one man, and third is one woman.

The testimony of women

He (swt) said:

'And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.' [Baqarah:282]

Abu Hurayra narrated that the Prophet (saw) said:

'O women! Give alms, as I have seen that the majority of the dwellers of Hell-fire were you (women).' One of them, which is eloquent asked, 'Why we are the majority of the dwellers of Hell-fire, O Allah's Messenger?' He replied, 'You curse frequently and are ungrateful to your husbands. I have not seen anyone among those deficient in intelligence and religion that subdues an intelligent more than you'. The woman asked, 'O Allah's Messenger! What is the deficiency in intelligence and religion?' He said, 'Is not the evidence of two women equal to the witness of one man? This is the deficiency in her intelligence. Also nights pass without her praying and she breaks her fast in Ramadan. This is the deficiency in her religion.' Abdullah b. 'Umar narrated that the Messenger of Allah (saw) said:

'The testimony of two women is equal to one man.'

Abu Sa'eed al-Khudri narrated that the Messenger of Allah (saw) said in a hadith:

'Isn't the witness of a woman equal to half of that of a man?' We said, 'Yes O messenger of Allah.'

These are the texts from the Kitaab and Sunnah, they are evidences to prove that the testimony of women is half that of men. The testimony of two women is equal to the testimony of one man. All of these except the ayah are general evidences. Thus they are general in all claims, whether they have a man with them or were women only. This is because the saying of the messenger (saw):

'the testimony of two women is equal to the testimony of a man' and **'Is not the testimony the woman equal to half the testimony of the man?'** is general. This is because they have used general expressions such as the word **'the woman, 'man'**, and **'Is not the testimony of a woman equal to half the testimony of the man?'** are general expressions. This is because they are gender nouns (*ismu jins*) with *Alif Laam* (the definite article). The *ismu jins* with *Alif Laam* is from the general expressions and therefore it is general in all cases. As for the ayah:

'And if there are not two men (available), then a man and two women.'

[Baqarah:282] This does not mean it is not allowed to have anything other than one man and two women. Rather it means the two witnesses are two men. And if you cannot find two male witnesses, then it should be one man and two women. The hadith came and made the testimony of women half the testimony of the man. This explains the statement: *'then a man and two women.'* Thus, the testimony of two women which is equal to the testimony of one man covers the financial rights, which is indicated by the verse.

Thus, the testimony of women is accepted in all claims, whether they are part of the transactions (mu'amalaat) or punishments ('uqubaat). The testimony of women is allowed in hudood and *jinayaat* just as it is allowed in contracts and tasarrufaat due to the general form of the text of the ahadith, without having any thing that specifies it in other than the punishments. As for what was narrated that Shurayh (rahimahullah) said: *'the testimony of women regarding hudood is not allowed.'* This is the speech of Shurayh and not a hadith; and so the speech of Shurayh is not evidence. Rather it is the opinion of a mujtahid like the opinion of Abu Haneefah for example, and so cannot be taken as evidence. Besides; it has no evidence form the texts, whether from the Kitab or the Sunnah. As for what has been reported from Zuhri that he said: *'It has been the practice (sunnah) since the period of the prophet and the two khlaafahs after him not to accept the testimony of the women in hudood.'* And in another narration: *'The testimony of the women is not accepted in hudood, marriage and divorce.'* This hadeeth is *munqati'* (there is break in the chain) via Isma'eel b. 'Abbas who is Da'eef (unreliable), and therefore his narration cannot be cited as proof. Also the saying: *'it has been the practice (Sunnah)'* does not mean the Sunnah of the Messenger of Allah (saw). Rather it can be the Sunnah of the righteous Khulafaa' or it might mean the way (*tareeqah*). Al-'Irbaad narrated that the Messenger of Allah (saw) said:

'Adhere to my *Sunnah* and the *Sunnah* of the Rightly Guided Caliphs, bite onto it with your molar teeth.'

The action of the righteous Khulafah has been called a sunnah which indicates that it means way (*tareeqah*). In the hadith of Hiddeen b. Munzir who narrated from Ali regarding the flogging of Waleed b. 'Uqbah that he (Ali) said:

The Prophet (saw) gave forty lashes, Abu Bakr gave forty

and Umar gave eighty; and all of this is Sunnah.'

The action of Abu Bakr, Umar and Allah's Messenger has been called a Sunnah which indicates that he meant way (tareeqah). This is because it has been narrated that Ali himself said:

'I would have not imposed a hudd (punishment) upon somebody from which he passed away and then find of that some bad in myself except the drinker of khamr; for if he passed away I would pay his blood money, because the Messenger of Allah (saw) did not legislate it (did not make it Sunnah)'. So, he says in this hadith (he did not make it Sunnah). In the first hadith he said (and every Sunnah). The two hadiths are sound which indicate that by Sunnah he did not intend the action of the messenger (saw). Rather what was meant is the way (*tareeqah*). The word Sunnah, if is used in an unrestricted manner it means way (*tareeqah*). The word 'practice' (Sunnah) does not indicate that what has been transmitted is hadith unless there is a qareenah to indicate this. What Az-Zuhri reported: *'It has been the practice (sunnah) since the period of the prophet and the two khlaafahs after him not to accept the testimony of the women in hudood, marriage and divorce.'* is not taken as a hadeeth, because there is no qareenah to indicate this. So from this perspective the use of this report (athar) as evidence is disproved. There is no evidence to exclude the hudood in temrs, of the permissibility of women's testimony. Therefore, it is allowed for women to testify in hudood and jinayaat, due to the generality of the evidences and because there is no sound hadith to exclude hudod and jinayaat.

As the texts have indicated the permissibility of women to testify in hudud and jinayaat, like other cases, the texts also indicated the permissibility of the women's testimony alone without men in all cases. This is because the saying of the Messenger:

'Is not the evidence of two women equal to the witness of one man?' is general ('aamm) for any woman or man. And his (saw) saying:

'The testimony of two women is equal to the witness of one man,' is unrestricted (*mutlaq*) and encompasses all claims. It includes any cases whether there were men and women witnessing or just women. There is no text to prevent the testimony of women only.

Therefore, it is allowed for just women to testify in all claims.

Those whose testimony is not accepted

In origin the testimony is rejected if there is an allegation due to the saying of the Messenger:

'There is no testimony for the one accused'. Since testimony is a report that can be true or false, then it can be taken as a proof if its truthfulness is outweighed. If there appears a cause for accusation, then the truthfulness will not be outweighed. However, a testimony will not be rejected for every *tuhmah* (accusation). This is because someone might find any *tuhmah* (charge) to defame the testimony of a witness so as to get it rejected. Therefore, the *tuhmah* for which a testimony is rejected must be identified. What defines the *tuhmah* is the *Sharī'ah* and not the mind, because the *Sharī'ah* has stated that in origin the Muslim's testimony must be accepted. So the origin of testimony is acceptance. So rejecting is contrary to the origin. And going contrary to the origin requires a proof to establish this. This proof cannot be anything other than a *Sharī'ah* text, because rejection is a *Sharī'ah* rule and hence requires a *Sharī'ah* evidence. This is because what the *Sharī'ah* has made a basis requires a *Sharī'ah* text to act contrary to it. Thus, no testimony is rejected unless it is a *tuhmah* mentioned by a *Sharī'ah* text. Thus, a testimony is not rejected due to a *tuhmah* originating from the mind or customs, because they are of no value. Rejecting a testimony is *hukm shar'ī*; so there must be a *Sharī'ah* text from the Kitab and Sunnah to indicate it i.e. there must be a *Sharī'ah* text that mentions the *tuhmah* by which the testimony of a witness is rejected.

Those whose testimony has been rejected by the *Sharī'ah* text are the untrustworthy people (*ghayr 'adl*), those on whom the *Hadd* of defamation (*qazf*) as been applied, traitors (whether male or female), those harboring hostility (against whom they testify), the servant who is completely preoccupied with his work, a son for the favor of his father and vice versa, and a woman in the favor of her husband and vice versa. It is not allowed to accept the testimony of all these people due to the text. As for rejecting the testimony of untrustworthy people due to His (swt) saying:

'And take for witness two just persons of you.' [Talaq:2]

'Then take the testimony of two just men of your own folk.' [al-Maa'idah:106] And due to His (swt) saying:

'O you who believe! If an evil-doer (fasiq) brings you news, verify it.'

These texts have stipulated that the witness be a trustworthy (*'adl*). The meaning (*mafhoom*) of these texts is that that the testimony of the untrustworthy people cannot be accepted. Previously we have mentioned the definition of trustworthy (*'adl*) as being abstaining from that which the people consider violation to uprightness (*isiqaamah*). So, whoever does not abstain from that which the people consider violation to uprightness is unreliable/ untrustworthy, thus his testimony is not accepted.

As for rejecting the testimony of traitors, male or female, people who harbor hostility, the servant whose is preoccupied with his work, this is due to what Ahmad reported from 'Amr b. Shu'ayb from his father who narrated from his father that the Messenger (saw) said:

'The testimony of a traitor (male or female) is not allowed, nor someone who has harbor hatred (ghamr) to his brother, and nor is the testimony of the qaani' allowed for the favor of the household, and the qaani' is the one on whom the household spend.' And he (saw) said:

'The testimony of one disputant against another disputant is not accepted.' Thus, the traitor's testimony is rejected and also the one who harbors hostility. So the testimony of an enemy is not accepted against his enemy due to the *tuhmah*. Also the testimony of the qaani' is rejected; and he is the servant whose is exclusively occupied with work. This is the person meant by his saying 'al-qaani', and who was explained by saying: 'al-qaani' is the one on whom the household spend' meaning the servant attached to service.

As regarding rejecting the testimony of the son for the favor of his father and vice versa, this is due to what Hisham b. 'Urwah from Ubay from A'isha that the Prophet (saw) said:

'The testimony of a traitor (whether man or woman) is not accepted and nor the one who harbors hatred to his brother and nor the testimony of the son for the favor of

his father and the testimony of the father for the favor of his son.' The word *al-Ghamr* : means *hina*, *shahnaa. Hina* means *hiqd* (hatred). In this hadith he (saw) mentioned the traitor, male and female, the one who harbors hatred and also the son's testimony for his father's favour and vice versa. Based on this hadith it is not allowed for the son to testify for his father's favour, whether son or daughter and the father cannot testify for his son's favour, whether father or mother, for both are parents. Also the meaning present in the father ie the tuhma exists in the mother.

As for rejecting the testimony of the wife for her husband's favor and vice versa, the recognized Fuaqaha among the mujtahideen mentioned the hadith of Hisham b. 'Urwah, Which has been reported by 'Amr b. Shu'ayb, from his brother, from his grandfather, in which he added:

'And there is no testimony of a wife for her husband's favor and testimony of a husband for his wife's favor.'

It means that the narration of 'Amr b. Shu'ayb, from his brother, his grandfather mentioned that the Messenger (saw) said:

'The testimony of a wife for her husband's favor and the testimony of a husband for his wife's favor is not allowed.'

The Fuqaha's acceptance of this narration (riwaayah) with this addition makes the hadith Hasan and so it is used as proof. Therefore, it is evidence for not allowing the wife's testimony for her husband's favor, and vice versa.

As for rejecting those on whom the hudood had been applied, this had been mentioned in the two hadiths; the hadith of Hisham b. 'Urwah and the hadith of 'Amr b. Shu'ayb, from his brother, from his grandfather:

'And nor the one that has been lashed due to a Hudd (punishment),' ie the Messenger (saw) said:

'The testimony of the one who has been lashed due to a Hudd (punishment) is not allowed.'

These are the evidences for those people whose testimonies are not allowed. Other than these people, the testimony is allowed if there is no text to the contrary. As for what is narrated by 'Aisha that the

Messenger of Allah (saw) said:

'The testimony is not allowed of a traitor (male or female), the one who harbors hatred for his brother, the suspicious and nor a relative' This hadith is weak (da'eef) since it has Yazeed b. Ziyaad ash-Shaami, who is da'eef. Tirmizi said: this hadith of zuhri is not known except from this line of transmission and nor is its *Isnād* sound in our opinion. Thus, the hadith is not deduced as proof. So the testimony of a relative is allowed against and for the favour of another relative except between father and son. As for what has been narrated by Abu Hurayrah that he heard the Messenger of Allah (saw) said:

'It is not allowed for a Bedouin to testify against a person from the village.' This does not mean the Bedouin's testimony is rejected absolutely. This is because the text is specific (khaass), since he said the person from a village. From this we deduce that there is an 'illah for not accepting it, which is the fact that he is a Bedouin ie those Bedouins who live their whole life in the desert. And since the one he testified against is a villager, the Bedouin knows nothing about the village or its people. This means it is, because of the fact he is ignorant of the state of the one he testified against. So the 'illah of rejecting his testimony is the ignorance and not the fact that he is a Bedouin.

The evidence to say the testimony of a Bedouin is allowed is:

'That the Prophet (saw) accepted the testimony of a Bedouin in sighting the moon (of Ramadan).'

So the messenger's acceptance of the Bedouin's testimony is a proof of its permissibility. This indicates that what's intended by the hadith:

'It is not allowed for a Bedouin to testify against a person from the village', is not the fact that it is a Bedouin, but due to his ignorance of the village and the villager. As for what has been narrated

'That Ali b. Abi Talib (ra) testified for Fatimah (ra) in front of Abu Bakr as-Siddeeq (ra) and with him was Umma Ayman. Abu Bakr said to him: if with you there was another man or a woman to testify I would have passed in her (Fatimah's favor).' Fatimah (ra) was angry with Abu Bakr ever

since he assumed the post of the Khilafah especially after he refused to give her the land of Fadak. And Ali was angry with Abu Bakr and did not give him the Bay'ah until after the death of Fatimah (ra). So, from where the testimony of Ali to the favor of Fatimah before Abu Bakr came? If this was regarding the issue of Fadak, then it is not the right with an opponent. Abu Bakr recognized the land was inheritance of the Messenger, but he cited the saying of the Messenger (saw) as proof:

'We the Prophets are not inherited'. If this was in some other matter, then it has not been reported that Fatimah had complained against anyone before Abu Bakr. The tangible facts reject this narration; and so it is rejected by meaning (*diraayatan*). Even if the report was sound, Ali's action is not a proof, because it is the opinion of a sahabi and the opinion of a sahabi is not proof. Since the proof is only that which the revelation (wahy) has mentioned or indicated, ie the Kitab and Sunnah and what the kitab and Sunnah indicated by way of evidences. Moreover, this report contradicts the established hadith of Hisham. So it is rejected due to its contradiction of a sound hadith. As for what was narrated via Abu 'Ubaydah>Hasan b. 'Azib >his grand father Shu'bayb b. Gharqad who said: I was sitting with Shurayh and Ali b. Kaahil and a woman with her opponent came to Shurayh. Ali b. Kahil who was her husband testified for her. Also her father testified for her and Shurayh allowed them to give their testimony. The opponent said: But this is her father and husband! Shuraysh said: Do you know anything that invalidates their testimony? The testimony of every Muslim is allowed.' This is not evidence because it is the judgment of a Qadi. It is not a *Shari'ah* evidence and hence cannot be cited as proof. Perhaps the (above-mentioned) hadith was not authentic (saheeh) for Shurayh or he did not know of it and so he judged in this manner. If he knew about both the hadiths then he would not have given such a judgment. This is because the hadith of Hisham explicitly states the prohibition of a father giving testimony for his son. Besides, the hadith of 'Amr b. Shu'ayb, which the Fuqaha cited as proof, also states clearly the impermissibility of a wife testifying for her husband and vice versa. How can we take the saying of Shurayh and reject what has been proven to be from the Messenger of Allah (saw)? Therefore, we reject the action of Shurayh, the Qadi and take the saying of the Messenger of Allah (saw).

When does the untrustworthy person become trustworthy such that his testimony is accepted?

Trustworthiness (al-'adaalah) in testimony is a basic condition. The one who is not trustworthy his testimony is rejected. However when the Fasiq or untrustworthy person becomes trustworthy his testimony is accepted. When the trustworthiness is realized in him and he has not been previously judged as fasiq, ie a Hudd punishment has been applied on him or his testimony has been rejected.

As for the one whose testimony has been rejected or has been sentenced to a Hudd punishment; in order that he is considered just and his testimony accepted it is stipulated that he has repented and reformed (salah) his condition; besides a year must have passed so that his repentance can be seen and his reform (salah) became clear.

As for the repentance (tawbah), this is because anyone who commits a sin is bound to make Tawbah, then when he makes it Allah accepts it from him as evidenced by the saying of Allah (swt):

'And those who, when they have committed Fahishah (illegal sexual intercourse etc.) or wronged themselves with evil, remember Allah and ask forgiveness for their sins; - and none can forgive sins but Allah - And do not persist in what (wrong) they have done, while they know. For such, the reward is Forgiveness from their Lord.' [Aali 'Imran:135-6]

And He (swt) said:

'And whoever does evil or wrongs himself but afterwards seeks Allah's Forgiveness, he will find Allah OftForgiving, Most Merciful.' [an-Nisa:110]

This indicates that Tawbah from all sins are accepted. However, if such Tawbah does not include a right of Allah which he must discharge, or if it does not include a right of another human being, then it is enough to feel remorse and to resolve that one would not repeat the sin. If the right of Allah, which he must discharge, such as missing the salah and not paying zakah or if the right is related to another human being, such as usurping someone property or hitting a person, then the Tawbah here would be by feeling remorse and resolving not to commit the sin again and leaving the unjust act that was committed. This is like praying the salah, paying the zakah or reimbursing the person from whom the money was usurped in like or

value. Besides, he should give himself up to the one he has committed aggression against him, so that he can take revenge. In this way the repentance would have been accepted from him and he would have given it its due.

This is in terms of the acceptance of the Tawbah. As for when a person can be considered to have rectified himself to give testimony, ie in terms of reconsidering him trustworthy whose testimony is accepted and guardianship (wilayah) is valid. It is not enough just to have tawbah with remorse and to leave the unjust act. Rather one year must pass in which his repentance must be apparent and it must be clear that he has reformed himself before his testimony is accepted or he is accepted to do a work in which trustworthiness is stipulated as a condition, such as in the judiciary for example.

As for the evidence that allows a person to become just after his tawbah and reform and the fact that his testimony is accepted, this is because of His (swt) saying:

'(This is) except those who repent thereafter and do righteous deeds.' [an-Noor:4] This came after His (swt) saying:

'And reject their testimony forever.' [an-Noor:4] The full text of the ayah is as follows:

'And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever; they indeed are the Fasiqun (liars, rebellious, disobedient to Allah). Except those who repent thereafter and do righteous deeds, (for such) verily, Allah is Oft-Forgiving, Most Merciful.' [an-Noor:4-5]

Allah (swt) said: *'Except those who repent'*, after saying: *'and reject their testimony forever.'* [an-Noor:4] When the exception comes immediately after words arranged together, then the exception refers to everything that came before, unless there is evidence to the contrary, such as a person that says 'his wife is divorced and his slave is free and he is bound to make pilgrimage (one hajjah), unless he entered the house'. The exception (unless) applies to all of the three matters. Thus, the exception (in the verse) refers to everything (which came before). However, there is evidence to say that the exception does not apply to flogging, and so this *Hadd* punishment is not excluded. There is an *Ijmaa'* to say the exception does not refer to flogging. So other than flogging remains exempted. So His (swt)

saying: *'Except those who repent thereafter and do righteous deeds.'* [an-Noor:4] is an exception to His (swt) saying: *'and reject their testimony forever.'* [an-Noor:4] So He (swt) exempted from the non-acceptance of testimony those who have been flogged due to defamation (*qazf*) after they have repented, when He (swt) excluded *'Except those who repent thereafter and do righteous deeds.'* [an-Noor:4] from His (swt) saying: *'and reject their testimony forever.'* [anNoor:4] This means it is allowed for the trustworthiness (*'adalah*) to return to someone who has been considered *fasiq* due to a Hadd punishment being applied on him, if he has repented and reformed himself, and it is allowed to accept his testimony.

As for the evidence that repentance on its own is not enough, but rather it must be established that the person has reformed himself, this is due to His (swt) saying: *'and they made righteous deeds (aslahoo).'* [a-Noor:4] after His (swt) saying: *'those who repent'* since the complete ayah says: *'Except those who repent thereafter and do righteous deeds.'* [an-Noor:4] This indicates that it must be established that the person has repented and reformed himself. This is because the *waw al-'Atf* (conjunction) means to add one thing to another. One needs to establish both things, ie repentance and self-rectification. As for the fact that a year must pass in which the repentance can be seen, and it can be clear he has reformed himself. This is because the meaning of the ayah: *'do righteous deeds (aslahoo,'* indicates that the rectification must be realized with repentance. He expressed the word 'islaah' (rectification) in the past tense indicating reform has been realized, ie except those who realized the repentance and self-reform. The realization of self rectification inevitably requires a period of time in which one can see this has been achieved. The verse does not indicate a specific period of time, but indicates the realization of self-rectification, and this requires time for the realization to take place, ie for a period in which realization of rectification has been achieved. As for the time period being a year, this is because when 'Umer lashed Sabeegh and jailed him for his question about 'Az-Zariyyat and An-Nazi'aat' (surah 51 and 79) he ordered to be boycotted till he repented. So, he ordered that he is not talked to for one year, thus indicating one year is needed for realizing the reformation togetherv with repentance. When the repentance of Sabeegh has been proved to 'Umer, he wanted to realize of his reformation, so he estimated one year period for that. Although the action of Umar is not a

Shari'ah evidence, however it can be taken into account in the absence of evidence. Moreover, realization of self-rectification is a matter, which is verified from the reality. And the reality is that man requires the four seasons of a year to pass before his condition in terms of his inclinations and desires is known. That is why the estimation of a year is closer to the reality. Therefore, repentance on its own is not enough to say that someone has regained his trustworthiness or that he can be reconsidered as being just. Rather, the repentance must be accompanied by self-reform for a period a year. If that happened, then the testimony is accepted from the person that has previously had either a Hadd punishment applied on him or his testimony was rejected due to the loss of 'adaalah. Besides, his guardianship will be valid and he can undertake the task in which 'adaalah is stipulated.

It is invalid for the Qadi to give a judgment based on his knowledge

It is not allowed for the Qadi to judge according to his own knowledge, whether he acquired that knowledge before he assumed the post of Qadi or after. This is due to what was narrated by 'Aisha, 'that the Prophet (saw) sent Abu Jahm ibn Hudhayfah as a collector of zakat. A man quarreled with him about his sadaqah (i.e. zakat), and Abu Jahm struck him and wounded his head. His people came to the Prophet (saw) and said: Revenge, Messenger of Allah! The Prophet (saw) said: You can take this much. But they did not agree. He again said: You can take this much, so they agreed. The Prophet (saw) said: I am going to address the people in the afternoon and tell them about your consent. They said: Yes. Addressing (the people), the Apostle of Allah (saw) said: These are people who came to me asking for revenge. I presented them with so much and so much and they agreed. Do you agree? They said: No. The immigrants (muhajirun) intended (to take revenge) on them. But the Messenger of Allah (saw) commanded them to refrain and they refrained. He then called them and increased (the amount), and asked: Do you agree? They replied: Yes. He said: I am going to address the people and tell them about your consent. They said: Yes. The Prophet (saw) addressed and said: Do you agree? They said: Yes.' The angle of deduction (wajhul

istidlaal) in this hadith is that these people came to the Messenger (saw) in his capacity as a ruler seeking a judgment of revenge i.e. they demanded as the guardians of the victim that the murderer be killed. The Messenger (saw) tried to change their demand to blood money (diyyah) and to grant pardon. They rejected when he offered them an amount of money but accepted his second offer. However this acceptance was in front of him only and there was no testimonial proof that they had accepted. If it was allowed for the qadi to give judgment based on his knowledge then the prophet would have accepted their pardon and judged that they be awarded the amount they accepted. But he (saw) informed all the people that they had accepted so that the people can bear witness to what was accepted. When they rejected that they had given their acceptance he (saw) agreed to their rejection. He did not judge on the basis of his knowledge that they had accepted the offer before him. That is why he went back and increased the amount he offered then informed the people and the people said 'we accept'. And at that point after the people had witnessed their acceptance did the prophet judge that they are given the amount accepted and he accepted their pardon. So this is evidence to say the Qadi cannot judge by what he knows. It has been narrated by Ibn 'Abbas

'That the Messenger of Allah (saw) made al-Ijlaani and his wife utter the imprecation (Li'aan) between themselves. Shaddad b al-Haad said: Is she the woman about whom the Messenger of Allah (saw) said: 'Had I stoned someone without evidence (bayyinah) then would I have stoned her?' He said: no. That woman used to display (such behavior) after (embracing Islam).' And in another narration: Ibn 'Abbas said:

'No, that woman used to display iniquitous behavior after (embracing) Islam.' Also Ibn 'Abbas narrated that the Messenger of Allah (saw) said:

'Had I stoned anyone without proof I would have stoned such and such woman.' The angle of deduction in this hadith is that the Messenger (saw) knew that the woman he mentioned was a fornicator. He knew this from the men who used to visit her, from her appearance and area in which she lived. There is no doubt that the appearance and exterior of a prostitute indicates she is a

fornicator. So what about when one sees men visiting her? Ibn 'Abbas said:

'She used display iniquitous behaviour after (embracing) Islam.' It means she used to show indecent behavior, ie she was ready to commit zina. All of this is acquired from knowledge. This indicates that the Prophet's saying:

'Had I stoned anyone without proof I would have stoned such and such woman.' This means the Messenger (saw) knows that she is a fornicator and the judgment regarding her is stoning, but due to the absence of testimonial evidence (bayyinah) he did not stone her. This indicates that the Qadi does not judge by his knowledge. This was followed by Abu Bakr (ra) who did not judge according to his knowledge. It has been narrated by Ibn Shihab from Zayd b. as-Sult that Abu Bakr as-Siddeeq said:

'Had I saw a man violating a Limit (Hadd) of Allah, I would not have seized him and nor called anybody regarding him unless I had someone else with me.' It might be said these evidences are with respect to punishments ('uqubaat), whilst the hadith of 'Aisha is regarding Jinayaat and the hadith of Ibn 'Abbas is to do with Hudood. When eveidence comes in a subject, then it is it specific (khass) to that subject. So these evidences are proof that the qadi should not give judgment based on his knowledge in punishments ('uqubaat), but not in other subjects. As for transactions (mu'amalaat), that requires different evidence. The answer to this is that the hadith of 'Aisha is not about punishments ('uqubaat) only, but it relates to punishments and money. The Messenger's request includes pardon instead of revenge and the offer of an amount of money they would accept to take. When he (saw) informed the people he informed them about their acceptance of a pardon and a sum of money since he (saw) said: 'These are people who came to me asking for revenge. I presented them with so much and so much (money) and they agreed.' This means they agreed to give pardon for revenge and to take an amount of money offered to them. When they rejected the offer and he increased the amount he went to the people saying: 'do you agree?' He meant the amount after the increase. When they had agreed after the increase, the Messenger (saw) did not give the judgment of pardon except after informing the people so that they can bear witness.He did not judge

that the amount they agreed to should be paid, because they rejected it before the people. So he increased the amount and judged by it after informing the people and after the people had agreed to it. So the hadith can be used as an evidence for money and punishments, and hence it is evidence to say it is not allowed for the qadi to give judgment based on his knowledge.

One might say that the Messenger (saw) did give judgment based on his knowledge. Abu Hurayrah narrated that:

'Two men who were disputing over a matter came to the Messenger of Allah (saw). The Messenger (saw) said to the plaintiff: 'bring your proof' but the man was unable to do this. So he said to the other man: 'Take an oath.' The man took an oath in the name of Allah Who there is no god save Him that he (the opponent) has nothing with him. The Messenger of Allah (saw) said to him: You have done that. But may Allah forgive you for the sincerity (ikhlaas) by which you said 'there is no God but Allah'.

And in the narration of al-Hakim:

'No you have it so give back his right. Then he said: your testimony that there is no God but Allah is an expiation (*kaffaarah*) for your oath.' And in the narration of Ahmad:

'Jibreel came down to the Prophet (saw) and said: **'He is a liar. He has taken the right of the other. So, he ordered him to give him his right, and the expiation for his oath will be his knowledge that there is no God but Allah.'** This hadith is evidence to say the qadi can give judgment based on his knowledge. The Messenger (saw) gave judgment based on his knowledge after the occurrence of the *Shari'ah* reason that necessitates the rejection of the case, which is the oath. So by greater reason it is allowed to give judgment based on one's knowledge before the occurrence of the *Shari'ah* reason. The answer to this is from two angles: First: This hadith has been declared defective by Ibn Hazm due to Abu Yahya who is Musda' al-Mu'arqib. It was also declared defective by Abu Hatim via the narration of Shu'bah .>'Ataa b. as-Saa'ib>al-Bakhtari b. 'Ubayd>Abu az-Zubayr. And what has been reported by Ahmad from the narration of Ibn 'Abbas, has in its

Isnād ‘Ataa b. as-Saa’ib and many have spoken (against) him. So the chain of the hadith is discredited, and thus it should be rejected and not cited as proof.

Second: If we suppose the hadith is authentic then the news given to the Messenger (saw) in this issue was via revelation (wahy) and whatever comes via revelation is acted upon, while the testimonial proof and oath are both rejected. This is because the revelation is the real truth. So, one should not make analogy between knowledge of something and knowledge of revelation. Moreover, knowledge via revelation is specific to the Messenger (saw). It is part of his special nature and not demanded from his Ummah and therefore cannot serve as evidence for judgment with respect to the Ummah. Thus, this cannot serve as evidence to permit the judgment of a Qadi on the basis of his knowledge.

It might also be said that the Messenger (saw) judged according to his knowledge regarding maintenance in the story of Hind, wife of Abu Sufyan. The Messenger (saw) permitted her to take what was enough for her and her children seemingly (bil ma’roof). He decreed that she and her children desreve maintenance, because he knew she was the wife of Abu Sufyan and did not seek proof. This indicates that the Qadi can give a judgment according to his knowledge regarding maintenance. The answer to this is that Hind did not complain to the Messenger (saw) about Abu Sufyan for the incident to be considered a judicial issue. Rather she asked if it was allowed for her to take from the money of Abu Sufyan for he is a miserly man. In response to her question he (saw) said:

‘Take what is enough for you and your children bil ma’roof.’

This is an answer to a question, ie a fatwa. The statement of a mufti depends on the correctness of the words of the one who is seeking a fatwa. So the Messenger (Saw) did not judge on the basis of his knowledge, but rather answered a question. So the hadith cannot serve as an evidence to permit the judge to give judgment on the basis of his knowledge.

Based on this, it is not allowed for the qadi to give judgment on the basis of his knowledge, whether in Hudood (punishments), jinayaat (crimes), amwal (funds), transactions (mu’amalaat) and tasarrufaat (dispositions) due to the hadith of ‘Aisha and Ibn ‘Abbas.

Rather the Qadi must demand proof and not judge without proof. That is why the Messenger (saw) said:

'Bring your two witnesses or take an oath.' And he (saw) said:

'You do not have anything other than this.'

The examination and inspection by the Qadi

The Qadi is considered a Qadi when he is in the judicial court. If he is not in the judicial court he is not considered a Qadi. This is because the *Sharī'ah* court, i.e. the judicial court is a condition for the validity (sihhah) of the judgment (qada). 'Abdullah b. azZubayr said:

'The Messenger of Allah (saw) gave judgment to two disputants sitting in front of him'

This hadith is evidence to say that the qadi gives judgment in the judicial court in which both disputants sit before the judge. If the qadi examined something in court, inspected it and attained some knowledge about it, or he witnessed something, then he is allowed to pass judgment according to this examination and knowledge,, because this is knowledge acquired in the judicial court. This is like the knowledge in a testimonial evidence or the knowledge in an oath. This does not come under the judgment of the Qadi by his own knowledge. Rather this Qada (judgment) is due to what has been proven in a court of law. If he saw a girl in the court and he found her to be baaligha (mature) or he inspected some goods in court and found them to be damaged or faulty and gave a judgment on this basis, then his judgment will be correct. It will not be a judgment based on his knowledge, but it is based on proof. However, if the qadi saw or witnessed something outside the judicial court and he was sure of what he saw, he will not be allowed to give judgment based on his seeing or witnessing. If he did that, then it would be considered as judgment based on his knowledge, which is not allowed. If he saw or witnessed something and he was not in court, then he cannot give judgment on it unless that is presented in the court and he saw it or witnessed it there; or a testimony given by a trustworthy established it. So the seeing or witnessing by a qadi is recognized and judgment is given on its basis as long as it is presented in court. Seeing

is like hearing, so it is not correct to stone someone claiming that he is a fornicator because he was seen fornicating. It is not correct to separate a husband and wife by claiming that one heard the husband give talaq to his wife, and nor is it correct to flog someone by claiming that one witnessed him drinking wine. Indeed one cannot give judgment on the basis of what one saw, heard or witnessed unless it was established in the judicial court. This is treated like the proof, confession or oath. They are not considered valid (for judgment) unless they were given before a judicial court; and so the same applies to seeing, hearing and witnessing.

This is with regards to a case where there are two disputants. As for the issues in which there are no disputants, such as the issues of *Hisbah* and violations (*mukhalafaat*). Here the seeing and witnessing is considered wherever it happened. This is because in such issues a judicial court is not stipulated regarding them; they can rather be examined at any time. This is because the hadith says:

'The Messenger of Allah (saw) commanded that the two disputants sit in front of the judge'

The implicit meaning (*mafhoom*) of this hadith is that it is not stipulated for the single disputant to sit before the qadi. The Qadi may give a judgment regarding a person while he is standing or lying down. The judgment may be passed in the court or the market or elsewhere. The Messenger (saw) was in the market and he saw dampness in the heap of food. So he ordered that the damp food be displayed on the top so that the people can see it. So he (saw) came across the heap of food when he was walking in the market. It was on display to be sold. When he obliged the owner to put the damp food on top, he passed that judgment while he was in the market. He was not in the judicial court. This indicates the judicial court is not stipulated in matters of the *Hisba*. It also indicates that judgment based on seeing or witnessing is correct. The Messenger (saw) saw the heap of food which was dry at the top. After inspecting it he found that the food was damp below. And so he gave judgment on the basis of what he saw and witnessed. Therefore, seeing and witnessing are correct in matters of the *Hisbah*, and it is correct for the Qadi to give judgment based on what he saw or witnessed. Similar to the case of *Hisbah* are the violations (*mukhalafaat*). So any issue in which there is no two disputants, it is valid for the qadi to give judgment based on

inspection and witnessing.

Information (*ikhbar*) and inquiry (*istikshaaf*)

Ikhbaar means to inform about a matter. As for istikshaaf it is the description of a specific reality such as peace of land, factory or house etc. In terms of ikhbaar it is not stipulated that it is on the basis of certainty, rather it is enough to be on the least amount of doubt, since it is not a testimony but ikhbaar and ihkbaar is open to be true or false. This is because the nature of a report (khabar) is that it is open to be true or false and so this applies to ikhbaar (reporting). That is why what is stipulated in testimony is not stipulated in ikhbaar. So no specific number is stipulated. The information given by one person is enough if the judge is convinced of it. If he is not convinced he can ask for more information until he is convinced. Likewise, it is not stipulated that the person be just ('adl). Any person can give information, whether he was trustworthy ('adl) or not, and whether it was allowed for him to testify or not. So the father can give information about the maintenance of his daughter, and the enemy can give information regarding the price of the property of his enemy, and so on and so forth. It is not necessary for those who give information to be experts. They may not be experts, but have knowledge of the matter about which they are giving information. That is why they are considered as informers and not experts. So regarding a wife's maintenance, price of goods, the rent for a house and mahr al-mithl (equivalent dower) etc,the Qadi will give judgment on such matters based on the information he gets from informers and not on their testimony. Any matter that requires giving information, it is not correct to seek or accept a testimony about it. This is because the intention is not to prove the claim but to assess something, and this occurs through giving information by somebody. Any matter in which information is required, the information can be taken from anyone and regardless of the number.

Similar to ikhbaar (information) is the istikshaaf in terms of it being information, in which the number or trustworthiness ('adalah) is not stipulated. However, the difference between ihkbaar and istikshaaf is that regarding ikhbaar, the Qadi does not need to request the informer to know the matter and then inform about him. Rather the informant informs the Qadi what he knows, whether he knew it

after the qadi requested him to find out the information, such as the mahr al-mith (equivalent dower), or he knew it before naturally without any request, such as informing about maintenance etc. This is different to istikshaaf. The inquiry is not correct unless it is based on a request by the Qadi. So if some people came and said to the Qadi that the house of so and so is lawful or that the land of so and so is sandy and no vegetation grows there or if someone's factory is out of service etc, without the Qadi requesting an enquiry and inspection, it is not correct to consider this as istikshaaf. This is because the assets (a'yaan) change and they are subject to change all the time. It is not possible for the Qadi to judge on the state of an asset unless he has witnessed it or heard the information of someone who has seen it at the point when he informed the Qadi. That is why the informant is not requested to witness the asset before giving the information. That is why it is not correct to inform what he has inquired about, unless he was entrusted by the Qadi to do the inquiry and give the information. This is in order the information before the Qadi about the reality is the same as it is at the time of ikhbaar. That is why he requires a request from the Qadi to undertake the inquiry. However, if the informant investigated the land before attending court and he informs about his inquiry at that moment, then it will be accepted from him, because he is informing about an inquiry that took place at the time the information was presented, so there is no possibility of change.

Documentary evidence

Allah (swt) said:

'When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuses to write as Allah has taught him.' [Baqarah:282]

This is a command from Allah (swt) to His believing servants that when they engage in fixed transactions they should write them down. So that it is ahfaz (more preserving) of its scope and time and adbat (accurate) for the witness. This writing is but the document by which a person establishes his right. That is why documentation is one of the testimonial evidences. Allah (swt) ordered the writing down of the contract when He said: 'write it down' for the sake of documentation and protection. Therefore,

written documents are one of the testimonial evidences because Allah (swt) has ordered them.

As long as the command to write down came in a general form *'faktubooh'* (write down) it includes al writings. So it includes every written document. However, the Legislator did not clarify the types of written documents in detail because the hukm came in a general form, so its reality is what will clarify its types. By examining the reality of the known written documents until today we find there are three types: Singed documents, documents issued by official departments and civil documents and unsigned ordinary documents.

Signed documents

All signed documents, whether they were signed in front of a trustworthy clerk or official department or if the owner signed it himself and not in front of an official department. All of this is considered admissions by writing; and the rules of admissions apply on them. The fact that they were signed in front of a trustworthy clerk or before an official department does not add anything to a document except that it is easier to establish it had been signed. Otherwise the ruling for all of them is the same which is that of admission by writing. Admission by writing is exactly the same as the verbal admission without any difference between the two.

As for proving it has been signed, if he admits it is his signature, then the signature has been proven, and thus the admission is proved, ie his admission that it is his signature is admission of whatever the signed document includes in terms of money or other issues such as marriage, divorce, raj'ah, sale, gift and the like. So, the admission of signature is an admission of whatever one has signed up to. However, if he admits he signed the document but rejects what is contained in the document in terms of debt and the like, and the plaintiff consented to that, then in this case the admission of signature will not be an admission of what is in the document, and he will not be accounted for what is in the document. Such as if someone claims such and such debt from somebody else and presented the document signed by him (the defendant). However, the defendant admits he signed the document but said; I signed the document to him formally so that he withdraws its amount from the bank, and I am not indebted to him. If the plaintiff agreed to that, this

would invalidate the admission of the amount, and the case will be rejected even if he admitted the signature. However if the plaintiff does not agree to that, then there is no value in this case to his words; and thus his admission of signing the document is taken as an admission of what is in the document, and there is no value to his rejection. He will not be requested to present evidence to prove that what is in the document is not debt on him, because testimony is not sought for negation. The plaintiff will not also be required to take an oath, because the one that takes an oath when he fails to present evidence is in the case there was evidence and he failed to present it. However, in this case he is not obliged at all to provide evidence; so the plaintiff does not take an oath; he is rather entitled to what is contained in the document once there is admission of the signature.

If he does not acknowledge signing the document, he rather rejects it, or if the signatory is absent or deceased, then the document cannot be acted upon and it will not be considered a written admission. It rather requires another testimonial evidence to prove the (authenticity of the) document. One should not say it is acted upon if his signature is known and famous. This is because if it is well known, then it can also be counterfeited; so it is open to possibility, and the well known principle says: 'if the evidence is open to possibility, then its use as proof is invalidated', and the same applies to signatures. One should not say the experts should be brought to verify the signature, because the views of experts are like *ihkbaar* (informing) and not like testimony; therefore it cannot be used as a testimonial evidence for the case. However, if the signature was proven by a testimonial evidence such as if the plaintiff brought two witnesses that testified the person signed the document in front of them, then the signature is proved to be his as if the person himself had admitted to signing the document. The testimonial evidence here is established for the action of the signatory and not the signature.

All documents are the same in this regard, whether they are financial documents or personal letters. They are known as letters, bequests or recognition of a right etc. All of the signed documents take the ruling of admission (*iqrar*), because they are an admission of writing. However, in respect to ordinary documents, i.e. letters, they must be addressed, i.e. directed to the person, and its address must be

clear with no ambiguity. If it is not directed to the person, then it is not a document. As for telegrams, they are not considered written documents, even if their origin is lodged in the postal department and signed. This is because telegrams are not signed by their sender in the presence of a designated employee, and the signatory is not investigated. That is why it is not considered a written document. As for if the defendant acknowledged it is his, the judgment is given based on his admission and not on the basis of the telegram.

Official documents

Official documents are the written documents arranged by employees designated to arrange that in accordance with the legal circumstances. They are taken as a standard without obliging the one that presents them to prove their contents, and they are acted upon as long as they have not been proven to be forged. So the information of a sentence, the certificate of marriage, the divorce document, and birth certificate etc and other such documents issued by the official departments of state; all of these are considered a testimonial evidence without the need of proving their contents or proving them as documents. As for copies of such documents, they are not acted upon except after verifying that the picture is a true copy of the original document, which was arranged by the designated employee. In verifying the copy it is not enough to have the department's stamp or the signature of the employee who produced it. Rather the employee needs to himself inform the judge that this copy is a true copy of the preserved original document after comparing them together. If that does not take place, then the copy is not considered testimonial evidence. To consider it as such, it is enough to have one employee, because this is ikhbaar, and so no specific number has been stipulated. As for the photocopy of the document, its ruling is like the document rather than the ruling of the copy. This is because it is exactly the same like the origin, rather than a copy of it. This is because photocopies are exactly the same like the origin. However, to verify that this photocopy is exactly like the original document, it has to be compared to the original document by the judge or his deputy. However, if the disputant acknowledges that this photocopy is correct and it is a true copy of the origin, then it is enough to accept his admission and thus it is considered a document.

Documents issued by civil departments

Documents issued by civil departments do not have the force of official documents. Rather they are not considered of the written documents, which are a type of the testimonial evidences. However, it is correct to rely upon them if the disputant acknowledges them, and thus accepted as a proof for the one who presented them. So, the invoices issued by auditors' departments, certificates of private schools, tickets from travel agencies etc are considered as ordinary papers and not documents. However, whatever has been contained in them is considered a proof for the one who presented them. This is because presenting them means acknowledgment of the validity of what is in them once he cited them as proof. If the disputant agreed to that, then it is a proof against him.

Unsigned ordinary documents

Ordinary documents are papers that have been written by the person's handwriting, or he was the one who dictated the debt to the clerk, or the papers he himself put them together or asked someone else to put them together for him; all of these are considered ordinary documents. They are like the unsigned letters, or the trader's logbooks etc. These documents take the same ruling as signed documents; where the writing is equivalent to the signature; and so their ruling is the same as that of admission (iqrar) of writing. If he admits the handwriting is his, or that he is the one that ordered its writing, or he dictated it to a clerk etc, then it is like admission of signature. His admission of this is admission of whatever the written document contains or of the thing written in the document, and so he will be obliged of it. An example of this is the organization and arrangement of registers and the signs put on them in accordance with the technical terms of traders, or they are terminologies admitted by those who have agreed upon them. These are treated the same as singed documents, and so the writing is like the signature.

External/foreign documents

Official documents issued by official departments of foreign states, if they are put together according to their legal situations, then they are considered as testimonial evidences. This is because it is allowed for

the Muslim to act upon the rules of dar alKufr (kufr homeland) whilst he lives there. If a document is drafted in dar al-kufr, ie by a foreign state according to its own laws, then this document is considered like the document drafted in dar al-Islam. However, it needs to be verified to make sure it has been issued by the department in question. Verification can be achieved if information came from those who drew up the document. This can be either by an employee giving information in front of a Qadi or in front of someone else delegated by him to hear that information. The legalization of official departments regarding such document is enough as verification.

Presenting the document

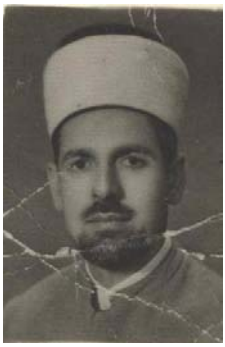
A document in origin is in the hands of the plaintiff. If it is in his possession then, it would not become testimonial evidence unless he presents the document to the Qadi and it remained in the case file until the Qadi passes the sentence. He is not entitled to restore it before the sentence. It is testimonial evidence (bayyinah) and such evidence must be retained until the judgment is passed. Do you not see that if the witness were to take back his testimony before the judgment in font of a judge, then his testimony would be considered non-existent; so the same applies to documents? However, there is nothing to prevent the person from taking a copy of it. If the document is not in the possession of the plaintiff then it is upon the plaintiff to produce it. If he was unable to do so, then the matter is examined. If it is not in the official departments and nor in the possession of the defendant, then he is considered unable to bring any proof if he was not able to present it in court. However, if it was in the official departments, then the court must decide to obtain the document form the department in question, whether it was demanded by the plaintiff or not, as long as he was unable to presente it. If it was in the possession of the defendant and the plaintiff requests that his opponent is obliged to present the document, then this matter also needs to be examined. If the opponent admits he has that specific document, then he is obliged to produce it in the court. If he does not produce it then his refusal to produce it will be taken as an admission of the documents existence. Then at that time the document is considered as if it has been presented by the plaintiff but with the descriptions agreed by the

opponent. If the opponent rejects that the document is in his possession, then the matter is examined. If the plaintiff has a copy, then the judge obliges him to prove that the document is with his opponent. If he cannot prove this, then the opponent will take an oath. If he takes an oath, then the document is rejected even if its copy was present. If he refrains from taking an oath, the Qadi will consider the copy of the document possessed by the plaintiff is a true copy of the origin, and considers it as a testimonial evidence for the case.

Wednesday 15 Sha'baan 1385

8/12/1965

About the Author



Shaykh Ahmad Da'ur

Graduated from al-Azhar University.

He was a member of *Hizb ut-Tahrir*.

He passed away to the mercy of Allah in the year 20XX