Authentication of Oral Evidence in Islamic Law of Shahadah: A Critical Analysis of Qanoon-e-Shahadat Order in the Light of Shariah Teachings

Hafsa Abbasi
PhD Scholar at IIU Islamabad
Lecturer, Department of Law, Allama Iqbal Open University Islamabad.
haf.abbasi@gmail.com

Dr Muhammad Asim Iqbal
Assistant Professor, Department of Law, International Islamic University Islamabad.
drmaiqbal@live.com

ABSTRACT

Evidence is like a backbone for any trial procedure. Islamic law of evidence has a complete and fruit full mechanism for admission of Oral Testimony. It ensures authentic and reliable oral testimony in all respects. Qanoon-e-Shahadat Order on the other hand follows evidence Act 1872 except few articles that were changed during the process of Islamization. Purpose of this research is to highlight the lacunas in Qanun-e-Shahadat Order regarding authentication of Oral Testimony in Shariah. Islamic law of evidence stipulates strict conditions regarding number, character, screening, and rejection of witnesses, which are not taken seriously by Qanun-e-Shahadat Order and need to be analyzed and compared in detail to have a better picture of lacunas present in Qanun-e-Shadat Order. The detailed conditions imposed by Islamic law regarding authentication of women's testimony, hearsay rule and purgation process are also not legislated in QSO according to the spirit of Islamic law. These areas need to be explored, highlighted and discussed due to increased importance and are overlooked by Qanun-e-Shahadat Order, which is a matter of serious

concern. Being a Muslim country law of evidence of Pakistan must abide by the rules of Quran and Sunnah.

Keywords: Qanun-e-Shahadat Order (QSO), Evidence, Authentication, Oral Testimony, Purgation.

1. Introduction

Islam introduced a very compact and universally applicable law of evidence. The in-depth wisdom under these rules is still being discovered by the Jurists and legal experts. Their effectiveness in Islamic legal history can be witnessed by the courts prevalent at that time, like Ottoman and Abbasid courts etc. The speedy trial procedure prevalent in classical Muslim Empires is the clear evidence. There is no legal aspect that is not covered by the Islamic law of evidence. It is a well-versed system.

Evidence Law in English legal system is based on man-made rationale. It is different from Islamic law in many ways, for instance, it does not possess a system of purgation of witnesses. Another major difference is that Islamic law of evidence classifies different nature of cases and crimes and fix different number of witnesses for each. In English law there are no such compulsions regarding number of witnesses. Another difference is limitation of blood and close relations for testification in each other's favour, as who can testify for whom. Like, in Islamic law, a wife cannot testify for her husband. A brother and father cannot testify for brother or son. These are just a few examples. English law does not put any such conditions. There are many more differences between both. In fact, their base is different. One is God made law and other is man-made law.

Unfortunately, Pakistan has adopted Evidence Act 1872, which was English law (man-made law). This law prevailed in Pakistan till 1984.

After that Qanun-e-Shahadat 1984 (Q.S.O) Order was enforced, repealing previous Evidence Act 1872. But Q.S.O is a mere repetition of Evidence Act 1872 except article 3, 4 to 6 (with reference to Hudud), adding article 44 and addition of a proviso to art 42.

This research is going to make a detailed shariah analysis of provisions of Qanun-e-Shahadat Order that are related to authentication techniques of oral evidence. There are many un-Islamic provisions in Qanun-e-Shahadat Order. This article shall focus on validity of provisions that are particularly related to Oral Testimony. Law of evidence is the backbone of all the procedural laws. So, this area is quite important and must not be neglected.

A lot of research has been done in the area of Islamic law of Evidence. But very less work is done to highlight the lacunas in QSO from Sharaiah perspective. Islamic ideology council proposed a draft of QSO Which was presented before promulgation of QSO 1984.

2. General Principles of Evidence in Islamic Law

The judge has a central role in judicial proceedings whose responsibility is to establish both the right of the Lord (public rights) and the rights of man (Private right) to settle disputes by attaining competent evidence. There are three ways for the judge to acquire knowledge;

1. By confession
2. By oath
3. By evidence

The matter can be resolved speedily if the accused confess the facts. If he does not accuse does not confess, then the plaintiff is supposed to produce evidence. In case the plaintiff fails to produce evidence, the defendant shall be required to take an oath in favour of denial. [1]

Oral testimony (*Shahādah*) is a major type of evidence in Shar'īah. Other evidences include written documents, circumstantial evidence and scientific evidence. The word used for Evidence in Arabic is "*bayīnah*". The literal meaning of this term is "visible or glowing". It is derived from the word "tibyān" which means an act of explaining and showing how something works or is done or emphasizing; publishing; making evident. It means visible or strong evidence.[2] Technically, it denotes the strong argument, or evidence. It means a very strong proof. The technical definition of this word is *bayīnah* is very well defined by *Ibn Qayyim.*[3]

It is worth mentioning here that similar kinds of proofs are mentioned under the English legal system, other than Oath and 'Ilm al Qāḍī (knowledge of a judge), as modes of authentication for physical There is not much difference in the law of evidence in English law and Sharī'ah law. Both the legal systems require that the evidence must be reliable, authentic, and must not be hearsay. But the techniques of authentication of evidence, especially oral testimony are not similar. [4]

3. **Shahādāh – Oral Testimony**

This mean of proof is dealt in Islamic law as the oral testimony (*Shahādah*) which is equally important in the western legal systems. It plays an important role in proving facts before the court. When someone is accused of a crime and he denies it, the burden of proof lies on the plaintiff. Thus, the judge asks the plaintiff to bring his witnesses or any other evidence to support his claim.[5]

General rules of testimony in Islamic law are discussed in the books of *fiqh,* under "*kitāb-al-shahādāt*". These fiqh books have categorized this topic under the following headings; rules of admissibility of testimony,

conditions for the admissibility of testimony; the reasons of rejection of testimony; disagreement of witnesses in their testimony, etc.

Testimony in court is dealt as a religious duty.[6] It is an important obligation upon all Muslims. Messenger of Allah (PBUH) is reported to have said:

"Should I not tell you of the best witnesses? They are the ones who produce their evidence before they are asked for it" [7]

Quran states that witness cannot refuse to give testimony once they are demanded. In Islamic law, it is a sin to conceal facts in front of the court. The reason behind it is that it affects the rights of mankind. A verse of *Qura'n* regarding this matter is;

وَلَا تَكْتُمُوا الشَّهَادَةَ ۚ وَمَن يَكْتُمْهَا فَإِنَّهُ ءَاثِمٌ قَلْبُهُ [8]

"And do not conceal testimony, for whoever conceals it - his heart is indeed sinful"

This verse denotes that *shahādah* is a religious duty and it must be treated as Amānah. Returning of Amānah is obligatory on a Muslim.

4. Categories of Shahādah

There are different classifications of testimonies. Islamic Law deals with different crimes requiring different number of witnesses for each. For instance, some Hudud crimes require four witnesses and some require two. Similar is the case with other crimes.

Marghīnānī states in his book that there are two broad categories of testimony in Islamic law; [9]

1. Testimony in the matters related to right of Allah Almighty
2. Testimony in the matters related to right of man

Numerical strength of witnesses varies in both the above cases. In fact, it is fixed by the Qur'ān on case-to-case basis. In cases of testimony for ḥudūd

offences, right of Allah Almighty is involved. While in the matters related to private rights and financial matters, right of man in involved. [10]

In cases of Ḥudūd, the rules of testimony are more stringent. Women are specifically excluded from being witness in these cases. Nevertheless, in cases of hudūd and qiṣaṣ, witnesses are at liberty either to give or refrain from giving testimony. Rather in these cases it is preferable to conceal the testimony.[11] Prophet (PBUH) said to a person who had borne testimony "Verily it would have been better for you, if you had concealed it".[12] But this rule does not apply in the case of theft where it is not encouraged to conceal the testimony. Rather it is an obligation to give testimony. The reason of excluding theft from this rule principle is that otherwise the right of proprietor will be compromised which is against the rules of justice. [13]

Discussing the rationale of preference to conceal testimony in case of ḥudūd and qiṣāṣ, *Marghīnāni* says that it protects from two harms; first is, defamation of character of offender and secondly the *ḥadd* punishment itself.[14]

Witness in ḥudūd and qiṣaṣ must be male and thus the evidence of a woman is not admissible in these instances. This opinion is unanimously agreed upon by pre-modern jurists, including Imām *Mālik* , Abū Ḥanīfa, Shāfi'ī, and Aḥmad bin Ḥambal.[15]

The numerical strength of witness varies according to the nature of the matter. Matters related to Ḥudūd involve right of Allah Almighty while financial and private matters include right of man. [16] In Ḥudūd offences where Right of Allah Almighty is involved, are the once which affect the society. Punishments of these offences are harsher and deterrent as compared to personal rights.

Essentially, there are four categories of testimony;

1. Testimony requiring four witnesses
2. Testimony requiring two witnesses
3. Testimony of one man and two women
4. Testimony of woman alone

Islamic law requires testimony of four men in crime of fornication and slandering. All the other Ḥudūd offences and punishment of Qiṣāṣ requires two male witnesses. Two male witnesses are required in cases of commercial transactions. If two male witnesses are not available, then testimony of two women and one man is admissible. Testimony of a woman alone is allowed in the cases where presence of a man is very rare. [17]

It is pertinent to mention here that the rules regarding number of witnesses in English law are not fixed like Islamic law. However, QSO stipulates in art 17 about competence and number of witnesses. It says that in financial matters two men will testify. In case of a woman two women will testify instead of one man. But all conditions regarding number of witnesses are not applicable for Hudood cases.

It is further stated, that in all matters (other than Hudood and financial matters), testimony of one man or one woman shall be admissible. Here no specification is made for family matters. Islamic law deal with every matter separately. As far as matter of single women's testimony is concerned, there are no separate rules regarding in QSO. Although narrations of Prophet (PBUH) guide in detail about it. Most important matter of Hudood laws is neglected by QSO as if it does not exist. It vaguly states that all other matters other than financial matters would be testified by one male or one female testimony. Without differentiating between family matters or

custody etc. in all other matters there is no way one women's testimony is equal to the testimony of one man.

5. Conditions of Testimony in Islamic law

As far as the conditions for carrying or bearing of testimony (Shurūt at-taḥammul) are concerned, they are broadly categorized into two categories:

1. General or basic Qualifications
2. Special Qualifications

The Muslims jurists are of the view that admissible and competent testimony arises out of three main qualifications. These are sound mind, majority and sightedness (i.e., witness must have observed the event directly). As Holy Prophet (PBUH) said, "If you know like the sun, then bear witness otherwise do not".[18] Imām Sarakhsī states in al-Mabsūt, that hearsay by mean of widely circulated information is not allowed in the cases of property. He further added about the cases of marriage that as a general principal hearsay should not be allowed in cases of marriage. The reason behind it is the sensitivity of the cases. But it is permissible by way of Istihsan in matters related to kinship, appointment of judges, marriage and death. [19] There are special qualifications for testimony in Islamic law are related to the number of witnesses, their gender as discuss.

1. Performance Condition شروط الأداء

The conditions of performance of testimony include, Al- 'Aqal(the intelligence), Al-Bulugh (puberty), al_Hurriyah (Freedom), al-Nutq(the ability to speak), al-Basirah (ability to see), Good memory, legal responsibility (Takleef), Justice (Adalah), and Islam. Last two are elaborated further in order to analyse them from the perspective of QSO.

2. **Justice (‘Adālah)**

Muslim jurists have unanimously agreed that a witness whose testimony entails a judgement must have the quality of being ’*adil* (that is, observing ‘*adālah*). This condition is essential for distinguishing truth from falsehood. Allah Almighty ordains the Muslims, “take for witness two persons from among you, *endured with justice*”.[20] The insistence here is on the witness’s devoutness and uprightness. It follows that the testimony given by a fāsiq[21] is not acceptable in court of law.

Testimony of ‘Ādil is a compulsory. Mālīk defined ‘*Adālah* as ‘the one who avoids major sins *(*al-kābai’r*)*, returns deposits and has good dealing with people. His good deeds are more prominent than the bad ones. Testimony of such a person is admissible.[22] Hunbalis consider Adil the one: who fulfils his duties (farāīḍ), avoids major sins (al-kabāi’r), and he does not insist upon minor sins. He has the quality of generosity and graciousness. *Shafi‘ī* considers graciousness as a necessary condition. [23] Imām Kāsānī states that a just person is the one who is not known as a wicked person. While the other scholars say that a just person is the one whose good deeds are not more than his bad deeds.

In Islamic law the evidence is authenticated by way of receiving it from a pure channel i.e Shahid Adil Witnesses with sound character (Ādil). The probity and just characters (‘adl) of witness makes the evidence reliable. These just witnesses act like a right hand of a judge to solve the case.

3. Testimony of a non-Muslim

The majority of scholars, including Shāfī, Mālīk, and Abū Thaūr,[24] opine that a non-Muslim cannot testify. This ruling is the same irrespective of whether he is testifying for a Muslim or a non-Muslim. They rely largely on the commandment of Allah Almighty. Allah Almighty says, “And take

for witness two persons *from among you, endued with justice,* and establish the evidence as before Allah."[25]

However, an exception that is recognised by some of the jurists relates to giving testimony regarding wills during a journey. The exception is such that, the testimony of a non-Muslim will be admissible in places where there were no Muslims who could have testified. Proponents of this view have relied on the verse of Qur'ān where Allah Almighty says: "O you who believe! Let there be witnesses between you when death approaches one of you, at the time of bequest, two witnesses, just men from among you, *or two others from outside, in case you are travelling in the land and the disaster of death should strike you*.[26]

Ḥanafī jurists are also of the view that testimony of a dhimmī in matters related to marriage of Muslim to a dhimmī woman is admissible without any issues.[27] It is also important to note that Imām Abū Ḥanīfa, Ḥammād 'ibn Sulaīmān, and different other scholars are of the view that testimony of a non-Muslim is acceptable if it be for another non-Muslim, irrespective of the fact that the two of them profess the same religion or they profess two different religions. The *Ḥanafī* jurists have conditioned it with another rule which is that if the two of them belong to the same country only then their testimony is admissible. Otherwise, their testimony given by one of them for the other is inadmissible.[28]

QSO stipulates in Article 17 that courts will accept testimony of witness that fulfill conditions stipulated in Quran and Sunnah. But the same article stipulates in proviso that is such person are not available they would take testimony from anyone who is available.

There is no doubt that the conditions stipulated in Islamic law are not easily available in witnesses nowadays. But it should not be overlooked

completely. At least, the qualities that are available in today's time period must be ensured. There must be some principles for taking the testimony.

4. Conditions for Rejection of Evidence

There are a number of sins which if committed by a person, will result in the loss of Justice in a witness. Imām Kāsānī states that if a person is addicted to alcohol and singing loses the title of a just witness. Similarly, if people gather around singer for intoxication and he provokes people of decadence then he is not just in character. Or a person who keeps pigeons or plays chess is not just in character. In case of chess, it is allowed in some school of thoughts but *Ḥanafī* jurist disallow chess because it is a game. [29] May be, it shows irresponsible behaviour of a person. But according to these conditions many of people shall not be apply. But there must be some restrictions at least. Because testification is a religious duty according to Islamic law.

There are certain other reasons due to which the testimony of an otherwise eligible witness might be rejected. For example, the testimony of someone who has grudges against another person, whether he is a Muslim or not, his testimony has to be rejected. The Holy Prophet (PBUH) has said, "the testimony a deceitful man or woman, of an adulterer and adulteress, and of one who harbours rancour against his brother is not allowable." [30]

The same rule goes for testimony of a person who would testify for himself. His testimony will not be accepted if he is also the litigant, the reason being, he may prioritize his interest over cause of justice. It is stated by the early learned jurists that testimony of a partner is not admissible where he has a share. Testimony of a *Mudhārib* (dormant partner) is also not admissible where he has a share. Testimony of a lawyer in a case which

he is going to plead is not admissible too. [31] In all these cases testimony of a person means he is testifying for himself.

Testimony of a master for slave is not admissible because money of slave belongs to the master and it is considered as testimony for one's own self. [32] It is also agreed by few jurists that spouses are not allowed to testify for each other. This is the opinion of Sha'bī, Nakh'ī, *Mālik*, and Abū Ḥanīfah. On the contrary, *Shafi'ī*, Ḥassan, permitted testimony of a spouses for each other because they consider this contract, a contract of benefit *(manfa'ah)*.[33] Same is the case of parents and their off springs. Neither of them can testify for each other.[34]

There is no such restriction in English law regarding the conditions of witnesses testify for their close relations. Spouses can testify for each other; sons can testify for their parents. The child's testimony is admissible. Qanūn-e-Shahādat does not specify any such condition. In fact, Article 3 stipulates such conditions but unfortunately makes it ineffective by itself.

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

So, the last line of the above proviso of article 3 "who may be available" makes the provision ineffective. There is no system of any screening of witnesses. That is why the whole fabric of judicial system is torn. The witnesses take oath in court and lie in front of judge in the court room. Buying of witness on rental basis, for

giving false evidence is a common practice in present courts of Pakistan.

6. Women's Testimony

It is unanimously accepted by the four School of thoughts that testimony of women is not acceptable in Ḥudūd and Qiṣaṣ cases,[35] unlike ahl-Zāhir [36]. But this is not the case in financial matters where testimony of two women is admissible along with one man.[37] Imām Abū Ḥanīfa says that testimony of women is admissible in all matters, whether financial or not, other than Ḥudūd and Qiṣaṣ.[38] These matters include, marriage (Nikaḥ), divorce, freeing of slave, 'Iddah and Ṣulḥ. When a woman is replacing man for testimony, two female testimonies shall be admissible.[39]

In the cases related to property, the condition is different. In cases of property, women's testimony is admissible.[40] While on the matters of kinship, marriage, divorce, etc., jurists are divided in their opinion. Ḥanafi jurists think that females are allowed to testify, while Shāfai jurists think the other way. [41] *Shafi'ī* differ in this opinion and state that women's testimony is not admissible except in the matters pertaining to money. The reason according to them is that women's testimony is originally inadmissible due to their defect in understanding, incapacity of governance and lack of memory. [42]

Al- Marghīnānī is of the view that women can testify originally because a woman has the capability of managing everything which is required for testifying i.e. after watching the incident, memorizing it, and conveying the relevant information of the incident to the judge. According to al-Marghīnānī, it is immaterial whether they are deficient in 'aql. He says that *Ḥanafī*s allow women to testify due to the reason that they are capable of meeting the basic elements for testimony although their memory is not that

good as compared to men in general. This problem of not being able to remember incidents properly, according to him, is guarded against by making a requirement of two female witnesses for every male witness.[43]

6.1 Single Woman's Testimony

As far as the testimony of women alone is concerned it is considered acceptable by majority of the school of thoughts in the matters which are not exposed to men. These are the cases in which presence and testimony of men is usually not possible, as it does not involve inspection of men. For instance, matters related to childbirth, menstruation, clarification of female sexual defects, etc. In these cases, the testimony of a single woman alone is admissible.[44]

Similarly, evidence of one woman is sufficient regarding virginity defects in private parts which cannot be exposed to men. This principle is derived from saying of Prophet (PBUH).

شهادة النساء جائزة فيما لا يستطيع الرجل النظر اليه[45]

"The evidence of women is valid with respect to such things as is not fitting for man to behold".[46]

In matters of child weaning (al-Radhā'h) *Abū Hanīfah* is of the view that testimony of women alone is not admissible because this is the matter which is disclosed to men.[47] The rule regarding virginity is such that when a man buys a female slave on condition of her being a virgin and afterwards he wants to return her because she is not. Another woman would examine her and give testimony. If she is not virgin, the buyer will have the option to rescind the contract. [48]

However, there is a difference of opinion among the jurists about the number of women to testify for these matters in which men cannot participate. Imām Abū Ḥanīfa is of the view that one woman is enough to

testify. Imām Malik requires testimony of at least two women. Imām Shāfi‘ī requires testimony of four women in these matters because Allah Almighty has made two just women equivalent to one just man. So, for that purpose two just men can only be replaced by testimony of four just women. [49] ("If there are not two male witnesses, then a man and two women from among those witnesses who please you; so if one of the two women errs, the other will remind her").[50]

Imām Sarakhsī says that it is a fact that the basis for not allowing women to testify alone is their lack of rationale (‘aql) and religion (dīn), which the Prophet of Allah (peace be upon him) described as "deficiency," thus creating doubts about its complete absence. Forgetfulness and errors are common in women, they make relatively more mistakes then men, and the inclination towards pleasure is usually higher in them. These are the serious problems with respect to testimony. So, by analogy women alone should not be allowed to testify alone. But this analogy is not always used because of the saying of the prophet (PBUH) which allows women to testify alone in matters which men cannot see. [51] No such specification is present in QSO, which are mentioned in Islamic law and saying of Prophet (PBUH).

Authentication of evidence in Islamic law as mentioned above is conducted through firstly, through ensuring specific number of witnesses and secondly, by checking character of witnesses.

7. ***Hearsay Rule and Exceptions:***

Hearsay is allowed in Islamic law in very few cases which are not hearsay in its real sense. Islamic law allows hearsay in the cases, which are famous enough. For instance, cases of birth or death are the ones which are known to many. Or the cases of kinship. [52]Al – Majellah states in article 1688;

"It is necessary that the witness should know personally that to which they depose, and that their evidence should be given in that way. It is not permissible for them to give evidence saying, "By hearsay, i.e. I heard from people."[53]

But if, with respect to properly being *waqf*, or to the fact of a person being dead, person gives evidence saying, "I have heard from trustworthy person", his evidence is held good. In matter of *vilāīat* and death and parentage, it is permissible for a person to give evidence by hearsay."[54]

To state simply, a person can give evidence on certain facts, on the basis of public knowledge. This is permissible without witnessing the event or the act, upon which the testimony is being made. It is called *Al-Shahādah bi-Tasāmay'* in Islamic law. So, one can produce evidence concerning, a person's descent, marital status or death, without actually observing or being resent at the time of his birth, his marriage contract or his decease.[55]

It is permissible to testify in these four cases on the basis of hearsay *(Al – Tasāmay').* The purpose of allowing these cases is to avoid hardship (*Ḥaraj*). The above-mentioned cases are the ones which are directly observed by few but receive fame in society easily. For instance, news of someone's death is enough to testify about it, because only a few people are present at the time of death. But this news spreads fast that so and so person died. On the basis of spreading of news, it is allowed to testify about it.[56]

If someone sees that a person is sitting in a court room and a lot of people are coming to him for decisions. He is allowed to testify that he is a judge on the basis of hearsay.[57] In Islamic legal system judge has the discretionary power to admit or reject any exceptions to the hearsay rule on the basis of credibility of hearsay. Marghīnanī says that analogically or as a

matter of general rule, it is not lawful to give evidence on the basis of hearsay. The reason is that the foundation of testimony is entirely based on sight and direct observation. That is the only way of deriving knowledge. These exceptions are permitted on the basis of istiḥsān.[58] That means adhering strictly to the rule of hearsay creates hardship for the general public.

The above mentioned four cases, in which hearsay is permissible, are the ones which are seen or observed by a few people. These cases usually carry element of privacy. It will cause a great hardship for people at large if it is expected to have a direct testimony on these cases. That is why they are permitted by way of hearsay. For instance, birth is an event for which none is present but midwife. Marriages and deaths are seen by few and cohabitation is seen by none. From all these events a number of consequences arise. For instance, consequence of birth is inheritance, marriage is dower and maintenance etc. So, a credible hearsay testimony is permitted to solve this problem.[59]

As compared to western law, Islamic law is very strict in hearsay testimony. There are a large number of hearsay exceptions which are permitted in western law. For instance, *Present Sense Impression, Excited Utterance, Existing Mental, Emotional, or Physical Conditions etc. There are almost 30 hearsay exceptions present in US law of Evidence*[60]. But in Islamic law only these four cases are allowed. In other words, western law is broad in allowing hearsay and Islamic law is very cautious and limited. It permits hearsay in only those cases which are already known by way of public knowledge. So, these cases are not hearsay in the strict sense.

Qanun-e-Sahadat Order, stipulates in article 17 that every witness giving testimony must have directly seen, heard and observed directly. It

gives two exceptions to the hearsay rule. First is expert testimony, second is inspection of real evidence by the court.

8. Secondary Testimony

Islamic law of evidence offers secondary witness *(Shahādah 'ala Shahādah)*. It is different from hearsay evidence *(Al-Shahādah bi-Tasāmay').* In this kind of testimony if the primary witness is either too far or is unable to attend the court for testimony due to any reason. He transfers his testimony to another just witness. He makes him his representative. This kind of testimony is permissible in Islamic law. In other words, if a witness has a legal excuse for not being able to attend the court session, he can transfer his testimony to other two just witnesses. It is called *Shahādah bi-Tasāmay'*in Islamic law. However, secondary testimony is inadmissible in Ḥudūd offences or Qiṣāṣ.[61]

Imām *Abū Hanīfah* says that one secondary witness is enough for one primary witness. Two witnesses will testify in place of two.[62] But Imām *Shafi'ī* opines that two secondary witnesses will take the testimony of one primary witness and four secondary witnesses will testify in front of the judge for two witnesses. [63]Imām Sarakhsī says this kind of testimony is allowed in all cases except Ḥudūd and Qiṣāṣ.[64]

Qanun-e-Shahadat Order stipulates that if a person is ill or dead or unable to come to court then he can transfer his testimony to someone else that is shahadah ala shahadah

9. Comparison in English and Islamic Law:

The above-mentioned facts made it clear that the general principles of Islamic law of evidence are different from the English law. There are some major differences in English and Islamic law on oral testimony when purgation, hearsay and just characteristic of the witness comes under

discussion. Secondly, the detailed conditions specified for the witness in Islamic law are not discussed in similar detail in the English law. The standards of admissibility are somewhat similar in both the English and Islamic Law. [65]

Conclusion

Oral testimony is the first and the most important means of proof in both the Islamic and Western law, but with a lot of differences. For instance, Islamic law does not accept testimony of a person who is not just in character (Ādil).**.** A witness who has a doubtful character cannot lead to truth. There is a long discussion of Muslim jurists explaining the attributes of a just witness. Although the standards of the Muslim Jurists regarding these characteristics relaxed with the passage of time, there is still a criteria to meet. QSO does not stipulate any such condition on witnesses. Islamic law also introduces a highly effective mechanism of purgation of witnesses. It developed a complete system of accredited witnesses who subsequently became the helpers of the judge. QSO on the other hand does not have any such procedures which involve purgation of witnesses.

The law of Pakistan on oral testimony is influenced by one fact. That is the Qanun-e-Shahadat order 1984 was previously called Evidence Act 1872, which is an English law. QSO 1984 is a mere repetition of Evidence Ac 1872. The standard applied for oral testimony are those which are followed in western law. So, the standards applied for oral testimony in QSO 1984, are those which are in English law. These standards have nothing to do with Islamic laws. Although Pakistan is a Muslim country but the laws being followed by them are western. Witnesses who come for testimony for e-evidence are the ones which qualify through English law.

The qualification for admissibility of oral testimony, in Pakistan, must be based on Sharīʻah.

Different classifications in terms of number of witnesses also adds in to the differences between Western and Islamic law. At least, four witnesses are necessary for testifying in case of Hudūd offences such as slandering and fornication. Other crimes and financial matters require at least two witnesses. QSO stipulates such conditions on financial matters only. If ignores Hudood. There is no classification such as *Ḥadd* offences and other offences. Pakistani law is completely silent on these matters, which means it follows English law.

Unlike English Law, the Islamic law differentiates in women testimony. Women are not allowed to testify in cases of *Ḥudūd* and *Qisās.* It is proven by the *Sunnah* of Prophet (PBUH) and *'Ijmaʻ*. It is allowed only in cases other than *Ḥudūd* and *Qiṣāṣ*, financial matters, property, marriage, divorce, freeing of slave, *ʻIddah* and s*ulḥ*, etc. Opinion of scholars is different regarding admissibility of women's testimony, which would be equally applicable to electronic evidence. The biggest among them is she cannot testify in case of Hudūd and Qisās. Another one of them is that in case her testimony is admitted, two women would replace one male testimony. QSO equates two women with one man in financial matters only and no other case. This is repugnant to Islamic law.

Biblography

[1] Prophet (PBUH) said, "Evidence must be produced by the plaintiff and Oath must be made by the defendant", *Book 18, Number 4244, The Book Pertaining to Judicial Decisions, Sahih Muslim, https://www.iium.edu.my/deed/hadith/muslim/018_smt.html*

Also in, 'Al*ā' al-D*īn Abu Bakr bin Mas'ud bin 'Aḥmad al-Kāsānī, *Badā'i' al-Ṣanā'i fī tart īb al-sharā'i*, Vol 7, (Dār al-Kutub al-'Ilmīah,), 287

[2] Al-Mu'jam al-wasīt, s.v "Bayīnah" Dar al-Arabi, 1/80.

[3] Ibn Qayyim al-Jawziyya (1292–1350 CE / 691 AH–751 AH), whose full name was, *Shams al-Dīn Abū ʿAbd Allāh Muḥammad ibn Abī Bakr ibn Ayyūb al-Zurʿī l-Dimashqī l-Ḥanbalī* . He was born on 7 Safar 691/29 January 1292 in Damascus. He wrote many books among which are*, Zād al-Ma'ād, Rawḍat al-Muḥibbīn, and Badā'i' al-Fawā'id.* He died in 1350 at the age of sixty.

[4] These include, Al-Yamīn (Oath), al-Iqrār (admission/confession), al-*Shahādah* (testimony), al-Kitābah (documentary evidence), ra'yu al-khabīr (expert opinion), al-*Qarīna* (circumstantial evidence) and 'Ilm al Qāḍī (knowledge of a judge)

[5] Prophet PBUH says "Produce your two witnesses or else the defendant is to take an Oath" Muslim bin al Ḥjāj Abū al-Ḥassan al-Qashīrī al-nīsābūrī, *Saḥīḥ Muslim, (*Beīrūt: dār 'Iḥyīā' al-'arabī. n.d), ׀vol.1/123. Tradition no. 221 ,Also in , Kāsāni, vol.7, 287.

[6] Burhān al-din Abu al-Ḥassan 'Ali ibn Abī Bakr Farghāni Marghīnānī, A*l-Hidāyah* , vol. 3 (Beirut: Dar ahya turas al-arabi, n.d), 116.

[7] Reported by Muslim in his Saheeh, Book of Judgments, hadeeth no. 4494; and at Tirmidhee in his Al-jaami', Book of Testimonies, hadeeth no. 2295.)

[8] Al- *Qur'an* [2:283]

[9] Al-Hidāyah, vol. 3, 116.

[10] Ibid

[11] Ibid,

[12] Mālik bin 'Anas bin Mālik bin 'Āmir , "Al-Maūta' ", vol 5, (Abu Ẓahbī: Mūassasah Zahid bin 'Amir al-'Asbīhi, 2004), 1198.

[13] *Imām Marghīnānī* says that this punishment includes both right of Allah and right of man. So, the witness should conceal about right of Allah Almighty and it is obligatory to bear testimony about right of man. The witness should use the word "he took" (أخذ) Akhaza, instead of using the word "he stole" because if he used the word, he stole then he will be liable to hadd. But if he said he took than there are a number of reasons for taking something. This way the person will be saved from imputation of hands.

[14] *Al-Hidāyah*, vol. 3, 116.

[15] 'Abu Ḥussain Yaḥyah bin 'Abī al-Khaīr al-'Imranī al-*Shafi'ī*, "*Al- Bīyān fi-Mazhab Imam Shāfaī*", vol. 13 (Jaddah: Dār al-Minhāj, 2000), 324. This stance is adopted by all four school of thoughts because of the saying of the Prophet (PBUH).

[16] *Al-Hidāyah*, vol. 3, 116, Also in 'Abu Ḥussain al-'Imranī al-*Shafi'*ī, "*Al- Bīyān fi-Mazhab Imam Shāfaī",* vol. 13/324.
[17] Al-*Qur'an* [4:15], Al-*Qur'an* [2:282]
[18] Muḥammad bin Aḥmad bin abī Sahl shams al-'Āa'ema al- Sarakhsī, *Al-Mabsūt,* Vol. 16. (Beirut: Dār al-Ma'rafa, 1993), 112.
[19] Sarakhsi, *Al-Mabsūt*, vol. 6, 266-267. Also in, Kāsānī, *"Badā'i' Al-Ṣanā'i"*, vol. 6, 266.
[20] Al- Qur'ān [65:2].
[21] Fāsīq is a term used in Islamic law for a reprobate person who neglects decorum in his behaviour (murū'ah) or lacks honour and proper behaviour. A fāsīq is unacceptable in a court of law. Imām Shāfi'ī defines fāsīq as the one who commits major sins *(*al-kabāīr*)* i.e who disbelieved Allah Almighty or Prophets or the Holly books, committed wrongful murder, drinks wine or steals, is involved in giving a wrong testimony or who has put wrong allegation on someone (Qazaf). Testimony of such a person is inadmissible Yaḥyah bin 'Imranī al- *Shafi'ī*", "*Al-Bīyān fi-Mazhab Imam Shafi'ī*", vol. 13, 278
[22] Al-Kasani, 7/268.
[23]AL-Sharbīnī al-Shāfi'ī, *Mughnī al-Muḥtāj,* vol.6/391. Also, in Shams al-Dīn Abū 'Abdullah Muḥammad bīn 'Abdur Raḥmān al-Ṭārāblisi al-Mālikī, "*Mūahib al-Jalīl fī Sharḥ Mukhtaṣar al-khālīl",* vol 6 (Dār al-fiqr, 1992)151. Also see Mansūr bin Yūnas bin Ṣalāḥ al-Dīn 'Idrīs Ḥambalī*, "Sharḥ Muntaha al-'Irādāt,* vol.3. ('Alim al-Kutub, 1993), 577.
[24] Ṭārāblisi al-M*ālikī, Mūāhib al-Jalīl*, 150/6, Sharbīnī, *Mughnī al-Muhtāj* 427/4.
[25] Al- Qur'ān [65:2].
[26] Al- Qur'ān [5:106,].
[27] Ibn Nujaīm, *Al-Baḥr ar-Rā'iq,* Vol. 3, p. 97.
[28] Al-Maūsūah al-Qūītīah al-Fiqhīah, vol.26/223.
[29] Al- Kāsānī, 6: 268-270.
[30] *Abū Dā'ūd Sulaīmān al-'Ash'th, Sunan Abī Dā'ūd, vol.3 (Beīrūt: Al-Maktabah al-'Aṣrīah*, n.d), 306. Tradition no. 3600 Translated by: Saleem Marsoof, "Witness Testimony – Some Perspectives From Sharia'at Law Justice"
[31] Abū Muḥammad Maūfiq al-Dīn 'Abdullah 'Aḥmad bin Qudāmah al-Ḥamblī, *Al-Mughnī li-'Ibn-Qudāmah*, vol. 10 (Cairo: Maktabah al-Qāhirah, 1986), 167. Ibn 'Ābidīn, Muḥammad Amīn bin 'Umar, *"Hāshiyah ibn 'Ābidīn"* vol.5 (Beīrut:Dār al-fikr, 1992), 480.
[32] *Al-Mughnī li-'Ibn-Qudāmah* 10/174
[33] Ibid. Abū al-walīd Muḥammad bin Aḥmad Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",n* vol. 4. (Cairo: Dār al-Ḥadith, 2004), 247.
[34] Sharbīnī, *"Mughnī al-Muḥtāj"*, 6/390.
[35] Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.
[36] Abū Muḥammad 'Ali bin 'Aḥmad bin Saee'd ibn Ḥazam, "*al-Muḥalā bil Āthār",vol. 8 (Beirut: Dā*r al-fikr, n.d), 478. It is stated by ibn Hazam that women's testimony is allowed in Hudud and Qisas cases. The reason for this ruling is that they do not believe in analogy. They say that if Allah Almighty has

permitted women to testify in financial matters they are allowed to testify in all other cases. It is stated in his earlier quoted book: "In cases of adultery, it is not permissible to accept the testimony of fewer than four just, Muslim men, or in the place of each man, two just, Muslim women. Thus: three men and two women, two men and four women, a single man and six women, or eight women alone [without any men] may testify in cases of adultery. In all other cases, including hudud and qisas, marriage, divorce, the return of wives after divorce, and monetary matters, the testimony of no fewer than two just, Muslim men, or a man and two just, Muslim women, or four just, Muslim women is acceptable. And in all of those cases except hudud a just man alone or two just women with an oath are acceptable. ibn Ḥazam, "*al-Muḥalā bil Āthār 8/476. Translated by* Karen Bauer , "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law", *Journal of the American Oriental Society*, Vol. 130, No. 1 (January-March 2010), pp. 1-21, 7.

[37] Al-*Qur'an* [2:282]

[38] Marghīnānī, *al-Hidāyah*, vol3/ 116. Also, in Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.

[39] Ibid

[40] Al Quran [2:282]

[41] Marghīnānī, *al-Hidāyah*, vol. 3/ 116. Also in Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.

[42] Al-Shīrāzī, "Al-*Muhazab fī al-fīqh al-Imām Shafi'ī*", vol. 3/437.

[43] Marghīnānī, *al-Hidāyah*, vol3/ 116 *Translated by* Karen Bauer, "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law", 7.

[44] Sarakhsī, *Al- Mabsūt*, vol.5/10`1. Also, in 'Ibn Rushd, *Bidāyatu'l-Mujtahid*, 4/248.

[45] Sarakhsī, *Al- Mabsūt*, vol.5/101.

[46] The Hidayah or Guide: A commentary on the Mussalman Laws, Trans. Charles Hamilton, vol. 2 (London: T. Benslay, n.d),668. https://books.google.com.pk/books?id=Tq9CAAAAcAAJ&pg=PA668&lpg=PA668&dq=The+evidence+of+women+is+valid+with+respect+to+such+things+as+is+not+fitting+for+man+to+behold&source=bl&ots=0qwE6qEfe0&sig=BO3cBfegfjoysZxtz4sEMiWa9wU&hl=en&sa=X&ved=0ahUKEwjExraN2KrTAhUEVxQKHRY8BrAQ6AEIKTAC#v=onepage&q&f=false (acessed: 17th April, 2017)

[47] Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.

[48] Sarkhsī, "*Al – Mabsūt",* Vol. 13/111.

[49] Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.

[50] Al- Qur'ān [2:282]

[51] Sarkhsi, *Al – Mabsūt*, Vol. 16, 114.

[52] Encyclopaedia if Islam, "Shahid", vol. 9 (Leiden: Brill, 1997), 208.

[53] *Majallah al-Aḥkām al-'Adalīah*, (Karachi: Kārkhāna Tijārat Kutub, n.d), art: 1688.

[54] Ibid.

[55] Encyclopedia of Islam, s.v. "Shāhid", (Leiden: Brill, 1997) vol.9, 208.

http://library.ut.ac.ir/documents/381543/3581025/Brill_-_The_Encyclopaedia_of_Islam_Vol_9_San-Sze_.pdf (accessed: 19th April, 2017)

[56] Sarakhsi, *Al-Mabsūt*, Vol.16, 150. Maghīnāni, *Al – Hidāyah*, vol. 3, 120-121. Also in Kāsānī, Badā'i' al-Ṣanā'i , vol.6, 266.

[57] Ibid 371.

[58] Maghīnāni, *Al – Hidāyah*, vol. 3, 121.

[59] Ibid.

[60] See Federal Rules of Evidence of USA. Rule number 803 "Hearsay Exceptions". (Accessed last May 24, 2017) https://www.law.cornell.edu/rules/fre/rule_803

[61] Encyclopedia of Islam, "Shāhid", (Leiden: Brill, 1997) vol.9, 208.

[62] Al-'Aīnī, "*al-Bināyah Sharh al-Hidāyah",* vol. 9/127.

[63] Sarakhsi, "*Al-Mabsūt"*, Vol.16, 138.

[64] Ibid 138.

[65] These standards include the evidence must be relevant, authentic, direct and best evidence rule.