A CRITICAL ANALYSIS OF THE MEANS OF PROOF IN CIVIL LITIGATION UNDER ISLAMIC LAW

BY

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A THESIS SUBMITTED TO THE FACULTY OF LAW,
AHMADU BELLO UNIVERSITY ZARIA IN PARTIAL FULFILLMENT OF THE REQURIEMENTS FOR THE AWARD OF LL.M MASTER IN LAWS

NOVEMBER, 2017

DECLARATION

I hereby declared that this thesis has been written by me and that it is a record of my own research work. No part of it has been presented or published any where at any time by any body, Institution or organization for the award of any academic degree.

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CERTIFICATION

This thesis is dedicated to "A critical Analysis of the means of Proof in Civil Litigation Under Maliki Jurisprudence" by Yahaya Imam, ABDULLAHI meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my father, Late Mal. Abdullahi Imam (The Chief Imam of Beji) and my mother Late, Hajiya Fatima Abdullahi (HajiyanBeji) for their endless prayers.

ACKNOWLEDGEMENTS

All praise is due to Allah (SWT) the most compassionate and merciful, without whose favour nothing could have been accomplished. In whose infinite generous favour I ask for forgiveness and mercy. One's life in this phenomenon, in this physical world is attributed to His Supreme being, in whose Qudurah (power) imbedded me with the energy and Hilkrnah to scale the academic hurdle, by producing a work of this magnitude, whereby in the most sublimity I acknowledge His kindness, which showed the manifestation of this thesis, therefore, I hereby ask for His protection against my mischievous deeds and guide us to the right path. Amin.

Several people in 'one way or the other have contributed in this work. Thus, I must express my appreciation and gratitude for their kind assistance.

I must, however, mention my supervisor, Prof. Muhammad Arsalan Muhammad,

under whose watchful eyes this task was undertaken. I remain grateful. Again the same gratitude goes to my second supervisor, Prof. Nuhu Muhammad Jamo, may Allah reward you abundantly.

My lovely mother Late Hajiya Fatima Abdullahi Imam Beji my great father Late Mallam Abdullahi Beji (Chief Imam Busigi), humble regards to my family Hajiya HannatuYahaya Imam and Hajiya Fatima Yahaya Imam for their moral support.

The Dean Faculty of Law Prof. A.M Madaki, Professor Y.Y. Bambale, Prof. I. A, Aliyu, Prof. K.M. Danladi, Prof. Akande, Prof. Aminu Gurin, Prof. Nasiru Maiturare, Justice Dalhatu Adamu (presiding justice court of appeal calabar division) Sheikh Danladi Keffi, Dr. Bala Babaji, Dr. Madaki and my children Eng. Ishaq Yahaya Imam,

Bar. Mustapha Yahaya Imam Bar. UmmiYahaya Imam Nazee Yahaya Imam, Eng. Saleem Yahaya Imam, Dr. Khairatu Yahaya Imam, Bar. Zubaidah Yahaya Imam Sadiya Yahaya Imam, Nuriyah Yahaya Imam, SubriyahYahaya Imam, Abdullah Yahaya Abdullah and my humble sisters Hajiya Fatima Limawa Minnaand Hajiya Khadijah Musa Laga Minna.

GLOSSARY

Adalah:	Just treatment
Adillah:	Proofs
Ahadith:	Prophetic traditions
Ahlul-kitab:	The people or the book (including Christians and Jews)
Buitumal:	Public treasury
Baghai:	Rebellion
Bain:	To go far
Buluq:	Maturity
Caliph:	Islamic head of state
Dinar:	Type of money
Dirliam:	Type of money
Diyah:	Compensation/damages
Fardayn:	Private right
Fardkl Fiyah:	Public Right/Obligations
Fasig:	Dissipated or transgressor
Figh:	Islamic Jurisprudence
Mugabe:	Islamic scholars in jurisprudence
Ghalib:	Dominant
Hadith:	The prophetic tradition
Hadd:	The Prescribed Punishment
Hajj:	Muslim Pilgrimage

Hajaru-aswad:	The Black Stone
Hukum:	Ruling/Judicial Decision
Huquq-Allah:	The Rights of Allah (public rights)
Huquq-Abd:	The Rights of Individuals
Ibadah:	Acts of Worshiping
Ijma:	Consensus of Opinion of the Muslim Scholars
Ilm-qadi:	Personal Knowledge of a Judge
Imam:	Leader
Iqrar:	Confession/Admission
Illah:	Effective Cause
Ikrah:	Compulsion
Ilm:	Knowledge/Science
Istihsan:	Public Good
Istishab:	Legal Presumption
Jamhur:	Majority View
Jahiliyyah:	Pre-Islamic Era.
Juruh:	Injuries
Kaffarah:	Attornment/Expoation
Khabar:	Information
Khatal:	Murder/Killing
Khata:	Mistake
Khulta:	Companionship

Lauth: Grave Presumption in murder cases

Lian: Legal imprecation

Liwat: Sodomy/homosexuality

Madina al-munawwarah: Holy City of Madina

Majlis: Meeting Place

Majbub: Mascluted

Majurah: An injured party

Mashhudalaih: A claimant who calls witnesses

Mashhudbihi: The subject matter in evidence

Mandub: Permissibility

Marad-maut: Death Sickness

Mardud: Rejected

Makhtum: Sealed

Muamalat: Contracts

Mumaiyiz: A person reaches the age of discretion

Muqalladah: Heavy

Murtadd: Aposted

Mutawatir: Recurrent

Muzakki: Purgator

Nasab:' Blood relation

Nukul: Rejection to take oath

Qada: Adjudication

Qadi:	A Judge
Qarinah:	Circumstantial evidence
Qasamah:	Oath taking in murder cases
Qisas:	Retaliation
Qiyas:	Analogy
Qiyafah:	Bearing or comparing similarities of people
Sarigah:	Theft
Shub amd:	Quasi intentional
Shubha:	ambiguity
Talaq:	Divorce
Ta'zir:	Discretionary punishment
Tuhmah	Accusation or suspicion
Tazkiyah	Purgation
Ummah:	Muslim community
Uquabat:	Punishments

LIST OF ABBREVIATIONS

A. S. W:	Alaihissalatu wassalam (May the peace and mercy of Allahbe upon Him.
DNA:	Deribonulic Nucleic Acid
R. A:	Radiyallahu anhu (May Allah be pleases with him/her)
SAW:	Sallallahu alaih wasallarn (Allah be pleased with him)
S.W.T:	Subhanahu wata'ala (the Exaulted and the Most High)

ABSTRACT

This dissertation entitled "A Critical Analysis of the Means of Proof in Civil Litigation under Islamic law "primarily examined the principles of Islamic Law applicable to means of proof. In this regard, the essential means of proof have been highlighted, i.e., Shahadah (testimony), al-Iqrar (Confession/Admission), Qarinah (circumstantial evidence), al-Kitabah (documentary evidence), flm al-Qadi (personal knowledge of a judge), al-Yamin (oath), al-Qiyafah (forecast), al-Khabar (Information). The study is predicated upon the research problem that while under Islamic law litigants are under an obligation to furnish proof in order to succeed in the prosecutions of their cases; and consequently, while the courts are also obliged to adjudicate on the basis of the strength of the proof presented before them, it is imperative that the particular means of proof recognized by Islamic law are brought to lime line and critically examined as to its utility in the adjudication of disputes before the courts. Therefore, this dissertation primarily examines various means of proof in civil litigation under Islamic law and their efficacy in the administration of justice under the sharia. The dissertation adopts mainly doctrinal method of research. It is principally observed that Islamic law makes it mandatory on Muslims to promote the cause of justice by obliging litigants to produce proof in support of their claims before judgment could be made in their favour and that anyone who is in possession of any piece of evidence is obliged to furnish it in order to uphold the cause of justice and secure the restoration of the legitimate rights of the people. Thus, the law accords ample means and standard of proof to different categories of matters in order that the ends of justice are attained. It is thereby recommended that Islamic law of evidence as interpreted by different schools of thought should be strictly adhered to by our judges in deciding disputes before the sharia courts in Nigeria and that the Sharia implementing states, through their Ministries of Justice and the Judiciaries, should intensify efforts in training their sharia judges in institutions of higher learning, for the effective performance and implementation of the shariah legal system in our states.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Islamic law (Shariah) is a divine law which is believed and considered by Muslims to be the most complete and comprehensive code of conduct deriving its source from the Glorious Qur'an which contains all aspects of life in this world and the hereafter[1]. The Glorious Qur'an it is also the primary source of Islamic Law devoid of any distortion, manipulation, interpolation and not subject to human alteration as Allah the Lawgiver has taken unto Himself the responsibility of protecting the integrity of the Glorious Qur'an[2]. Allah (SWT) in chapter 15:9 says: "verily, is He who have sent down the Dhikr (i.e. the Qur'an) and surely, We will guard it (from corruption)".[3]

This verse is a challenge to the entire mankind and obliges the belief in the miracles of the Glorious Qur'an as it is a clear fact that more than 1400 years have elapsed and not a single word of the Glorious Qur'an has been changed, although the disbelievers tried their utmost to change it in every way, but they failed miserably in their efforts. On the

[1]Doi, I.A. (1970) *Sharia the Islamic Law*, Ta-Ha Publishers, London, pp, 2-9

[2] Yamani, A.Z. (1388 A.H.) *Islamic Law and Contemporary Issues.* The Saudi Publishing House, Jedda, Saudi Arabia, P. 6 in whose words he described sharia as a system based on the welfare of the individual in the community both in his everyday life and in anticipation of the life hereafter; Bambale Y.Y. (2007) *An Outline of Islamic Jurisprudence*, Malthouse Press Limited, Lagos Nigeria pp 9-10, See also N.J. Coulson, (1969) conflicts and Tension in Islamic Jurisprudence, The University of Chicago Press, Chicago, p. 3 in whose words he said: "Islamic law has been alternatively described as a divine law and as a jurists law".

[3]Qur'an 15:9, translation from al-Halali, M.T and khan, M.M. (n.d) *English translation of the Meanings and commentary of the Holy Qur'an,* Kind Fahd Glorious Qur'an Printing Cpmplext, Madinah, p. 339

contrary, all the other holy Books (the Torah and Gospel) have been corrupted in the form of additions or subtractions or alterations in the original text.[4]

Therefore, the Islamic Law is perfect, just and fair for all places and times and treats all human conduct with equality and justice, be it civil or criminal in nature and also lays down the procedures and manner of proving all allegations. Being the divinely revealed law, Islamic law seeks a number of temporal and spiritual goals, the most important of which is the pursuit of justice. Both the Glorious Qur'an and the Sunnah of the Holy Prophet (PBUH) repeatedly demand justice and condemn injustice; hence, rendering justice attracts reward and occasioning injustice attracts punishment.[5]

Islamic law has laid great stress on the evidence to prove the facts relevant for the judgement of a court. Unless it is proved beyond reasonable doubt that the accused has committed the crime or the defendant, has violated the right of the plaintiff, the court cannot give judgement against the accused or the defendant. The Holy Prophet (PBUH) said, "if people would be given what they claim (without evidence), some persons would claim other people's blood and properties, but it is obligatory on the claimant to produce evidence."[6] Thus, evidence is of Supreme importance in the administration of

[4]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 22.
[5] Doi A.I and Clarke, A. (2008) Sharia Islamic Law, Ta-Ha Publisher, London, p. 28 where it was stated that: "The difference between other legal systems and the Shariah is that the fountain head of the Shariah is the Qur'na and the Sunnah, i.e. al-wahy al-jali (the revelation per sec).." Mir Wali Ullah, (1986) *Muslim Jurisprudence and the Islamic Law of Crimes*, Taj Company.
[6] Al-Baihaqi, Ahmad bin Husain, al – Sunan al Kubra, Volume VIII, page 114. Cited in Anwarullah, (2004) *Principle of Evidence in Islam*, *A.A. Nordeen Publishers*, Kuala Lampur, Malaysia (2nd Edn) pp. vii-viii.

justice. Moreover, evidence is a restrainer to false, weak and unsubstantiated claims and complaints. The Prophet (PBUH) warns those who make false claim by saying:

> You come to me for adjudication perhaps some of you are cleverer in arguments than others. If I should adjudicate in favour of a person against his brother depending upon the former's statement while the latter in reality is in the right, then I would only be handling the former a piece of hell-fire.[7]

The Glorious Qur'an has made it imperative for a witness to give evidence and not to conceal it especially when he is summoned by a court for it. It has laid down the criterion for evidence for different crimes and rights as well as of the witness. The Sunnah of the Holy Prophet (PBUH) also gives Supreme importance to the evidence produced in the court of justice. The disputants are given full freedom to present their cases and set forth their points of view.

Detail inquiries and investigations were conducted to bring to the knowledge of the courts the real circumstances leading to the commission of the offences. The ultimate reliance for the decision of the case was made on the apparent evidence. The Holy Prophet (PBUH), "*We have been ordered to decide on the apparent evidence and this is*

[7] Al-Aini, Badruddin, Umdah al-Qadri Sharh Sahih al-Bukhari, Volume XIII, page 257. Citied in Anwanullah, *Principles of Evidence in Islam, op cit., p.ix*

Allah Al-Mighty who knows the secretes."[8]Umar Ibn Al-Khatab (May Allah be pleased with him), in a letter to Abu Musa al-Asha'ri, writes,

> The burden of proof is on the claimant and the defendant may be put on oath. If a claimant brings proof within the prescribed time, his claim should be allowed otherwise judgement should be given against him. All Muslims are acceptable as a witness against each other except those who have been punished with *hadd* of *Qazf* (accusation of adultery), those who have tendered false evidence, and those who are suspected (of partiality) on the ground of accuser's status or relationship."[9]

The instructions of Abu Yusuf to Caliph Harun al –Rashid regarding the proof of a crime are wroth-mentioning. He writes to the Caliph:

> You should not accept the compliant alone as proof of the man against another in murder or theft. One should not be punished for a had crime save according to clear and certain evidence or confession free from coercion. It is impossible to imprison a man merely as a result of another man's accusation against him. The Holy Prophet (PBUH) did not question the people with accusation. But you must call both the accuser and the accused together. If the accuser produces positive evidence in support of his allegation, the judge will rule for him, otherwise, he will set the accused free. The companions of the Holy Prophet (PBUH) were so cautious about imposing punishment for fear they might harm the innocent that they preferred to avoid penalties.

[8] Al-Baihaqi A.H, *Al-Sunan Al-Kubra*, *op cit.*, Volume VIII, page 94., cited in Anwarullah, (2004) Principals of Evidence in Islam op cit p. 7
[9] Ibn Hayyan (1361 A.H.) *Akhbar al-Quzzat*, Matba'ah Al-Istiqamah, Cairo, Volume, I, p.70.

> They would say to an accused thief, 'Did you steal", say "No".[10]

The object of the Law of Evidence is to lay down principles for the proof of the facts relevant for the decision of a court. In every dispute there are at least two litigant parties, the plaintiff and the defendant. The latter denies the claim and the former claims what is contrary to the apparent fact. The burden of proof lies on the plaintiff because what is apparent is presumed to be the original state. If a defendant can produce evidence to disprove the claim of the plaintiff and to establish his non-liability; he is allowed to present such evidence. The defendant is also allowed to disprove the credibility of the plaintiff's witness of submitting evidence to that effect.[11]

However, any fact can be proved by any evidence which proves the facts in issue to the satisfaction of the court. The term "*bayyinah*" is normally used for evidence which means anything which proves or disproves the fact disputed in a court – whether it be the statement of a witness, circumstantial evidence, documentary evidence, opinion of an expert, oath or any other thing with which the court is satisfied.[12]

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[10] Abu Yusuf (1329, A.H.) *Kitab Al-Kharaj*, Al-Matba'ah al-Safiyyah, Cairo, p. 190, Al-Bahai, A. (1965) *Min – Tiriq al-ithbat fi-sharia*, Dar al-Fikr, Egypt p. 37.

[11] Anwarullah, *Islamic Law of Evidence,* op. cit., pp. 5-13, Al-Kafawi, M.S. *Mirafa'at: Islamic Law of Evidence, (*Unpublished Monograph) CILS, ABU, Zaria, pp. 1-7

[12] Emairi, M. T. *Murafaat: Procedure and Evidence in Sharia Courts,* (Unpublished Monograph) CILS, ABU Zaria, *pp. 1-5*

It is pertinent to point that evidence may also be of two kinds, namely, judicial and extra-judicial. Judicial evidence means evidence produced during judicial proceedings in or before the court to prove or disprove any fact disputed therein. Judicial evidence includes testimony given by a witness in a court, all documents produced to and read by the court and all things examined by the court for the purposes of proof. Extra-judicial evidence means evidence recorded or produced in matters outside the courts such as the attestation of the document of any contract.[13]

It is relevant to mention that the jurists, while interpreting the text of the Glorious Qur'an and Sunnah have adopted different views in certain matters relating to evidence.[14]But the court may not strictly follow the views of any particular school of thought or jurists and may follow the view of any school or jurists whose view is suitable in the circumstances of a particular case because all the schools of thought and jurists are right and their research was aimed to elaborate the matters relating to the evidence.

1.2 Statement of the Research Problem

The application of Islamic law by Sharia courts in Nigeria faces serious proble*m a*nd challenges from various dimensions, virtually due to lack of proper or adequate

[13]Anwarullah, *Islamic Law of Evidence,* op. cit., pp. 5-13, Al-Kafawi, M.S. *Mirafa'at: Islamic Law of Evidence, (*Unpublished Monograph) CILS, ABU, Zaria, pp. 1-7

[14] Dasuqi, H., Al-Tajj Wal-Ikhlil, (Commentary of Al-*Hattab*), Vol, p, 87: Al Zirqani, Sharh Muwatta of Imam Malik Vol. viii p. 43, Ibn Qayyaim, At-Turuq Al-Hukmiyyah fi al-Siyasah al-Shari'iyyah, Matba'ah al-Muhammadiyyah, Cairo (1973) p.66

training of our judges on Islamic law of evidence and procedure. In the circumstances, the issue of the presentation of proof and its acceptance by the courts and what particular kind of proof is best suited to a particular transaction or claim is a pivotal question that both litigants and judges must be familiar with in order to render justice to the deserving party. Hence, in the absence of a strictly Sharia-compliant rules of evidence and procedure to guide the courts, in the state that are not applying the Shari'ah rule i.e. some of the states in Nigeria that there are yet to implement it, in some instances both litigants, judges, lawyers, and court registrars do perambulate as to the applicable principle of Islamic law of evi*d*ence in a given case, thereby resorting to English procedure instead of that of Islamic law. To avert this setback, it is imperative to elaborate and analyze the means of proof in civil litigation under Maliki Jurisprudence to serve as a reference to our judges, lawyers and students learning the Islamic law of evidence.

Moreover, while Islamic scholars have written various books on the subject, majority of these books were written in Arabic language, ranging from the interpretation of some Ahadith of the Prophet (S.A.W.), to various Islamic jurisprudential books. Hence, this work will serve as reference for the elaboration and analysis of the means of proof in Islamic Law of evidence.

1.3 Research Question

The following research questions are as follows:

i. To what extents has the shari'ah court effectiveness implements the shari'ah rules of evidence and procedure?

ii. What are the challenges and hindrances that shari'ah implementing states faces in modern day world?

iii. What are the role of judges and Islamic scholars in enhancing the success of implementing the various means of proof in civil litigation under Islamic law?

1.4 Aims and Objectives of the Study

The principal aim of this research work is to provide an analysis on the principles of Islamic law relating to means of proof in civil litigations under Maliki jurisprudence. In the light of the above, the following are the objectives of this research work:

1. To examine and highlight the various means of proof provided for in civil litigation under Islamic law as per the Maliki School of Islamic Jurisprudence.
2. To examine the value of proof (evidence) and its role in the administration of justice under the sharia.
3. To examine and analyze some of the problems militating against the application of Shari'ah legal system as it relates to the applicability of Islamic law of evidence in Nigeria.
4. To provide additional reference material in English language for better understanding of the subject matter by judges, lawyers, students and other

stakeholders involved in the administration of sharia justice in Nigeria.

1.5 Significance of the Study

This study will be beneficial to judges, lawyers, lecturers, students, magistrates, police, draftsmen, and other stakeholders involved in the administration of Sharia justice in Nigeria and to the general public. It can also help towards securing additional compliance with the rules of the Sharia on matters relating to proof (evidence) by the Sharia Courts. The study will also provide frontier for further research work on means of proof in civil litigation under the Shari'ah.

1.6 Methodology

Doctrinal research method, otherwise known as library based research was adopted in this dissertation. Useful materials and information from books, journals, and manuscripts were consulted and duly acknowledged. Footnotes system was used as a method of references and bibliography of the whole materials consulted was provided at the end of the whole work. Both primary such as the Glorious Qur'an and the Hadiths and secondary sources such as Islamic textbooks, journals etc. will be used and internet sources will also be used if the need arises.

1.7 The Scope of the Research

The scope of the research is purely limited to the discussion of the principles of Islamic law of evidence relating to civil litigation under Islamic law.

1.8 Literature Review

The notable books on the subject are:

Abu Zaid in Al-Risala[15]had espoused on the principles of Islamic law of evidence in a nutshell but the subject matter was not clearly discussed, limiting his discussions on the principles of the law of evidence without any details as to the classification of the means of proof.

Other books of *fiqh* within the Maliki School of law besides those mentioned above that are typically known and frequently referred to in Nigeria are books of commentary mostly to those books already mentioned above.

But before going into these books of commentary, an important book to be looked at is *Tuhfatul Hukkarn*[16] *b*eing one classical book most frequently referred to and relied upon by both lawyers and judges alike in Sharia courts as a book of substantive law and procedure in the field of litigation. The exposition contained in this book has covered several aspects on the subject. This book alone has also attracted so many commentaries *s*uch as *Ihkamul Ahkam* al-*Bahjah* f*i* Shark al-*Tuhfah*[17],

[15] Abi Zaid Alkirawani, Al-*Risala*, *Makhtaba Al-Kulliyah*, *Azhar* (nd) at p96.
[16] Ibid
[17] Abu al-Hassan Ali ibn Abdulssalam al-Tusuli, al-Bahjah fi Sharh al-Tuhfah, Dar al-Kutub al-Iiimiyyah, Beirut, Lebanon (nd), vol. 1 pp, 350, 357.

Mayyara ala al-*Asimiyyahs*[18] etc. and each o*f* these commentaries remain standard works as far as means of proof is concerned.

There are certain well written and authoritative books of commentaries on the above stated Maliki' books on *fiqh*, prominent among them is Al-*Mudawwanah*,[19] Shark al-*Kabirli* al-Sheikh al-*Dardir*'[20]', Shark *Mukhtasar* Khalilli al-*Khirshy.*[21]*Hashiyat* al-*Dasuqiala Shark* al-*Kabir*; *Hashiyat* al-*Sabuni* ala Shark al-*Sagir*[22], *Fawakih* ad-*Dawani*[23]*Minhaj*al-*Jalil Sharh Mukhtasar Khalil*[24] these books have thoroughly considered the various means of proof under Islamic law as exposited by various Muslim scholars. These books taken together have provided abundant literatures on the subject of Islamic law of evidence and procedure and they are authority on the subject, especially under the Maliki School of Islamic law.

Abdus-Sami Al-Ash'ari.[25], is one of the popular and more preponderant versions of Malik jurisprudence. While explaining Islamic la*w of evidence in the chapter he* cal*led* "qualification of judges and evidence", he adopted the method of using techn*ical* expression, which makes the whole chapter incoherent *and difficult to understand. He* mixed up the procedure and evidence together.

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[18] Ibid
[19] Imam Malik ibn Anas, Al-Mudawwanah al-Kubrah, Dar al-kutub al-illmiyyah, Beirut, Lebanon (nd) Vol. 3 pp, 375-398
[20] Al-Dardir, Ahmad ibn Muhammad al-Adawai, Sharh al-Kabir li al-Sheikh al-Dardir, (nd) pp, 309, 317-319.
[21] Al-khirshy, Muhammad ibn Abdullah, Sharh mkhtasar Khalil lil khirshy, (nd)p. 187
[22] Ahmad In Ghanim ibn Salim ibn Mahna al-Naghraway, al-Fawakih ad-Dawami ala Risalatu Abi Zaid al-Qiraqani, (nd) pp. 317- 322, 326
[23] Al-Saawi, Ahmad Ibn Muhammad, Hashiyat al-Saawi ala Sharh al-Saqir, (nd) , pp. 390-393
[24] Muhammad Ulaisah, Minhaj al-Jalil Sharh Mukhtasar Khalil, pp. 358-433
[25] In his book Jawahirul Mil (a commentary upon Mukhtasar Khalil) p.69

Shamsuddeen, *the author of Hashiyatul Dasuki on the commentary of* Sharhul Kahir, has discussed many issues relating to Islamic law of evidence, particularly the means of proof. In the chapter dealing with the law of evidence, he discussed the following issues, namely: *Shahada* (testimony), Iqrar (confession), al-*Yameen* (the oath taking), *Qasama* and *Qarinah*, all were discussed in single chapter; this style makes the whole things ambiguous.[26]

Abdullahi Muhammad Ahmad, the author of Fat hut Ally al-Malik *on the* commentary of *Tabsiratul-Hukkam*, the author outlines t*he legal position and the logic* behind the position of *Qadi* (judge). He also classified the people who qualify and those who do not qualify to be judges. He enumerated all the means of proof and other related matters.[27]

The contributions of these authors are such that most of today's legal issues on the question of means of proof in any Islamic society that desires the application of the Sharia in the arena of administration of justice has ample source of guidance in doing so. However, these books of Islamic law can be considered to have contemplated situations relative to the time these Muslim jurists of which today, many recent and emerging legal problems continue to pose questions in search of legal solution that to contextualize the already established principles of the Sharia would require a re-examination of the contribution of these authors as regards legal problems appropriate to present day situations. It is therefore expedient that these books be studied and analyze*d so as to gain* their contemporary application in

[26] Ibid at p.62
[27] Ibid at p. 12

the administration of sharia justice particularly in the northern states of Nigeria where quest for the application of sharia resurfaces.

El-Imairi[28], in his manuscript titled "*Marufa'at*: Procedure and Evidence in Sharia" Courts" has discussed the procedures related to the administration of justice under Islamic law. The elegance of his presentation togeth*er with the scope of the issues* covered in the manuscript is good enough to warrant its recommendation as a source book to be refined and adopted as the rules of procedure to guide the sharia courts in northern Nigeria. However, his discussion featured only certain aspect of the means of proof to the neglect of others.

Keffi[29], in his article on the subject has discussed certain aspects of proof by testimony of witnesses in civil litigation under Islamic Law and M. S. Abubakar[30] on the other hand had discussed "Oath: Al-Yameen" as one of the means of proof under Islamic law. However, although these authors have examined these two modes of proof, i.e., shahadah(testimony) and al-Yameen (oath), and had exposited enormously on them, this study would further examine the other means of proof beside those mentioned by these authors.

In the book *Irskadal-Saalik*[31], some aspects of the Islamic law of evidence and procedure was discussed by this author. So also, in the book *Aqrab al-*

[28]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* unpublished manuscript Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Zaria.

[29]Keffi, S.U.D. (2006) Aspect of Proof by Testimony of Witnesses in Civil Litigation under Islamic Law, Journal of Islamic and comparative law. Pp. 27-47

[30] Abubakar M.S. Oath: Al-Yameen, *Journal of ISLAMIC and Comparative Law, pp, 48-63*

[31] Ibn Askar, Abd al-Rahman Ibn Muhammad, Irshad al-salik Ila Ahsraf al-Masalik fi Fiqh al-Imam Malik, Mustafa

Masalik[32]particular means of proof in the adjudication of disputes was also discussed.

Similarly, in the book *Mukhtasar Khalil*[33] it follows closely what the book Aqrabul Masalik have conversed on the subject but that the discussion furthered compasses certain aspect of the well-known means of proof under Islamic law. However, these three books, that is to say, Irshad al-Saalik, Aqrab al-Masalik and Mukhtasar Khalil provided mainly the basic and general principles on the adjudication processes under Islamic law without setting forth the procedural aspect of how every mode of proof is to be placed and accepted before the courts. These books did not also elaborate further on the principles regarding the formality and kinds of cases every particular mode of proof is applicable.

Another contemporary writer in this area Anwarullah, the author *of "Principle of Islamic Law of Evidence"*,[34] had tried to highlight some important aspects of Islamic law *of* evidence and he classified the means of proof in order of priority. This book is a valuable material and a good reference for those who have interest in Islamic law of evidence and would be a valuable source material for this study, although important as it is, it was a collection of Islamic jurisprudence relating to evidence under th*e Hanafi* School of law.

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al-Babi Publishers, Cairo (nd), p. 96

[32] Al-Darhir, Ahmad Muhammad Ib Ahmad, *Aqrab* al-*Masalik li Mazhab al-imam Malik*, *al-Qudus Publishers. Cairo (*nd*)*, pp. 106-107

[33] Khalil Ibn Ishaq a;-Maliki Mukhtasar Khalil fi Fiqh Imam Dar al-Hijra, Dar ibn al-Haitham, Cairo, pp. 167-169

[34] Anwarullah, *Principals of Islamic Law of Evidence*, A.S., Noorden Publishers, Kuala Lampur, Malaysia

1.8 Organizational Layout

The research work consists of six chapters. Chapter one deals with the general introduction and it focuses mainly on the background of the study, statement of the research problem, aim and objectives of the study and significance of the research. It also discusses the scope of the study, methodology and literature review. Chapter two dealt with nature of proof in Islamic law of evidence. Chapter three discusses the concept of *Iqrar* (admission). Chapter four deals with the concept of *Shahadah* (testimony) and *alyamin* (oath). Chapter five discusses proof by expert evidence while chapter six provides for the summary and conclusion of the research work.

CHAPTER TWO

THE NATURE OF PROOF IN ISLAMIC LAW

2.1 Introduction

Proof is of supreme importance in the administration of justice as the Glorious Qur'an states: "O you who believe, be steadfast witness for Allah in equity and let not hatred of any people seduce you that you do not deal just"[35].The Glorious Qur'an also in chapter four 4:135 states: "0 you who believe stand firmly for justice as witnesses to Allah even if it is against yourselves, your parents or your kind and whether it be against rich or poor for Allah can best protect both"[36]:

In another verse, the Glorious Qur'an in chapter 2:282 also states: "Let no witnesses withhold their testimony when it is demanded from them and conceal not your testimony, for whoever conceals it his heart is tainted with a sin"[37].

In the same vein, the Glorious Qur'an in chapter 65:2-3 says: ''And take for witnesses two persons from among you, endued with justice and establish the evidence for the sake of Allah"[38]. These verses of the Glorious Qur'an enjoin Muslims to render testimony for the sake of Allah when called upon to do so in order that justice shall prevail among the ummah. These verses also lay authority regarding the legality of rendering testimony as a means of proof under Islamic law.

[35] Qur'an 5:8 Translation from al-Hilali, M.T. and Khan M.M. *the English Translation of the Meaning and Commentary of the Holy Qur'an*, Kind Fahd Printing Complex, al-Madinah al-Munawarrash, Saudi Arabia
[36] Ibid
[37] Qur'an 2:282 ibid.
[38] Qur'an 65:2-3 Ibid

Moreover, the doctrine of presumption of innocence was applied by the Prophet (P.B.U.H) in all his adjudications as a judge. He warned that a judge could only act on evidence and upon the proof of the facts as he explains in the following hadith:

> I am a human being and you may bring your cases before me, perhaps some of you are more intelligent in making their cases than others and may receive favourable judgement from me. If I adjudicate in favour of a person his brother, which he does not deserve, he is receiving the Hell fire and it is up to him either to accept it or reject it.[39]

In another hadith, the Prophet (P.B.U.H): peoples' claim were to be accepted on their face value, some of them would have claimed other peoples blood and property, but the burden of proof is on the plaintiff and the rebntal of it is on the defendant"[40]. Thus, these a hadith further establishes the legality of rendering testimony and its value in the administration of justice under Islamic law.

2.2 The Concept of *Shahadah*

The first source of proof of any fact in Islamic law of evidence is *Shahadah*(testimony) which means "information of what one has witnessed or seen or beheld with his eyes, declaration of what one knows, decisive information, it also means to be present'[41]In this chapter, *Shahadah* (testimony) means the statement of a witness

[39] Muslim I., (nd) Sahih Muslim, Chapter DCXL, Darul Arabia, Beirut Vol. III p. 92,
[40] Ibid
[41] Ibid

of any matter, oral or written, in or before a court to prove or disprove any fact disputed therein by using the expression *"ash-hadu"* or any other synonymous expression. It generally signifies the evidence of a witness given *viva voce* (orally) in court.[42]

In Islamic law, great importance has been given to *Shahadah* (testimony). In giving effect to the evidence, the *Qadi* or judge who is assigned to look into the matter has to rely upon the information given by the witness, which can be regarded as reliable evidence upon which cases are decided where such testimony is established to be true. It is unanimously agreed by Muslim jurists that a judge should base his judgment upon what he learned from the testimony given by the witness.[43]

Imam Malik strictly holds that issuing judgments not based upon the evidence of witnesses is forbidden and this is the guideline issued by Imam Sahnun to be the practice in what is to be done in a court of law.

From the above Qur'anic verses and hadith, it is clear that the judge must be guided by the Islamic principles of justice while conducting the trials. That is to say, he must be God-fearing and open-minded. A just decision can never be achieved unless claims and proof are presented, otherwise the litigants cannot have proper opportunity to prove their cases or defend their legal rights.

2.3 Requisite Rules on Rendering Proof in Islamic Law

[42]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 22
[43] Asim B.M. *Gift for Judges Al-Andalusi, p. 4-5*, poem No. 42 43, and 44

The general rules in Islamic law of evidence are that evidence or testimony is obligatory to be presented by the person to whom the request to testify is made. That is to say, the complainant, plaintiff or claimant must adduce evidence to substantiate their claim.

Although this general rule is subject to certain conditions and qualifications, this is based on the provision of Qur'an 2:282 already quoted above to the effect that concealment of evidence is a sin against Allah.

The Muslim jurists have classified witnesses as follows:

(a) A witness who is asked by the contending parties to witness a transaction between them.

(b) A witness who perceives the fact in issue and voluntarily goes to court in order to testify what he knows about the truth of the matter. In this regard, the Muslim jurists have classified the legal rules of evidence as follows:

a. *Fard al-Kifayah* (Collective Responsibility): Muslim jurists are unanimous in cases other than *Hudud* that giving evidence is *Fard al-Kifayah.*[44]That is to say, the responsibility is discharged when a member of the community discharges it. Thus, the collective responsibility to protect a right or interest is discharged when some people in the community give evidence to secure such right or

[44] Bahrassu A.E., (1969) *Mas'uliyyah Al-Shar'iyyah* Halabiy Publications, Bengazi, Libya, p.16

interest.[45] The above rule becomes *Fard Ain* (individual duty/responsibility) if nobody volunteers to give it. As such, if a right or interest cannot be secured unless and until the evidence to secure it is made ^ available, in this respect, it becomes *ford ain* on them to render it.[46]

b. " In *Hudud* cases, it is not obligatory to give evidence where the witness is given choice to testify or not to testify.[47] Some Muslim jurists are of the opinion that Islamic law has given the witness choice of concealing the evidence or the choice to disclose it by testifying but it is better for the witness not to disclose it.[1348] So also, a witness may not give his testimony in *Hudud* cases as it is *mandub* (commendable) to conceal such offences. If however, a witness volunteers to testify, then his testimony shall be accepted.[49]

The ground for the above rules on testimony of witnesses in *Hudud* cases is the Hadith reported by Abu Hurairah (R.A) who said that the Prophet (P.B.U.H) is reported to have said: "He who covers the vices of his brother Muslim, will have his own concealed by Allah in the Hereafter"[50]

In cases affecting certain matters like *Talaq* (divorce), emancipation or marriage, it is obligatory for the witness to give evidence even if he is not called to do

[45] Ibid at p. 16
[46] Abdul-Rahman A. (nd) Shar al-*Khattab*, Maktaba al-Misriyyah Vol, VI p. 163
[47] El-Imairi, M.T. *Murafa at Procedure and Evidence in Sharia Courts op cit, pp. 28-29*
[48] Ibid
[49] Ibid
[50] Muhammad A.A. (nd) *mawahid al-Jalil fi Sharh al-Hattab* (A Commentary on Mukhatasar Khalil Maktabah al-Kubra, Egypt p. 163

so.[5152] Also in cases pertaining to *huququl adami* (private rights), a witness cannot give evidence, unless he is called upon by one of the litigants to testify. He may in litigants that he is disposed to testify on the fact in issue and if he is invited, he may go ahead and testify.[53]

2.4 Burden of Proof in Islamic Law

The fundamental principle of Islamic law is that it is the duty of the claimant to establish his claim. If he fails to establish the claim, then it becomes the duty upon the defendant to repudiate the plaintiffs claim or to maintain his innocence by taking an oath.[54]The court must also be convinced that the defendant has or has not committed the alleged act before the matter is decided. The proof of a matter requires presentation of evidence (proof) or *ithbat*, until the matter attains the degree of certainty (probative value) which can be established by sight, hearing, touching or by other means of perceiving a fact. Hence, the witnesses must be faithful people who testify for the sake of Allah and without any inclination regarding what they actually know about the truth of the issue in dispute between the parties.

Likewise, Islamic law places upon a party who asserts an issue or makes a claim to bring forth proof (evidence) to substantiate his assertion. In that, regarding the

[51]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 28-29
[52] Othman M.S.A. (1996) *Islamic Law of Evidence*, Kuala Lumpur, Malaysia p. 46
[53]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 17-18
[54] Ibid

burden of proof placed upon the complainant, plaintiff or claimant before the court can adjudge him entitle to a particular right. Ibn Abbas (RA) reported Allah's Messenger (P.B.U.H.) saying: "if people were to be given according to their claim, they would claim the life of others and their property, but the burden of proof is on the plaintiff and the oath is on the defendant."[55]

This is one of the fundamental rules of *the Shari'ah as* regarding legal decision. That is to say, the plaintiff must produce at least two reliable witnesses in order to prove the validity of his claim in criminal cases other than in *Zina,* which requires four reliable male witnesses. Therefore, the concept of fair hearing originated from the Shari'ah where one party cannot be given advantage over the other party on any account. This includes access to court, opportunity to represent himself and be represented. It is not fair for the judge to listen to the case of one party and denying the other party the opportunity to present his defense. Umar Ibn al-Khattab, while appointing Abu Musa al-Ashaari as a judge in Kufa, gave him the ethics of a judge concerning trial of matters in the following statement:

> Consider all people equal before you in your court and in your attention, so that the noble one will not expect partiality and the humble will not despair for justice from you...Avoid fatigue and meanness and avoid annoyance of litigant, for establishing justice in the court of justice. God

[55]Ibid at p. 11

> will grant you a rich reward and give you a good reputation.[56]

On a close observation of the above statement, Umar (R.A) in these few words lucidly conveyed the position of fair hearing. All these basic elements of justice are enriched and practiced in the administration of Shari'ah since its inception many centuries ago. Therefore, the objective of legislating or burden of proof is to ensure that justice is done to all litigants without any discrimination as the Glorious Qur'an in chapter 49:6 stated: "O you who believe! If a Fasiq (morally bankrupt) comes to you with any news, verify it, lest you should harm people in ignorance, and afterwards you become regretful for -what you have done"[57]

2.5 Standard of Proof

This refers to aggregate of evidence needed to prove a fact to the level of yaqin(certainty). This kind of certainty can be achieved by way of an eye witness or material evidence. Below the standard of *al-yaqin* is uncertainty or *adamul yaqin*,(uncertainty)which is subdivided by the jurists into three as follows: *al-zann*, (speculation) *al-shakk* (doubt) and *al-waham* (confusion) respectively. *Al-Zann* means a conjecture which is a state of uncertainty close to the state of *al-yaqin*.

[56]Al-Sharkashi, al-Mabsut, (nd) op cit vol. VIII p. 266

[57] Quran 49:6

This standard is not adequate to prove a case because *al-zann* is opposed to *al-yaqin*. This was clearly stated by the Glorious Qur'an:

"Such is Allah, your Lord. Apart from the truth what (remains) but errors".[58]

The above position explains that al-zann cannot be used to determine the truth because "al-bayyinatu li ithbati kharijil zahir, wal yamin li baqa'il asl[59]", meaning "Evidence is for the proof of what is not clear, an oath is for the confirmation of what is presumed."[60] Under the above principle, al-zann which is clearly an unproved matter cannot be the basis for proving the fact in issue. The Glorious Qur'an held that, al-zann is improbable as the basis of ascertaining the truth as stated in the following verse: "O you who believe! If a Fasiq (morally bankrupt) conies to you with any news, verify it, lest you should harm people in ignorance, and afterwards you become regretful for what you have done"[61].

The above is the general principle regarding *al-zann.* In some circumstances however, *al-zann* may be used as an aid to ascertain the truth of a certain extent, although there is some room left for doubt, as the above Qur'anic verse clarifies.

On the other hand, *al-Shakk* is a state of doubt bordering between "proved" and "not proved". Therefore, certainty stands on a high position than doubt, which is

[58] Qur'an 10:32
[59] Ibn Farhun (nd) Tabsiratul Hukkam, op cit, Vol, 1. P. 286
[60] The Mujallah (1980), (An English Translation) of the *Mujallah al-Ahkam* al-diyyah, Tuler lahore, Pakistan p. 74
[61] Qur'an 49:6 op cit. at p. 701-702

based on probabilities[62]. As for *waham,* this term refers to a state of doubt or fancy which leans closer to error. It cannot be taken into account in deciding a dispute. To this effect, the relevant maxim is *"al-yaqin la-yazalu bish-shakk",* meaning "with doubt, certainty does not fade". Included in the category of *waham* is mere suspicion without any ground and such suspicions are rejected.[63] In spite of the above, if a suspicion becomes supported by evidence, the court would nevertheless consider the matter.

Moreover, a fact tendered to support an issue may be rejected if *galabat al-zann (*excessive probability*)*there exists in it, of an inference that goes to the contrary of what is sought to be established. For instance, if a person declares that he owes one of his legal heirs some money during *maradul maut* (death sickness), such a declaration is to be rejected, unless and until the other heirs approve the declaration. This is due to the possibility of the declarant trying to exclude the other legal heirs from inheriting his estate or reducing their shares.[64]

However, if such declaration is made by a person under normal circumstance without any fear of death or being in a state of approaching death *(maradul maut),* that declaration of liability is valid.[65] That is to say, it would be accepted as having acknowledged as a legal liability against the declarant. But on the basis

[62]*Mujallah al-Ahkam Al0diliyyah op cit. p.74*
[63] Mahmassani, op cit, p.224
[64] Ibid p.224
[65] Mujallah al-Ahkam al-diliyyah op cit, p. 74

of absurdity or *waham,* there are grounds to reject a declaration made during a period of death sickness *(maradul maut).* A declaration or confession made during the period of sickness cannot be accepted due to the existence of probability without good grounds for holding the veracity of such a declaration or confession.[66] In the light of the above proposition, *waham* refers to a state of doubt which leans closer to error and it may be divided into two as follows:

(a) **Mere Possibility:** This is the probability that cannot be supported by proof of evidence. This type *of waham* should be rejected.

(b) **Possibility that is based on proof and evidence:** This type of proof may be accepted and in certain situations is favoured above other kinds of evidence. It is therefore clear, that the burden of proof lies on the party who claims or accuses, i.e., he who asserts must prove.[67] This is the rule of evidence deducted by Imamal-Shafi'i under his principle of *al-istishab* or legal presumption, which is accepted by all the *sunni* schools.

The burden and standard of proof may sometimes reach the highest standard, that is *al-yaqin,* or sometimes the lowest standard of certainty, or sometimes the lowest standard of *al-zann al-ghalib* (strong probability) supported by evidence. In this case,

[66] Mahmassani op cit, p.226
[67] Zaidan A., (1982) op cit. at p. 73

however, *Shakk* or *waham* are to be rejected where doubt exists especially in cases involving *hudud* offences.

For *hudud cases,* an accused person shall not be convicted if there is no strong evidence to justify the conviction; that is, evidence which establishes the case beyond any *shubha* (ambiguity) as *hudud* convictions are liable to be set aside on the existence of the ambiguity.

2.6 Juristic Exposition on the Issue of Proof

The jurists have laid down on the basis of *fiqh.* innumerable rules of evidence with vivid and suitable details to pick out falsehood and to distinguish it from the truth in order to do justice and administer it. Proof of a matter requires presentation of evidence until the matter attains the degree of certainty. In other words, the fundamental rule of Shariah provides that no weight should be attached to doubt or fancy or similar things and that weight should be attached to certainty only or to what might be established by evidence.[68]

Evidence is for the person who claims, the oath is for the person who denies the - claim and evidence is for the proof of what is not clear and the oath is the confirmation of what is presumed. The basis of the above principle is the hadith of the Prophet (PBUH) to the effect that proof is brought by the complainant and taking

[68] Imam Al-Bukhari and Imam Muslim.

oath is upon the one who denies.[69] Thus, if the plaintiff is unable to produce any proof, oath will be administered on the defendant and if he takes the oath, judgment will be given in his favour.

The Muslim jurists on the issue of proof have viewed it as follows. According to the Maliki School, if the plaintiff institutes an action in a court of law, he is duty bound to adduce witness in order to establish his claim. If he fails to establish it, the burden of proof of innocence is now shifted on to the defendant. That is to take oath in order to exonerate himself from the plaintiff allegation. If the defendant on the other hand, refuses to take the oath, according to Maliki School, the plaintiff shall take the oath. This view is agreed by Shafi'i and Imam Ahmad once he takes the oath, he is entitled to judgement.[70]

However, according to *Hanafi* School, once the defendant refuses to take oath, then the plaintiff would be considered to have established his claim and consequently there is no need for the plaintiff to take any oath. This is considered as a form of evidence by presumption in favour of the plaintiff. Thus, the defendant's refusal and the plaintiffs oath must amount to the minimum evidence required which entitles the plaintiff to his claim. On many occasions, the Prophet (P.B.U.H.) gave judgment in

[69] Sunan Ibn Majah (1972) Abudawood Isa al-Babi al-Halabiy, Egypt vol. 2 p. 220
[70] El-Imairi M.T. *Murafa'at* Procedure ad Evidence in Shariah Courts, op cit, pp. 77-78

matters involving monetary transactions on the basis of one witness and the claimant's oath.[71]

Similarly, there is provision for proof by *Khultah* which is evidence of previously established interaction between partners and this occurs where there is very strong suspicion that a defendant is liable regarding an allegation, but no proof is forthcoming from the plaintiff. It often arises between individuals who have closer relationship and have constant interaction. For instance, if two people were business partners and later on one of them claims that the other partner is indebted to him and such a person was unable to get witnesses, the other person will be asked to take such an oath. Evidence of previously established interaction between the partners must be found by the court before the oath can be administered on the other party. If he declines, he will not be referred back or offered to the plaintiff.[72] The objective of the evidence is to prove what is contrary to the manifest and the objective of oath is to establish the continence of the original state of affairs.

Muslim jurists are unanimous on the fact that, if the accused person denies and refuses to take oath in a matter affecting *Hudud* offences, judgment cannot be passed against him, except in theft cases, in which case, if he refuses to take the oath, there is no evidence against him, in which case, the proper procedure is to ask him to pay

[71] Audah, A. Al-Tashri al-Jana'I fi; Islam op cit Vol. II p. 341
[72] Al-Dasuqi, Hashiyat al-Dasuki ala Sharh al-Kabir, Dar Al-Fikr Beirut, Lebanon, (nd) Vol, IV pp. 185-186

compensation for the stolen property. In other words, he is responsible for the stolen property; hence, there is no *hadd* punishment on him.[73]

The jurists differ on the matter of *Qisas,(Retaliation) Diyyah (Blood money)*and *Ta'azir (reprimand punishment).* According to Imam Malik, no case of *hudud* and *ta'azir* will be decided on the basis of refusal to take oath. That is to say, there must be reliance on tangible evidence to establish the commission of the particular offence rather than reliance on refusal to take an oath which indicates denial of the particular allegation. But Imam al-Shafri is of the opinion that the court can pass ajudgment on the basis of refusal to take the oath by the complainant in cases of *Hudud* and *Qisas.* On the other hand, Imam Abu Hanifah holds the view that if the accused refuses to take the oath involving bodily injury or hurts *(jurhuj,* he will be punished by *Qisas* or by *Ta'azir*[74].In the same vein, Imam Abu Hanifah opines that in matters other than *hudud* and *qisas,* it is acceptable to pass judgment on the basis of the refusal of the defendant or the accused to take oath but the complainant or the plaintiff will in no case, be subjected to oath taking because in their view, the defendant's refusal to take the oath is circumstantial evidence of admission.[75]

2.7 Classification of Means of Proof

[73] Ibn *Farhun (nd) Tabsiratul Hukkam*, *op cit*. vol. 1 p. 316 cited in Anwarullah, (1994) *Islamic Law of Evidence.* Shariah Academy, Pakistan, p. 83
[74] Ibid
[75]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 22

In the administration of justice, it is imperative for a claimant, plaintiff or complainant to adduce evidence in order to secure judgment of the court in his favour. As such, the proof of a matter requires the presentation of evidence before the court until the matter attains the degree of certainty. Hence, proof is of supreme importance to the administration of justice as the Hadith of the Prophet (PBUH) said: *"If people's claims were accepted on their face value, some persons would claim other people's blood and property."*[76]Thenecessity of proof is thus a restraint to false, weak and unsubstantiated claims.[77]Therefore, the means of proof in Islamic law of evidence is classified into the followings:

a) Proof by Testimony *(Shahadah);*

b) Proof by Admission *(Iqrar}*\

c) Proof by Oath *(Al-Yamin)*\

d) Proof by Documentary Evidence *(Al-Kitaba);*

e) Proof by Circumstantial and Forensic Evidence *(al-qara'in)*

These categories of means of proof are discussed below.

2.7.1 Proof by Testimony *(Shahadak)*

[76] Al-Baihaqi Sunan al-Kubra, Dar Al-Fikr, Beirut, Lebanon (1973) vol, VIIIp. 177
[77]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 18

The word *"Shahadah"* is a relative term, which means to give information by words.[78]When two parties appear before the court and in the presence of the *Qadi* (judge) to prove the right which one person has against the other, such proof is called *"shahadah"* (testimony). *Shahid* is the name given to the person who gives the evidence and the *mash-hud alaih* is the right that need to be proved.[79]

As-Shahadah means to view, because a person who views something can give information on what one has knowledge about. It is true information in the court of law about something perceived in order to establish or prove a certain claim or any act in favour of another.[80] So, the evidence of a witness does not become proof until it is perceived by the judge in court to establish a right belonging to some person.

The judge may, however, study the credibility of witnesses from his personal knowledge or from what is ascertained by means of secret inquiry. When in doubt, the judge shall abstain from giving any decision.[81] The majority of Muslim jurists allow testimony in all cases but specify the minimum number of witnesses required in accordance with the types of cases, as well as circumstances involved in each case. They explain that specification of the number of witnesses is a matter

[78] Bahasy, A.F. *Nazariyyatul Ithbat, Sharikatu*l Arabia, Egypt (1962) p. 13 cited in Anwarullah, Principles of Evidence in Islam, op cit, pp. 7-79
[79] Ibid pp. 13-14
[80]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 28
[81] Al-Dardeer, *Alshar al-Kabir Ala Mukhtasar Khalil,* Mustapha Al-Habilay, Egypt, (nd) vol. 4 p. 124

contrary to *Qiyas* (analogy), because the determination of the truth depends upon the trustworthiness of witnesses and upon their number.[82]

Under the above principle, the testimony of four persons in adultery cases has been sanctioned by the Glorious Qur'an[83] While in civil matters, the number of witnesses is two men, or one man and two women. But in cases where it is proved to be rare for men to have knowledge, women's evidence is exclusively admissible. Nonetheless, if a testimony is admitted by accrediting a witness *(Ta'adil)* on the side producing the witness, the other side has been given a power to impugn the same by the process of *tazkiyah*[84]

2.7.2 Proof by Admission

Admission is the strongest means of proof because a person is bound by his own admission. This is the general principle of Islamic law.[85]

The Glorious Qur'an also made references to this in the following remarks: "0 *ye who believe, be staunch injustice witness for Allah, even if it is against yourself."*[86]

In the Hadith, the Prophet (P.13.U.H) is reported to have said: *"speak the truth even if it will be against yourself* "[87]

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[82] Qadri A. Islamic Jurisprudence in the Modern World, Delhi, India (1986) p. 504
[83] See Qur'an 4:15, where the Almighty Allah states "if any of your women are guilty of lewdness, take the evidence of our (Reliable witnesses from among you)".
[84]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 28
[85] Sabiq S *Fiqh us Sunnah*, Dar al-Fath, Cairo, (1970) vol. 3 p. 446
[86] Qur'an 4:15

It is a prerequisite for valid admission that the person making it should possess sound mind, free from duress, free from court interdiction and he should not suffer from any legal disability.[88] That is to say, for it to be valid, an admission must be declared in a state of perfect mental alertness of the kind that let the declarant be aware of the legal implication of his admission. Similarly, when the defendant makes an admission, he is not entitled to retract or withdraw it.

But if the withdrawal was in respect of an admission made concerning the right of the Almighty Allah whether punishable by *Hadd* or otherwise such as that concerning the crime of *Zina* or drinking wine, some Maliki jurists subscribe to the opinion that such a withdrawal is permissible. Other Maliki jurists however opine that unless the withdrawal is for an explanation of doubt, it cannot be accepted.[89] But Ibn Al-Arabi in his book *Ahkam Al-Qur'an*[90]says that the first view, i.e., to withdraw without explanation is the favoured view of the Maliki School.

Some jurists together with the Zahiri School took exception of this rule, i.e., withdrawal should not be allowed on the ground that that hadith relied upon to support such a view was not authentic in that it was reported only as a saying of Ibn Mas'ud and

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[87] Bukhari Hadiths No. 712 p. 496
[88] Ibid p. 927
[89] Al-*Qawanin Al-Fighiyyah*, p. 244 cited in El-Imairi, MT. Murafa'at: Procedure and Evidence in Shariah Courts, op cit, p. 27
[90] Ibn Al-Arabi *Ankam Al-Qur'an op cit, vol. 4, p. 1880*

Umar, The Prophet is reported to have said: *"set aside punishment where there is the least doubt"*[91]

2.7.3 Proof by Oath:

Under this heading, if a person brings an action and the defendant denies it, the plaintiff must adduce evidence. The basis of this is the Prophetic tradition to the effect that*: "The burden of proof is on the plaintiff and taking the oath is on the defendant"*[92]The process of oath is accepted in property and other matters like marriage and divorce, but it is not generally applicable in the violation of the rights of Allah.[93]

2.7.4 Proof by Documentary Evidence

Documentary evidence is the evidence which is derived from a document produced for the inspection of the court in a matter under dispute. "Documents" means any matter expressed or described upon, any substance by means, intended to be used, or which may be used, for the purpose of recording the matter. In other words, document includes any written, printed or inscribed material which gives information.[94] For the purpose of providing documentary evidence in proof of a matter before a court, documents include books, maps, pamphlets, magazines, planes, charts, drawings, photographs, lithographs, graphs, soundtracks, etc. Modern

[91] Sabiq S. *Fiqh us Sunnah*, *op cit*, *vol. 2*, *p. 224*
[92] Al-Baihaqi Sunan Al-kubra, Dar Al-Fikr, Beirut, Lebanon (1973) vol. VIII, p. 177
[93]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 80-81
[94] Ibid

technology has open up new possibilities in the form of tape, film and the like, so that the ranges of materials which may be described as documents, has expanded somewhat the more traditional understanding of the term "document" which is admissible in Islamic law as well.

In civil cases, a document produced by computer printout is admissible as evidence of any fact recorded in it of which direct oral evidence of it would be admissible, provided that the computer had been operating properly throughout the material time and had been supplied with information of the kind contained in the document.

In Islamic law, it is a fundamental principle of principle that no evidence should be placed upon in writing, because handwriting resembles one another and because writing falls outside the recognized means of proof,[95] that is testimony, admission or refusal to take oath. Moreover, the handwriting itself produces the original oral testimony (evidence) which was primarily evidence of the writing.[96]

[95] Al-Sharkashi, al-Mabsut, (nd) op cit vol. VIII p. 266
[96] Ibid

CHAPTER THREE

*AL-IQRAR (*CONFESSION/ADMISSION)

3.1 Introduction

This chapter discusses the principles of the Islamic law of evidence and procedure applicable to *Al-Iqrar* (admission/confession) as one of the means of proof in civil litigation. The chapter focuses on such issues like the authority as to legality of admission, essentials of admission, rejection of admission, whether it can be divided, etc.

3.2 The Definition Of The Term Al-Iqrar

Al-Iqrar (confession/admission) is the most strong evidence and proof according to Islamic Law. *Al-Iqrar* can be used to prove a particular fact or issue in both criminal and civil cases. In the literal sense, *al-Iqrar* means "admission, recognition or confirmation".[97]In the legal sense, however, the various schools of jurisprudence have formulated their various definitions. The following are some of the definitions:

1. Maliki and Shafi'i Schools define Iqrar as: The testimony of the existence of right against the maker of the admission himself. It is also the confession of one's guilt.[98]
2. Hanafi School, defines it as ". An admission of the existence of a right (*haqq*) of

[97] Al-Jaza'iri A.J. (1976) *Minhajul Muslim*, Darul Fikr Beirut p. 467
[98] Ib Qudamah, A.A. (1958) al-Mugni, Mustapha al-Halabiy, *Egypt Vol, 3. P. 228*

another person against the maker of the admission himself.[99]Or "The testimony of the existence of the right or interest (*thubutul haqq*) for the benefit of another person and detrimental to the right or interest of the maker of the admission himself through the use of specific words.[100]

The term was also defined by Al-Shawkani as: *"The evidence of a person upon himself.[101]*That is to say, it is an acknowledgement by a competent person binding himself. On the basis of the above definitions, *al-Iqrar* is therefore, is a form of admission for the purpose of proving against the maker of the admission himself *Iqrar* affects only the person making it and does not extend to any other body. Thus, if a competent person makes *al-Iqrar* on behalf of another, that stands invalid.

3.3 Authorities *(Adillah)* as to the Legality *of Iqrar*

Going by the text of the Qur'an and Sunnah of the Prophet (PBUH) and *Ijma'a*(consensus of the Muslim jurists), *Iqrar* has been accepted and acted upon, as a strong and superior method of proof, if complied with all its legal stipulations.[102] In the Glorious Qur'an, Allah has said: *"O you who believed. Be staunch in Justice,*

[99]Al-Jaza'iri, A. J. *Minhajul-Muslim,* op cit., p.467

[100]SalarnTM.A. (1964) *Al-Qada' fil Islam*, Dar al-Nahada al-Arabiah, Egypt, p.79
[101]Al-Shaukani, M. (1961), *Tafsir Path al-Qadir*, op cit, Vol. Ill, p. 231
[102]Anwarullah, *Islamic Law of Evidence,* op. cit., p. 82-87

witnesses for Allah even if it will be against yourselves".[103]In another verse, Allah said:"... *Nor it is lawful for them to hide what Allah has created in their wombs if they have faith in Allah and the last day* ...''[104] This implies that Muslim women are enjoined to fear their Lord and acknowledge what they knew to be conceiving in their womb at the event of separation so that the responsibility thereto would be accordingly shouldered by its respective bearer.

The Prophet (PBUH) is reported to have said *"communicate to one that boycotts you and be kind to a person who offends you and speak the truth even though it will be against yourself.*[105]The Prophet of Allah (P.B.U.H) is also reported to have executed Ma'iz, the Ghamidia woman and Guhainia woman on the basis of their Iqrar for committing the crime of *Zina*.[106]

All the companions of the Prophet (P.B.U.H) and the *tabi'un* (their followers) have accepted *Iqraras* a valid means of proof, that is capable of sustainable punishment or judgment in any case, be it criminal or civil in nature, and all the schools of Islamic jurisprudence subscribe to this view.[107]

[103]Q 4:135, Holy Qur'an, Text Translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia

[104]Qur'an 2:282

[105] An-Nawa\vi, (1985) *Riyadul al-Salihin,* Dar al-Jalil, Egypt, p. 74

[106] Mohammed, A.S. (nd) *Masalik al-Dilalah Fi Sharh al—Risala*h, Darul Fikr, Beirut p 227
[107]El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 20.

3.4 Conditions for Admission

The validity of admissions depends upon its fulfillments of certain conditions which include:

i. Admission (iqrar) should not be divided, i.e., it should be absolute and indivisible.
ii. Admission once made cannot be withdrawn, i.e., an acknowledgment in favour of the right of an individual cannot be retracted.

The evidence must be in conformity with the claim/complaint in respect to the subject matter. But any difference between evidence and the claim/complaint which can be reconciled does not render the evidence inadmissible.[108]

3.4.1 Indivisibility of Admission

In order to become the basis for judgment, the evidence must satisfy that it is indivisible.

This means that the evidence must clearly and explicitly not be divided in order to prove the occurrence of the criminal actor's violation of a right without any need of exploration or interpretation.[109]

3.4.2 Delay in Admission

[108] ibid
[109] Ibid

It is a condition that the presentation of evidence should not be delayed. Some jurists have. raised the issue of delay of evidence as equivalent to doubtful evidence which is sufficient to preclude punishment for *hudud* crimes.[110] Muslim jurists consider testimony (inadmissible) if the witness fails to come forward and submit his testimony within a specified period of time. This applies to all *hudud* offences. But *iqrar* is always admissible whenever made except in the crime of drinking, i.e., delay in the expression of one's acknowledgement does not affect the value of such admission.[111] This view is based on the theory that where the rights of Allah are affected, testimony is the providence of Allah.

Additionally, another view was expressed by many jurists, including Imam Malik, Imam Shafi'i and Imam Ahmad Ibn Hanbal, that delay in the presentation of one's *iqrar* does not necessarily cast doubt on the evidence. Proponents of this view claim that *iqrar* cannot be nullified by mere presumption but is left to the judge to determine its credibility.[112]

3.4.3 Retraction from *Iqrar*

[110] Ibid
[111] Anwarullah, Islamic of Evidence op cit. pp. 88-90
[112] ibid

Retraction from *Iqrar* in matters relating to the rights of individuals is not admissible. But retraction from evidence in *hudud* is admissible at any stage before the execution of the punishments and upon the reception of the retraction, the *hadd* punishment is nullified. If a witness retracts his evidence in a civil matter before the pronouncement of the judgment, the evidence stands revoked and the court shall not make it a ground for its judgment.

If a witness, in a case of *zina,* retracts his evidence prior to the pronouncement of the judgement or prior to the execution of the punishment, he shall be liable to *hadd of qadhf* (defamation). If the witnesses in the case of Qisas, Zina, apostasy, theft retract their evidence after the execution of the punishment and declare that they had intentionally given false evidence, they shall be liable to the punishment as was given to the executed person. And if they say that they had made mistake in the testimony they rendered to the court, they will be liable to *diyyah* (compensation) or *ta 'azir* as the case may be.[113]

3.4.4 The Essential Elements of *At-Iqrar*

The following are the essential elements *of Iqrar:*

[113] Al-Jazairi, A.J. (1976) *Minhajul Muslim*, Darul Fikr, Beirut p. 149

1. *Al-Muqirr* (the maker of the confession/admission).
2. *The almuqaru hihi* (the subject of *iqrar).*
3. *Al-Sigah* (formular of *iqrar)*
4. *Al-Maqarulahu* (the person in whose favour it is made).
5. *Mahallul iqrar* (the place of confession/admission)[114].

***Al-Muqirr*: The Maker of the Confession/admission**

The following are the conditions governing the maker.

1. He must be sane. This means an insane or a lunatic cannot make a valid *iqrar.*
2. He must be *baliqh* (adult). This is the view of the majority of Sunni schools.[115] However, according to the Hanafi School, even *al-mumayyiz* (a person who reaches the age of discernment) can make a valid *iqrar*[49]*.* The rule is that children are not qualified to make *Iqrar.* However, if they reach the age of discernment *(tamyiz)* and their guardians permit them to engage in trade and to transact with the general public, they are allowed to make *iqrar.*[116]The idea is that, such children are deemed to be at par with adults, as a result of their in-exposure to daily business transactions involving adults. Nevertheless, the *iqrar* made by such children should only be restricted to matters involving *mu 'amalat* (contracts). For example, trusts, loans, business, etc. In respect of other matters

[114] Ibid
[115] Ibn Farhn (nd) Tasbiratul Hukkam, Darul Fikr, Beirut, vol. 1 p. 63
[116] Ibid

like crimes, dowry (sadaq), kaffara (expiation), their *iqrar* is not admissible against them.[117]

3. He should make it voluntarily. This is based on the Prophetic tradition in which the Prophet (SAW) was reported to have said: *"My community is exempted from any liability on the effect of compulsion, duress and forgetfulness".*[118]Muslim jurists discussed this issue as follows:

Imam Malik is of the opinion that the *iqrar* made must be voluntary, otherwise, it would be invalid even if it would lead to the recovery of property in case of theft or in the recovery of goods in a *Hirabah* cases.[119]

Abu Hanifa maintains that, if *Iqrar* is obtained by compulsion, i.e., by torturing the accused in order to obtain his confession or even by way of threat, that *Iqrar* is inadmissible. However, some commentaries on *Hashiyatud-Dasuqi ala Muwatta Malik.* maintain that Ibn Hassan and Ibn *Ziyad* allows beating of an accused to admit his guilt on condition that the beating cannot amount to the exposure of the bone or flesh of the accused.[120]

[117] Ibn Farhun (nd) *Tasbratul Hukkam*, Darul Fikr Beirut, vol. 1. P. 65
[118] Ibid
[119] Ibid
[120] Ibid

Ibn Abidin added that without beating the accused, it will be very rare to obtain the confession of the guilty. He further argued that there is a special need for taking this measure during the investigation due to the spread of corruption. However, those scholars who support beating, limit it to the evildoers that are famous in occasioning mischief and immorality to the people in the society.[121]

The opinion of Ibn Hazm leads to a legal dilemma, for this does not rely on the invalidity of the involuntary confession but rather on its results as self sufficient evidence and a valid basis on which the opinion of jurists tries to balance the requirement of justice necessitating the punishment of the guilt and the protection afforded by the *Shariah* against harming a person to obtain a confession.

An assessment of the above view suggests that, the majority opinion is more consistent with the *Shariah,* and the second view which is that of the minority, clearly stands on a weak ground which conflicts with the *Shariah.* as it requires that, the means and the objectives be equally legitimate. The third view may be justifiable. However, it is unacceptable for two reasons: first, it conflicts with the established principles of the *Shariah* as expressed by jurists, using it as a basis for several secondary judgements, secondly, the use of illegal means to achieve

[121] Ibid

legal ends, requires the exclusion of what is obtainable through valid means, because reliance upon the results of an involuntary confession will tempt weak souls to torture the accused.[122]

Furthermore, the accused is not protected sufficiently from this danger simply by affording him a subsequent opportunity to take action against his torture. His injury may not be adequately redressed in that manner. He is better protected if voluntary confessions are held invalid and their results and consequences are nullified. Another issue is whether a confession is valid it obtained by deceit?

In this case, Ibn Hazm is of the opinion that, it is allowed and preferred. He says since no coercion is involved in this type of evidence, it is allowed.[123] On this question he criticized Imam Malik, by commenting that deceit is not forbidden. He attributed the use of trickery to the Holy Prophet (P.B.U.H) and Sayyidina Ali (R.A.) who used it in order to obtain confession of certain suspects. Ibn Hazm argued that trickery is not like force, for force is that which harms the suspect's body or property, as it threatens him or his family. Noharm is sustained by trickery. Thus, trickery is not like coercion.[124]

[122] Bassiouni, M. C. (1980) *Islamic Criminal Justice System,* New York, pp.106-107

[123] Anwarullah, *Islamic Law of Evidence,* op cit., pp. 84-85

[124] Ibid

The Maliki view seems to be more sound and more acceptable for it is not true that the investigations report is susceptible to deception and deceit. Furthermore, coercion, nullifies a confession by invalidating the element of choice and negating the voluntary nature of confession, which is a requirement of its validity. This defect is likewise present in a confession obtained through trickery. Thus, the latter must be considered the same in the effect as an involuntary confession. Ibn Hazm's viewed harm or the threat of harm as the defect of involuntary confession. While a confession gained through deceit is not without harmful consequences, it is more important to recognize the effect of the means employed as the means of coercing the accused to submit to the will of the confessor.[125]

He should not be under any interdiction by court order (*al-mahjur*). If a person who is under interdiction makes a *iqrar* in favour of another, that *iqrar* is not acceptable.[126] He should not be in the state of unconsciousness. He should not be in the limited state of intoxication; and He should not be subject to suspicion.[127]

3.5 The Formula *ofAl-iqrar*

[125] Bosiouni, *Islamic Criminal Justice System, op cit, pp. 106-107*
[126]Al-jaza'iri A.J. (1976) *Minhajul Muslim,* Darul Fikr Beirut, p. 157
[127] Ibn Farhun Tasbiratul Hukkam, op cit, p. 42

Sigha is a pronouncement or what is equivalent to it leading to a fact from the person making it.[128]

3.5.1 The Condition Governing the Formular *(Siqah)*

It should be direct and not based on any future event and should be in a clear language and not ambiguous.[129]

(a) *Iqrar* by Writing

The oral or verbal *iqrar* may be reduced into writing. Writing is more secure and more reliable and can be easily tendered in a court of law as evidence to prove the fact admitted. A written admission may, in certain situations be made official while in other situations admissions are made using ordinary paper. In both situations the *iqrar* is admissible provided that its authenticity can be proven.[130]

The above view is clearly supported by the Qur'anic verse which states: "O ye who believe! When you deal with each other in transactions involving future obligations in a fixed period of item reduce them to writing."[131]

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[128] Ibid
[129] Ibid
[130] Al-Jaza'iri, *Minhajul Muslim,* op. cit, pp. 349-350

[131] Qur'an 22:282, *Holy Qur'an,* text translation and Commentary, by Abdullah Yusuf Alj, Dar Arabia.

The above verse directs that transactions should be documented by writing it down in order not to forget. The Prophet (P.B.U.H) is reported to have said:

> Narrated Abdullah bin Umar: Allah's Apostle said, "It is not permissible for any Muslim who has something to Will to stay for two nights without having his last Will and testament written and kept ready with him". Abdullah bin Umar (Allah be pleased with them) said: Ever since I heard Allah's Messenger (may peace be upon him) say this, I have not spent a I night without having my Will (written) along with me.[132]

Therefore, if a person admits liability by writing in favour of someone who is absent, but later on denies the *Iqrar* he would be bound by this written *Iqrar,* if it can be proven that he was the one who wrote it or dictated it.[133]

(b) *Iqrar* by gesture:

Gesture is the movement of hands or heads to indicate or illustrate an idea, feeling etc.[134]Gesture is enough to express an *iqrar* when made by a sick or by a dumb person provided it is well understood by the persons before whom it is expressed.[135]

[132]Sahih al-Bukhari, Hadilh No. 2738; Sahih Muslim, Hadith No. 1627
[133]Ibn Farhun, *Tabsiratul Hukkam,* Dar Fikr, Beirut, Vol. 1, p. 142

[134] Advanced Learner's Dictionary p. 15
[135]Ibid p 15

A gesture from a dumb or sick person is admissible in evidence particularly when a dumb or a sick person admits that somebody owes him a particular thing by nodding his head. This is a good *iqrar,* provided his attention is manifested. All the *Sunni* schools agree with this view except Imam Abu-Hanifah who maintains that gesture is a mere medium which can hardly substitute a clear expression[136].

(c) By Silence

Admission by silence does not generally constitute admission if the maker of the *iqrar* can speak. However, there are some few circumstances where silence can be considered as admission in civil matters. It is accepted in case of selling and buying. For instance someone enters into a shop and picks out a commodity and goes to the cashier and pays the price without any verbal communication, using only the written price on the labels, that can be taken as admission by silence or by conduct.[137]

In another example, where someone is present when the estate of a deceased was disposed of and he keeps silent, he cannot come later on and claim a debt from the deceased.[138]

***Al-Muqirru Lahu* (The Person in whose favour the confession was made)**

[136] Ibid

[138] Ibn farhun, *Tasbsurat Al-Hukkam,* op cit., Vol. II, p. 192.

The following are the conditions governing *muqirru lahu:*

1. He should be known and identified and the identity must be established. This may be an individual or a legal person, like a company or an institution etc.
2. He should be human being or legal person not an animal. An admission in favour of embry is valid.[139]

Al-Muqirru Bihi* (the subject matter *of al-iqrar)

The following are the conditions governing it:

1. It should be lawful and valuable in nature.
2. It should be known and identified even by description.[140]

3.5.2 *Mahallul Iqrar* - Place of Confession

For crimes regarding which there are provisions in the Holy Quran, otherwise known as *hudud* offences, their admission should only be made in court and not outside the court. However, if made outside the court should be repeated in the court. For crimes other than *hudud* as in the case of contractual transactions, admission made outside the court can later on be admitted in the court even if not repeated, provided it is not denied and even if denied can be accepted if it can be established by evidence.[141]

3.5.3 *Al-Iqrar* in Civil Case

[139] Ibn Qudama, *Al-mungi, op cit.*, Vol. 5, p. 127
[140] Ibid, p. 127
[141] Ibid

It is prerequisite for a valid *iqrar* that the person making it should be of sound mind free from undue influence and interdiction and should not suffer from any legal disability when the defendant makes *iqrar,* he is not entitled to retract it, if such *iqrar* relates to rights of the individual *(al-huququl adami).* But a person may retract from his *iqrar* case involving doubt *(shakh).* This is based on the prophetic traditions that says: "set *aside had punishment when there is ambiguity.*[142]

Al-iqrar on behalf of a third party is not valid, because admission affects only the maker. For example, if there are several defendants in a case of debt, and if some of them admit the debt while the rest deny it, it binds only those who made it,

Iqrar may be qualified where the defendant admits the claim of the plaintiff but attaches some qualifications to it. For example, he admits a debt but added that it is not yet due.[143]

The jurists of the Shafi'i school do not accept the above position and according to them, both debts admitted either in healthy condition or during sickness are valid, since they are all derived from the understanding which is the cause of both health and sickness, Hanafi School opines that an admission is invalid when it intends to prejudice the right of another and the admission of a sick person does induce the consequence.[144]

[142] Reported by al-Bukhari and Muslim
[143] Qadiri A. (1986) *Islamic Jurisprudence in the Modern World*, Delhi, India, p. 503.
[144] Hamilto (nd) al-*Hidayah*, DarulMuktasar Vol III pp. 161-162

Tanaqud occurs where the person (plaintiff), by spoken words, contradicts that which he has earlier said on his claim that is causing his action to be of no effect.[145] It means earlier statement of the plaintiff contradicting his claim prevents an action to o Thus, when a person takes steps to buy a house, and afterwards brings an action t that the property belongs to him before the purchase, he cannot be heard, someone says "I have no claim against such a person". If later he brings an action claiming something from that same person, he cannot be heard.[146]After a person admitted that a certain property belongs to another person, if later he brings an action claiming that the property belongs to him, he shall not be heard.[147]

3.5.4 *Iqrar al-Nasab* (Admission of Paternity)

This does not generally constitute admission if the maker of the admission can speak, Admission of paternity here is simply where a man is considered accepting the paternity of the child as his legitimate child.[148] For instance, where someone being congratulated on the occasion of his wife giving birth to a child, when he keep silent on that occasion, he is presumed accepting the paternity of the child as his legitimate child.[149]

3.5.5 *Iqrar* in Theft (*Sariqah*)

[145] Qadiri A. *Islamic Jurisprudence* in the modern world op cit. pp; 503
[146] Ibid
[147] Ibn Hazm, (nd) *al-Muhallah*, Makatabah al-Tijariyyah, Vol. 8, pp. 250-254.
[148] Ibid.
[149] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 22.

For offence of theft, the Hanafi jurists differ as to the required number of times must be repeated. According to Imam Abu Hanifa, the *Iqrar* is valid even I pronounced only once. But his disciple Abu Yusuf is of the opinion that the *Iqrar* mus[1] made repeatedly twice in respect of offences requiring the testimony of witnesses or four times in respect of offences requiring the testimony of four witnesses before the maker can be convicted. The number of repetitions required is according to the number of witnesses required in oral testimony. Abu Yusuf and Imam al-Laith, maintain ' theft, and drinking of intoxicants, the *Iqrar* should be repeated twice.[150]

According to the Maliki and Shafi'i schools, the *Iqrar* should be repeated at before it is admitted in evidence. They rely on the Prophet (P.B.U.H) *hadith* transmitted by Abu Daud that someone had been brought before the Prophet (P.B.U.H) on the allegation of theft and the Prophet (P.B.U.H) refused to accept his confession until he repeated it twice.[151]

3.5.6 *Iqrar* in *Qisas* and *Diya*

If the victim or his heirs promise to pardon an accused in the offence of *qisas, diyyah,* hurts and stolen property, etc and after that he confesses and identifies his co-accused and other circumstances of the commission of the offence, the victim or his heirs can pardon him, but the state cannot pardon the accused in the offence of the *qisas, diyah* or hurts

[150] Ahmad, R. (1996) *Introduction to Islamic Law*, The Open Press, Kuala Lumpur, Malaysia, p. 40.
[151] Ibn Qudama, (n.d), *al-mugni*, Maktabatul Jamhuriah, Egypt, p. 116.

and stolen property, because these are the rights of human beings *(huquq al-adami).* However, in the case of *ta'azir* offences (discretionary punishment) the state can pardon an accused person if it is in the larger interest of the nation.

If there is an accomplice to whom pardon has been tendered, the Islamic law principle is that the confession of the accused person is only a conclusive proof against him and it cannot be extended to his co-accused and the offences of the co-accused will be proven only by the co-accused i.e. by his own confessional statement.[152]

3.5.7 *Al-Iqrar* in Favour of an Heir

If *iqrar* is made in favour of an heir by any sick person, that *iqrar* shall be void unless ratified by the remaining heirs. This is based on the prophetic *hadith* that says: *"there is no (bequest) in favour of an heir, unless the other heirs ratify it."*[153]The reason being that it will give chance to deprivation of the heirs from their rights which the Allah granted to them. However, if the *iqrar* is made when the maker is healthy and of sound mind, that *iqrar* stands valid.[154]

[152] Ibid.
[153] Reported by Ibn Abbas.
[154] Ibn Hazam, *al-Muhallah* op cit., Vol. 8, p. 251.

According to Shafi'i school, a sick person can make an *Iqrar* in favour of a third party, whether the subject matter of *Iqrar*is a debt, it should be included within the scope of one-third 1/3 of the estate (which the person is empowered by law to bequeath). The school is not opposed to doing it by a sick person in favour of an heir. The school is also of the opinion that where two *iqrar* are made at the same time in favour of two different people, none shall have priority over the other.[155]

However, according to Hambali school, the *iqrar* of a sick person to his legal heir is absolutely void, because it may amount to technically validating a *wasiyyah* which cannot be made to an heir. Imam Auza'i, on the other hand, did not see anything in favour of his legal heirs,[156] denying him the chance to make such a bequest will be a wild allegation as the law always applies to reality. According to him, we cannot exchange certainty with suspicion. It means that, this *iqrar* is a certainty, and to suspect that the sick person is attempting to deprive his heirs by his *iqrar,* is an assumption which should give way to certainty.[157]

3.5.8 *Iqrar* in Bankruptcy

[155] Al-Jaza'iri A.J. (1976) Minhajul Muslim, Darul Fikr, Beirut, p. 157
[156] Ibn Juzai (nd) Al-Qawanin al-Fiwhiyah, Dar Fikr, Beirut, p. 42
[157] Ibn Hamz, Al-Muhallah, op cit, vol. 8 p. 254

If a person is declared bankrupt *(muflis)* and makes *iqrar* in favour of his relatives or friends, there is suspicion to that *iqrar,* therefore, it should be investigated. If mischievousness is established, that *iqrar* will be disregarded.[158]

3.5.9 Extra-Judicial Confession

According to Hanafi, Maliki and Hanbali scholars if a judge hears a confession from the accused person which did not fulfill the requisite conditions for its admissibility, he cannot base his judgement on that one while deciding the matter in the court. However, the Shafi'i school maintains that a judge will not base his judgement on what he has seen or known or heard, while another view in the same school says that, the judge is authorized to base the judgement on what he has seen, heard or known.[159]

[158] Ibid
[159] Ibid.

CHAPTER FOUR

TESTIMONY (*SHAHADAH)*

4.1 Introduction

The Qur'an and the Sunnah of the Prophet (P. B. U. H.) placed great premium on evidence. Both strongly recommend that evidence should not be concealed or withheld. The Qur'an Chapter 2 verse 282-283 Allah says: "Let not witness withheld their evidence when it is demanded of them, but never conceal evidence, for he who conceal it, had a sinful heart".[160]Therefore, it should be clearly understood from the above verses what Sunnah says is that once a clear evidence is established the fact in issue will come to an end, as seen in chapter three. It is only when it becomes impossible to establish it then the other means of proof may be resorted to.

4.2 Definition of Testimony (*Shahadah*)

Shahadah "literally means information of what one has witnessed or seen or beheld with his/her eyes, or a declaration of what one knows, or decisive information. It also means to be present.[161] Technically, it means to give true information before a court of law what one has seen or known for the purpose of proving or disproving a right or a

[160] Qur'an 2:282 – 283 *Glorious Quran*, text translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia.
[161] Lane, E. W, *Madd al-Qamus* (Arabic – English Lexicon) Lahore, (1978) p. 161

claim. It means being actually present and witnessing an event or the true information in the court of law about the thing perceived in order to establish or prove a certain right or claim or any fact in favour of another.[162]

4.3 Authorities for *Shahadah* in the Glorious Quran And *Sunnah* of the Prophet (P.B.U.H)

The Glorious Quran provides a number of verses that refer to *shahadah* or testimony such as: "And for those of your woman who are guilty of *Zina* call to witness four of you against them"[163]

In another verse the Glorious Quran states:"And those who accuse chaste woman and then couldn't produce four witness (in support of their accusation), whip them eighty strokes"[164]

The Prophet (P.B.U.H) has made it obligatory for the plaintiff to produce witnesses in order to prove his case as he says: The burden of proof is on the plaintiff."[165]

In another Hadith, the Prophet (P.B.U.H) has also said: "Your proof or his oath."[166]The evidence must be clear as indicated in another prophetic tradition, where the Prophet

[162] Al-Dasuqi, S.M.A. (nd) *Hashiya al-Dasuqi ala-Shar al-Kabir*, Mustafah Halabiy, (Egypt). Vol. IV, p.114.
[163] Qur'an 4:15, translation from Abdullah, Y. A. (nd) Glorious Quran: Text, Translation and Commentary, Dar Arabia.

[164] *Quran 24:4 Ibid p. 110*
[165] Reported by Sunan al-Baihaki, cited in Anwarullah, *Principles of Evidence in Islam*, op cit., pp. 78-79.

(P.B.U.H) said;"You have to see the thing as you see the sun before you give evidence or otherwise you should not give it."[167]

4.4 The Difference Between *Al-Bayyina* and *Al-Shahadah*

4.4 The difference between *Al-Bayyinah* and *Al-Shahadah.* The majority of Islamic Jurists disagree with regard to whether evidence refers to *Shahadah* (testimony) or that *Bayyinah* is general in it's interpretation and that *shahadah* is more specific and vice versa the basic issue here is whether *shahadah* means evidence or that *shahadah* is only a type of evidence and whether there are other types of evidence. The Islamic jurists are divided into two as follows:

(a) Majority of the Islamic jurist and Scholars held that *al-bayyinah* refers to *shahadah* only. That means *al-shahadah* and *al-bayyanah* are the same in their meaning.[168]Their argument is based on the fact that in the Glorious Quran and the *Sunnah* of the Prophet (P.B.U.H), *Shahadah* or testimony is referred as *al-bayyinah* (the evidence).That the Holy Prophet (P.B.U.H) had also used the word "al-bayyinah" several times intending it to mean shahadah" in his Hadith to the effect that:

> From Anas Ibn Malik, according to him the first Lian in Islam was when Hilal Ibn Umaiyah accused his wife of adultery with shuraih Ibn Sha'am. The Holy Prophet (P.B.U.H) had

[166] Reported by Imam Muslim, cited in Anwarullah, *Principles of Evidence in Islam*, op cit., pp. 78-79.

[167] Reported by Al-Bukhari, cited in Anwarullah, *Principles of Evidence in Islam*, op cit., pp. 78-79.
[168] Anwarullah, *Principles of Evidence in Islam*, op cit., pp. 1-3.

said to Hilal "give me your evidence and if you fail to bring witnesses, the Hadd punishment of accusation of zina will fall on your back[169]

(b) The second group of the Islamic Jurists consisted of Ibn al-Qaiyim and other Islamic jurists including Ibn Hazm, are of the opinion that the word al-*bayyinah* is a general in its application. Anything which clarifies or explains a right can be termed to be *al-bayyinah*. According to them *shahadah* or testimony is a form of al-*bayyinah* or evidence. In holding this view, they rely on the following:

(1) The Quranic verses which mentioned *al-bayyinah* cannot be interpreted to mean only testimony but its real meaning should also include argument, grounds and clear proof.[170]For example, the Qur'anic verse 29:35 that says;

"And We have left thereof an evidence as sign for people who care to understand.[171] Another Qur'anic verse 6:57 says:"*For me I (work) on a clear sign from my lord*".[172]

4.4.1 The Legal Position in Giving *Shahadah*

[169] Izzudeen B (1393AH) *Minhaj-al Salihin*, darul Fikr, Lebanon p. 586.
[170] Madkur. M.S (1964) *al-Qada fil Islam*, Dar al Nahadah, Egypt p.83

[171] Translation from Abdullah, Y. A. (nd) *Glorious Quran: Text Translation and Commentary, Dar Arabia.*
[172] Ibid

It is a general rule in Islamic law of evidence that giving testimony is obligatory on the person to whom the request to give it is made. The responsibility to appear and render testimony has been explained by the Glorious Qur'an itself in chapter 4:135:"O you who believe stand out firmly for justice as witnesses to Allah even if it is against your selves or your parents or your kin and whether it be against the rich or poor for the Allah, best protect both."[173]

The Glorious Qur'an in chapter 2:282 has also said:"Conceal not evidence, whoever conceals it his heart is tainted with sin.[174]In same chapter2:282 Allah the Almighty reminds the *Muslim Ummah* to cooperate in giving evidence and testimony, as deciding to do so is a sin."The witnesses should not refuse when they are called on for evidence".[175]Ibn Abbas has stated that withholding testimony is one of the major sins.[176]

The Muslim jurists are unanimous in their ruling that in non-*hudud* cases the rule of giving evidence is only *fard Kifayah* (general obligation) that is, the responsibility will be discharged. If a member of the society comes forward to discharge it. Thus, the collective responsibility to protect a right or interest is discharged when someone has given evidence to secure such right or such interest.[177]The above *fard Kifayah* however, will be transformed into *fard ayn* (personal/private obligation). If any body volunteers to

[173] Abdullah, Y. A. (nd) *Glorious Quran: Text Translation and Commentary, Dar Arabia.*
[174] Ibid at p.12
[175] Ibid.
[176] Al shirazi, I.Z (1360AH) *Kitab Al-Muhazzab Daru Kutub al Nabin* Egypt Vol. 11, P.347
[177] Bahnasy, A.F. *Nazariyyatul Ithbat,* op cit., p. 16.

give the evidence as such right or interest that cannot be secure unless and until evidence to secure it is available.[178]

4.5.1 The Nature of *Shahadah*

Shahadah as true information in the court of law needs to be established by reliable witnesses depending on the type of matter in question – be it a civil matter or criminal offence. For example, proof by four credible men is sufficient in obtaining conviction on illicit sexual intercourse (*zina*) against the offender. At the time of testimony by each of the four credible men before a court of law, it is a duty incumbent upon the judge to ascertain the evidence before him.[179]

Proof in civil matters are also proved by two male witnesses such as proof to the existence or non-existence of a marriage contract, its termination, revocation and the recall of a wife whose marriage contract, its termination, revocation and the recall of a wife whose marriage is terminated, expiration of *Iddah* (waiting period), *Khul'* or demand of release from marriage bond by wife, contractual obligations, proof as to the existence of such contract, proof of the existence of bequest appointment of agent

[178] Ibid, p. 18.
[179] Al-Shirazi, *Kitab Al-Muhazzab*, op. cit at P. 33

(*Wakil*), acceptance of Islamic religion or denouncing it, a claim that a person has attend the age of majority e.t.c.[180]

Poof in civil matters involving monetary claims such as price at which goods are sold, proof on legal issues, on options, proof on accidental homicide, the amount of diyyah agreed by the parties. It is cardinal principal of Islamic law that all civil cases which involve monetary claims also be proven by one man or two women or on an oath of the plaintiff.[181]

Lastly, it is strongly believed, based on analogy (*qiyas*) that all offences related to *ta'azir* may also be proven by the evidence of two credible men, when no monetary claims are involved. However, where monetary claims are involved.[182]

4.5.2 The Pillars Of *Shahadah*

Shahadah has some important pillars that govern it. They are as follows:

1. The party who gives the testimony.
2. The party for whose benefit the testimony is given.
3. The party against whom the testimony is given.
4. The subject matter of the testimony.
5. The specific words indicating the testimony.[183]

[180] Ibid.
[181] Ibn Farhun, (n.d) *Tabsiratul Hukkam*, Halabiy Publication, Vol I. p. 228
[182]Jabir .A. (1976) *Minhajul Muslim* Darul Fikr, Beirnt P.461.

The following are the conditions governing the witness.

i. **He must be adult and sane**. All the Islamic jurists agree on this. It is based on the prophetic *hadith* that says:

"Three persons have been exempted from legal obligation, the minor until he attains puberty, an in same person until he recovers and a sleeping person until he awakes."[184]

ii. **He must be a person of probity (*Adil)*:** That is a person of irreproachable and serious character, who is not liable to suspicion. Allah in the Glorious Qur'an says: *"... and call to witness two men of probity from among you*."[185] In the same vein, the Glorious Qur'an states in respect of witnesses:

"O you who believe, if an evil does come to you with a report ascertain the truth, lest ye harm people unwittingly and after wards become full of regret for what you have done."[186]

The Prophet (P.B.U.H) is also reported to have said 'The testimonies of an impious person a notorious liar are not accepted."[187].

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[183] Ibid.
[184] Narrated by al-Bukhari and Imam Muslim Darul Fikr.
[185] Qur'an 65:2 *Glorious Quran* Text Translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia. see also Qur'an 2:282.

[186] Qur'an: 49:6 Text Translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia.
[187] Al-Asqalani, H.H (nd) *Bulugul Marami*, Beirut, P.290.

Based on the above, the Islamic Jurists view that to be just *(adil)* is one of the conditions required of a witness. They are however divergent on the meaning of (*adalah*).According to the *shafi'i* school, *adil,* means a person who abstains from capital sins and does not persist in minor sins and thus models his conduct upon the respectable among his contemporaries and fellow countrymen. Therefore, *adil* is a person who is generally considered to be reliable person in the society he is lives. Imam Abu Hanifa is of the opinion that the requirement should be reasonable as befits an ordinary Muslim and there as no blameworthy attributes on the person of such witness.[188]

According to the *Hambali* School, justice is measured by someone's adherence to the dictates of religion and truth of his speech and conduct.[189]

As such, two things are important, when it comes to weighing the justness of witnesses testimony.

a. The excellent observance of religious responsibilities.
b. His protection of himself and honour and avoidance of things which are condemnable by religion.[190]

The justness required also does not mean that the witness should be some one who has never committed any sin. Avoidance of major sins qualifies one to be a witness because

[188] Ibn Rusud, M.A. (1969) *Bidayatul Mujtahid*, *Wanihayatul Muktasid* Maktabah al-kulliyah, Egypt, P.466.
[189] Ibid.
[190] Ibid.

it usually follows that a person who avoids major sin would also avoid minor sins as well.[191]

Thus, the evidence of the *fasiq* (dissipated), according to the majority of Islamic Jurists, should be dismissed unless the witness repents. They are however not in agreement with regard to a *fasiq* who falsely accused someone of committing *zina* (adultery) by Q*azf* (defamation of zina). Imam Abu Hanifa is of the opinion that his testimony should not be accepted even if he repents, which the majority of the Islamic Jurists including Imam Malik maintain that such testimony is admissible in evidence provided the witness repents and mends his ways.[192]

(iii) **He must be a Muslim:** According to Imam Malik, Imam Shafi'I and imam Ahmad, the evidence of a non-Muslim is inadmissible whether in favour of or against a Muslim, likewise in favour or against a non-Muslim counterpart. They based their argument on the qur'anic verse which says: "*And call to witness two Adil Persons among you*".[193]

According to Imam Abu Hanifa, the evidence of non-Muslims is admissible in favour of or against one another. He further maintains that the evidence of a Jew is acceptable in favour or against a Christian and vice versa, in his view, the two religions are considered as one unit. The school also justifies its view with the prophetic Hadith that says: "The

[191] Ibid.
[192] Quran 75:7 *Glorious Quran* Text Translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia.
[193] Qur'an 65:2 *Glorious Quran* Text Translation and Commentary, by Abdullah Yusuf Ali, Dar Arabia.

Prophet (P.B.U.H.) had stoned two Jews because they committed the offence of Zina, on the strength of the evidence of the Jews".[194]

The Maliki School accepts the evidence of a non-Muslim if they are medical experts. This can only be allowed in cases of necessity in which case there is no muslim expert to treat that case. It is worth nothing here that the Maliki's who accept that opinion of medical expert they do not consider as admissible testimony but mere explanation on the field which he is specialized. The other schools do not accept this opinion.[38]

4.6 Witness in Marriage Contract

It has been explained that the required number of witnesses in marriage under the Maliki school of law should be two reliable males, Muslim witnesses and no element of female is acceptable. This is the view of the Shafi'i, Maliki and Hanbali schools. However, in the Hannafi School, the evidence of females is acceptable.[195]

[194] Reported by Sunan al-Baihaki, cited in Sabiq, S. *Fiqh-us-Sunnah* op cit., Vol. III, pp. 228-229.
[195] Ibid

All the schools maintain that any marriage conducted without witnesses is null and void. According to Shafi'i and Hanbali schools the witnesses should be present at the time of making the contract of the marriage or else the contract itself will be null and void.[196]

Malikis are of the view that the contract can be conducted without the presence of the two witnesses but the marriage should not be consummated unless the two, male, adult and Muslim witnesses testify. If that is neglected then the marriage will be null and void. They say that the word "*nikah*" literally means consummation and not the contract itself.[197]They also say that the taking of the witnesses at the meeting place of the contract is better but if not taken then there is no harm to take it later on before the consummation of the marriage.[198]

4.7 Evidence on *Ridaa*(Breast Feeding)

The evidence as regards *Rida'a.* It is when two people of different sexes were suckled during their childhood by one woman, and these two persons married without knowing that fact of being suckled by one woman, in this case according to Islamic law, they were considered as brother and sister. In such case, the evidence of two men as to confirm the *rida'a* is admissible Maliki School and no less than four women under the Shafi'i

[196] Ibn Farhun (nd) *Tasbiratul al-Hukkam fi Usul al-Aqbiyyah wa ManahijulAhkam,* op cit., Vol. 1. p. 293.

[197] Ibid

[198] Ibn Qudama, *Al-Mugni*, op cit., Vol. 9. P. 156.

school. Hambali's say either two women or one woman.[199]Hanafis say the evidence of women alone is not acceptable, It should either be two men or one man plus two women.[200]

[199] Ibid.
[200] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., p. 65.

4.8 *Tazkia*(Purgation)

The word *Tazkia* (purgation) is an Arabic word meaning to make pure.[201] It is of two kinds. The first one is that the judge should write secretly to one or more male persons, in whom he has confidence to be of good reputation and character. Such a person or persons should enquire about the witnesses in question, from the people of his locality, those whom he trades with, his neighbours and those whom he performs prayers with.[202]

The person to whom the court has written is known as Al-muzakki" or the purgatory secretly giving all the information he has collected about that particular witness. If the result is that the witness is trustworthy and just then he would be summoned and heard. However, if the reply of the *Muzakki* is negative, he would be called and his evidence would be rejected.[203]

As soon as the complainant narrates his claim, the defendant has to reply. If the defendant admits the claim, judgement would be given in favour of the plaintiff. However, If the defendant denies the claim, then the plaintiff will be asked to mention his witnesses (if any). Some of the witnesses may be known to the presiding judge and some may not. Those whom he knows to be of good reputation and character will be summoned and heard. Those witnesses which the judge does not know and has no idea

[201] Ibn Anas, M. (nd) Al-Mudawwana al-kubra, Mustafa Halabiy Dar fikr, P.144.
[202] Ibid.
[203] Ibid.

about their disposition, enquiry should be made about their character to ensure as to whether they are trustworthy or not. This sort of enquiry is known as *tazkia* (purgation).[204]

4.8.1 The Condition Stipulated in Respect of the *Muzakki*

(a) That the *Muzakki* should be male person, the *tazkia* of a female is not admissible even if the witnesses are female.[205]

(b) There should be close acquaintance between the *Muzakki* and the witness. That is to say, they should either be neighbor or have some commercial ties or have travelled together for a journey where they would have had the full chance of knowing one another.[206]

The above called judicial *tazkia* (purgation). Extra judicial *tazkia* on the other hand is a piece of information which is sought secretly, but treated as information within the Islamic judicial circle, which is also treated as recommendatory. It is conducted outside the court and also is regarded as information which can assist the court in arriving at a rightful decision.[207]

[204] Ibn Farhum, *Tasbiratul Hukkam*, op cit., p. 356.
[205] Sabiq, S (1978) *Fiqh al-sunnah Darul Fikr*, Beirut. Vol III. p 137.
[206] Keffi, S.U.D (2006) Aspect of Proof by Testimony of Witnesses in Civil Litigation under Islamic Law, *Journal of Islamic and Comparative Law, Centre for Islamic Legal Studies*, A.B.U, Zaria Vol. 27 P.39
[207] Ibid.

4.8.2 *Al- Tajrih*

Al-tajrih literally means "impeaching the evidence so adduced by the plaintiff.[208]But before wounding or impeaching the evidence, practice and procedure makes it mandatory upon the judge to invite the party to the litigation against whom judgement will be passed, as to whether he has something to tell the court. The party to the litigation against whom the judgement will be passed may be the plaintiff and whatever happens he must be invited to express his opinion as his defense. Where the judge passes his judgement without asking the party to do so, such judgement becomes a nullity.[209]

4.9 *Al-Yameen* (Oath as a Means of Proof)

Al-Yameen in the literal sense means "the right side" it could also means "Oath" as a person who takes an oath usually does so by putting up his right hand.[210]The Oath or *Yameen* is also known as (*Al-halal*" or "*Al-Istihal*" and "*Al-qasamah*". In the technical sense, an oath is an utterance. In another definition an oath is a positive statement of a thing with regard to a probable matter or improbable matter and strengthening such

[208] Ibid.
[209] Murad, M. (2001) *Minhaj al-Munir,* Darul Fikr, p. 510
[210] Anwarullah, *principles of Evidence in Islam,* op cit.,p p. 130-131; Al-Dasuqi *Hashiyat ad-Dasuqi ala Sharh al-Kabir*, Vol. 4 p. 228.

statement by invoking the name of Allah or one of His Attributes.[211]Another way of proof of civil litigation and judgment passed in favour or against a complainant are all based on the quality of proof adduced before a court of law. Therefore, the proof which is known as *al-bayyinah*, is the basis of the Islamic judicial system, since no remedy is given without proof.

Al-Yameen or oath, as a means of proof under *Shariah* ranks as the number three in hierarchy, of means of proof which means it cannot be resorted to until the first and second means are lacking the confession (*Al-Iqrar*) and the testimony (*al-shahadah*), they are obviously stronger and preferable to swearing an oath. This happens when the plaintiff raises a claim and the defendant denies the claim then the plaintiff has to bring witnesses. If he fails to do so, he has the right to ask for the oath of the defendant or otherwise the case should be rejected. This is based on the prophetic hadith, where the Prophet (P.B.U,H) is reported to have said: *"Adducing evidence is on the plaintiff and taking the oath is on the defendant".* In another hadith the Prophet (P.B.U.H) said: *"whoever takes an oath, let him take it in the name of Allah, otherwise let him retain from taking it entirely*".[212]

4.10 Kinds of Matters that Attract Oath Taking

[211] Sabiq, S. (1978) *Fiqh-us-Sunnah*, Darul Fikr, Beirut, Vol. III, p. 137; El-Imairi, M. T. *Murafa'at: Procedure and Evidence in Sharia Courts*, op cit., pp. 77-78.
[212] Al-Baihaqi, *Sunan Al-Kubra*, op cit., Vol. III p. 177.

Rights of individuals or private rights are those that are not punishable by *hadd* like murder or wounds. However, Maliki School is of the opinion if defendant declines to swear, the oath is reversible to the claimant and if he swears judgment is to be passed for the recovery of the property but if the claimant declines to take the oath then matter must be dismissed The Shafi'i and Hanbali schools agress with Maliki.[213]

(a) *Qadhf*

In the case of *qadhf* the Islamic jurists differ. According to the Maliki and *Hanbali* schools, the oath may not be administered in the absence of appropriate evidence that is two reliable witness because the crime is punishable by *hadd*, which entails the right of Allah.[214]The *Shafi'i* school maintains that in this crime the right of the individuals is more dominant than that of Allah and therefore they administer the oath.[215]In the Hanafi School the favoured view is that oath should not be administered in the case of *qadhf*. However, some Hanafi jurist maintain that oath should be administered because of the rights of individuals.[216]

(b) Private Rights

These rights are divided into two as follows"

i. Non property cases, like marriage, divorce, *raja'a* paternity etc and

[213] Ibn Rushd, Al-Mudawwanah Al-Kubra, p. 179 cited in El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts*, op cit., p. 82.
[214] Hashiyat Al-Dasuqi ala Shar al-Kabir, Vol. 5. P. 508 cited in El-Imairi, M. T. *Murafa'at: Procedure and Evidence in Sharia Courts*, op cit., p. 82.
[215] Ibid.
[216] Ibn Farhum, *Tasbiratul Hukkam*, op cit., p. 609.

ii. Those rights pertaining to property e.g *Sadak*, Khul etc

The Maliki School, differentiates between cases pertaining to property and none property cases. In property cases they have the same view as that of the Hanafis and shafi'i, as far as the administration of oath to the defendant is concerned. But in non-property cases, like marriage, divorce, *raja'a* etc they administer the oath when the plaintiff fails to produce witnesses. If a woman claims that her husband divorced her and she produces no witnesses, then the husband should not be sworn as in the case of Hanafi and Shafi'i schools.[217]

(c) Those Crimes Which are not Punishable by *Hadd*

For those crimes that are not punishable by *hadd* like murder and wounds. The Islamic jurists also differ. According to the Maliki School, they do not administer oath in respect of those crimes.[218] Though, the general rule in the Maliki School is that, in cases where two male witnesses are imperative, the oath should not be administered.[219]According to Hanafi School, the oath should be administered in those crimes for which punishment is not by way of hadd so long as they affect the rights of individuals in respect of *mal* (property), such as compensation for *diyah* or *Qisas*.[220]In Hanafi School, judgment by

[217] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 80-81.
[218] Ibid
[219] Ibid
[220] Ibn Anas, M. (nd) Al-mudawwana al-kubra vol. v. p 179.

mere *nukul* is allowed. However, the Hambali School maintains the view of the Maliki school.[221]

4.10.1 Administration of Oath on Certain Occasions in Divorce Cases

It has always been stressed that in the Malik, Shafi'i, and Hambali schools, the evidence in cases pertaining to marriage, divorce, *Rija'a* paternity etc, should be two male witnesses and that is the minimum requirement. While in Hanafi school one male and two female witnesses may be sufficient.[222]

It has also been explained that if a wife alleges that her husband has pronounced divorce against her and the husband denies that allegation, she has to produce the minimum required evidence, that is, two male witnesses. In the event where she fails to adduce the witnesses or she was not able to bring sufficient evidence, then the husband is to be required to swear. This is according to the Hanafi and shafi'i schools.[223] Therefore, if he swears, the case should be dismissed accordingly. But if he refuses to swear, according to Hanafi School, judgment for divorce is going to be passed against because his refusal is a conclusive presumption of his admission. However, the Shafi'i in this respect maintains that, the oath is reversible to the plaintiff, and if she swears,

[221] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 80-81; Ibn Farhum, *Tabsiratul Hukkam*, op cit., Vol. 1. P. 197.
[222] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts*, op cit., pp. 82.
[223] Ibn Farhum, *Tabsiratul Hukkam*, op cit., Vol. 1. P. 197.

judgment of divorce is to be passed on the strength of the refusal of the defendant to swear, together with the plaintiff's oath.[224]

The Maliki and Hanbali schools, no oath be administered to the defendant if he denies the allegation and if the woman fails to produce witnesses. But if she was able to produce, as one man or one man plus two female witnesses or even two female witnesses according to this school, the defendant should be asked to take an oath.[225]If the defendant swears, the case is dismissed, but if he refuses, he is to be imprisoned for a year, during which if he agrees to swear as required, he will be set free and the case is to be dismissed. However, if he insists that he will not swear until the end of the term of imprisonment, he is to be set free.[226]

If a man claims that a certain woman is his wife and the woman denies the allegation and the man fails to produce witnesses, his claim is going to be dismissed without asking the woman to take oath, even if he was able to produce one male witness and two female witnesses[227] This is because, marriage is always made public and there is tendency that their neighbours and relatives must be aware of the marriage, and therefore, his failure to produce the required number of witnesses is the conclusive presumption that the lies is not true.[228]

[224] Ibid
[225] Al-Dasuki, S.M.A (nd) *Hashiyatul al-Dasuki*, *al-Shar al-Kabir*, *Mustafah Halabiy*, (Egypt) Op. Cit. P 200
[226] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* op cit., pp. 81-83.
[227] Ibid.
[228] Ibid.

However, if a woman brings a case that she was the wife of certain man, who is dead an she has no two male witnesses and she claims that her *sadak* or dowry and her share of inheritance in the deceased estate was not given to her, here, since the case is all about property, she is required to produce one male witness or two female witnesses, plus an oath. If she does, then she is entitled to her *sadak* and her inheritance.[229]

4.10.2 When an Oath Can Be Administered

An oath can be administered on the following occasions.

1. To the plaintiff when he has only one witness or two female witnesses in cases of property.
2. To the defendant when he denies the claim and when the plaintiff fails to produce his witnesses.
3. To the plaintiff in case the defendant has refused to swear.
4. Judicial oath is also administered to the plaintiff after he has established his claim against a deceased person, a minor, an absent person or an insane person.[230]

In respect to number 1 above, that if the plaintiff has only one male witness, schools or two female witnesses as in the maliki school and in respect of property cases, the

[229] Ibid.
[230] Ibid.

plaintiff may in addition to that insufficient evidence, take an oath, as to the truth of his claim and on the strength of that, judgment may be passed in favour.[231]

In respect to number 2 and 3 above, when the plaintiff fails to bring witnesses, he will have the right to ask the defendant to swear and if he latter swears, then the case is dismissed and all Islamic Jurists agree to this.[232] But if the defendant refuses to swear, the judgment should be given to the plaintiff. This is according to Hanafi School, because they take refusal to be an inference and circumstantial evidence.[233]But in the Maliki, shafi'i and Hanbali Schools, refusal *(nukul)* by the defendant will not entitle the plaintiff to any right unless the plaintiff himself takes an oath as to the truth of his claim.[234]

In the Nigerian case of **Ibrahim Gaya, vs. Abdu Ali**.[235] The court of Appeal, in dismissing the appeal, unanimously held that:

> The position of the Islamic law in this kind of situation is that, where the person who is to swear has declined to do so, the oath would be offered to the other side. If he too declines to take the oath, the status quo in respect of the property would be maintained. That is, the person in possession of this property shall hold on to it.

Thus, if the plaintiff swears, judgment will be passed in his favour, but if he refuses, the case is to be dismissed. Therefore, the status quo is sustained, as

[231] Ibid.
[232] Ibid.
[233] Ibn Juzai, (nd) *al-Qawanin al-Fiqhiyyah*, *Dar al Fikr*, Beirut, P. 334
[234] Sabiq, S. (1973) *Fiqh al Sunnah*, *Darul Fikr*, Vol. III p. 449
[235] S.L.R.P (2007) 2. P. 145

mentioned in the above decided case. In the Maliki School, the denial to take an oath by the defendant is equal to one witness and the plaintiff will be asked to take the oath to complete another witness. Therefore, he will be considered to have produced two witnesses.[236]

All that has been explained above applies to property cases in all the schools. It is also applicable on marriage, divorce, *raja'a* paternity cases etc. In the Hanafi and shafi'i, but Malikis and Hambali do not administer oath in such cases of marriage and divorce.

The administration of an oath on a plaintiff is rendered imperative in respect of circumstances where the plaintiff have made a claim against the deceased person or against any absent person or a minor, the plaintiff establishes his case and the heirs are minors, the plaintiff must swear to the effect that he did not receive from the deceased at his life time that debt or any part thereof.[237] This is referred to as *yaminul qada* (oath of judgement).

In another example, if a woman brings an action against her husband for divorce or for lack of maintenance and he is absent after she has established her case. She is required to take oath otherwise known as *Yeminul Qada*. This is judicial oath she will swear that their marriage subsists and that she was and continued to be obedient and she is

[236] Ibn Farhum, *Tabsiratul Hukkam*, op cit., Vol. 1. P. 190.
[237] Ibn Farhum, *Tabsiratul Hukkam*, op cit., Vol. 1. P. 190.

deserving of maintenance from him. This sort of oath is always required when the right is established and the defendant is absent or dead or is a minor or an insane person.[238]

4.10.3 The Formular of Oath

According to the Maliki school, the swearing may be by the name of the Allah. For example, "*Billahillazi lailaha Illahuwa*".[239]Meaning I swear by the name of Allah, Who there is no other deity beside Him.[240]

[238] Ibid.
[239] Ibid.
[240] Al-Dasuqi *Hashiyat ad-Dasuqi ala Sharh al-Kabir*, Vol. 3 p. 228 cited in El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts*, op cit., p. 53.

CHAPTER FIVE

PROOF BY EXPERT OPINION

5.1 Introduction

It is a testimony of evidence given by person who are officials of experts in a chosen field. The given opinion is based on a high standard of specialized Knowledge.[241] It assists the court to determine a fact in issue. Hence, a person who qualified as an expert by knowledge, skill, experience, training or education relating to the fact in issue may testify thereto in the form of an opinion of expert if called upon to do by the court.

5.2 Proof by Expert Opinion

One of the sources of the proof of crime or a right in Islamic Law is evidence by expert i.e. expert's opinion. Expert's evidence means the testimony which is given in relation to some scientific, technical or professional matter by experts i.e. persons qualified to speak authoritatively by reason of their special training, skill or familiarity with the subject.[242]

In this respect, the Glorious Qur'an in chapter 16:43 states: "*And before you also the messengers we have sent were men, to whom we have granted inspiration. Ask those*

[241] El-Imairi, M.T. *Murafa'at: Procedure and Evidence in Sharia Courts,* Centre for Islamic Legal Studies (CILS) A B U, Zaria.(nd) p. 46.
[242] Ibid .

who possess the knowledge (know) if you do not know"[243]The legal authority on the resort to expert opinion in deserving instances indicates that the opinion of an expert has been given due importance in Islamic law. The Glorious Qur'an in chapter 16:45 states that: *"And before thee also the messenger We sent were but men to whom We granted inspiration. If you realised this not, as those who possess the message."*[244]

The Sunnah of the Prophet (P.B.U.H) has also recognised the expert's evidence. It has been related on the authority of Aisha (R.A) who said that:

> One day the Holy Prophet (P.B.U.H), came to her and said with extreme happiness" Oh Aisha don't you see that Mujazzaz al-Mudlaji came and saw Usamah and Zaid Lying together being covered with a sheet in a position that their heads were covered but their legs were not covered, and said, these legs are from one another.[245]

Mujazzaz (RA) was an expert of lineages, as far as the above *hadith* is concerned and the Prophet's (P.B.U.H) happiness signifies his approval of or lawfulness of the art of *qiyafah*. It has been related in *muwatta* of Imam Maliki on the authority of Abdullah Ibn Abi Bakar who relates from his father who relates from Amrah Binte-Abdur Rahman who said that a thief stole some fruits (Cetruja) in the period of Usman (RA). Usman

[243] Translation from Abdullah Y. A. (nd) *Glorious Qur'an: Text and Translation and Commentary*, Dar Arabia.
[244]Anwarullah, *principles of Evidence in Islam*, op cit., p. 125.
[245] Ddaraqutni, *Al-Sunan*, op cit., Vol. II, p. 88.

ordered that its value should be fixed by the experts. Thus its value was fixed by three dirhams equal to 12 dinars. Usman ordered to ampute his hand[246].

On the basis of the above, it would be proper for the courts to seek the advice and opinion of experts in a certain case in order to assist the judge in, upholding justice, because a judge is only a normal human being who possess limited knowledge. Furthermore, Islamic law encourages a judge to hold discussions and consultations on matters of which the court is not certain. This is however subject to the condition that a judge should always exercise proper care and attention before accepting opinion or advice.

After testimony and admission an authoritative source of a proof of a fact in Islamic law is circumstantial evidence (*al-qarain). Qarinah* literally means connection, conjunction, relation, union, affiliation, association, linkage or indication. In terms of law it is the logical inference to be drawn from something done, or from circumstances by virtue of which makes the matter certain. It is also called presumption, which means a conclusion or inference as to the truth of some fact in question, drawn from other facts proved or admitted to be true. Circumstantial evidence may be weak or strong. Sometime it is

[246] Al-Sarakhsi, Shamsuddin, Al-Mabsut, Vol. 4, p. 206.

considered conclusive, while on other occasions it might be only probative. When it is strong it is accepted as evidence for the relevant fact[247].

5.3 Circumstantial Evidence

Circumstantial Evidence is the evidence from which the judge may infer the existence of a fact in issue but which does not prove the existence of the fact directly such as finger-print, possession of stolen property, weapons used, opportunity, motive.

A presumption is a rule of law by virtue of which, where a party proves one fact (the primary fact) a second fact (the presumed fact) will also be taken to have proved, in the absence of evidence to the contrary. A party who adduces evidence sufficient to overcome the effect of the presumption is said to be rebut the presumption. The theoretical basis for recognizing presumptions is that the presumed fact would, in the usual course of events, flow naturally from the existence of the primary fact, so that the rational connection between the two is so strong that it is unnecessary to required evidence of the presumed fact in the absence of unusual circumstances. No evidence is then required to establish the presumed fact. Where a presumption is of the 'persuasive' kind, the opponent may rebut the presumption only by disproving the presumed fact to the appropriates standard of proof, if it is of the 'evidential' kind, the

[247] Ahmad Ibn Hanbal, al-Musnad, Volume III, p. 212

opponent may rebut the presumption by introducing evidence against the presumed fact sufficient to amount to a rule as to the burden ad standard of proof, as any other fact in the case.

The Islamic law recognizes circumstantial evidence for the proof of a right or an offence liable to *ta'azir.* The Glorious Quran states,

> At the last Joseph and she raced towards the door one behind the other and she tore his shirt (pulling it) from behind and them met her husband at the door. Seeing him, she cried out, 'What punishment does the one deserve who shows evil intentions towards your wife? What else than that he should be put in prison or tortured with painful torment.' At this a witness of own folk testified (saying) if his shirt is torn from front, then she speaks truth and he is of the liars. And if his shirt is torn from behind then she tells a lie and he is of the truthful.' When the husband saw that the shirt was torn from the back, he said, "This is one of your cunning devices, your devices are indeed very cunning.[248]

The Holy Prophet Muhammad (PBUH) has recognized circumstantial evidence as a source of proof in many cases. Some of these cases are as under:-

a. It has been related that in the battle of Badar the two sons of Afra'a claimed that they have killed Abu Jahal. The Holy Prophet said to them, *"Have you cleaned your swords?"* They said, "No" The Holy Prophet said, "Show me your swords" When Holy Prophet saw the swords being bloodstained, he said, "*You have killed*

[248] Qur'an 12:25-28 Translation, from Abdullahi, Y.A (nd) *Glorious Qur'an: Text, Translation and Commentary*, Dar Arabia.

him."[249]

b. It has been related on the authority of Numan Ibn al- Jariah who relates from his brother that some people brought their dispute about a hut to the holy Prophet. The Holy Prophet sent Huzaifah to decide their dispute. Hazaifah decided in favour of those on whom side the bamboos of the hut had come out. When he returned and told the Holy Prophet, the Holy Prophet said, "*Your decision is correct".*[250]

c. It has been related on the authority of Abu Harairah that Holy Prophet (PBUH) said, "There were two women who had small sons. A wolf came and took away the son of one of them; One of them said to other, *"It was your son".* The other said, *"No, it was your son".* The brought their dispute to Prophet David (PBUH) and he decided in favour of the elder one. Then they went to Prophet Solomon (PBUH) and related to him their dispute for decision. He ordered to provided him a knife to make two pieces o f the child so as to give piece to each of them. On this the younger one said, *"Don't cut him into pieces, this is the son of the elder one. "Hearing this Prophet Solomon decided in favour of the younger one".*[251]

The Holy Prophet has also used the word *"bayyainah"* for the proof of an offence or a right which means anything that proves or disproves the commission of an offence or violation of a right whether it be witness or something else such as circumstantial

[249] Ibid
[250] Ibn al-Majah, al-Sunan II, p 171.
[251] Al-Taj al-Jami'a li Usul fi ahadis al-Rasul, Volume, III, p. 60.

evidence, oath, documents.[252] Thus the Muslim jurists concur that circumstantial evidence is acceptable in the crimes of *hudud* and *qisas***.** There are three viewed in this matter. The Hanafis and Shafies and with one exception Hanbali's reject the use of presumption in *hudud and qisas,* allowing only witness and confession as evidence. This view is based on the hadith of the Holy Prophet (PBUH) who said, *"Were I to stone anyone without evidence, I would have stoned so-and-so (fullanah), for her speech, appearance and cohabitation are such which raise suspicion".* This reinforces the rule that doubt nullifies *hudud.* Since a presumption is always doubtful it cannot be the basis for judgment in *hudud* which are removed by doubts. This is the proffered view among the jurists.

The second view would permit certain types of presumption to be used in proving *hudud* cases. Thus, for example, pregnancy of an unmarried woman is sufficient proof on her adultery provided she does not claim coercion. The smell of alcohol or regurgitated wine presumptively proves drinking. This is the view of Imam Malik and reported view of Imam Ahmad and is based on the statement of Umar who said, *"Adultery is publicly proved when pregnancy appears (in case of an unmarried woman without being coerced) or confession is made."*[253]

[252] Ibn al-Qayyim, al-Ilam at-Muwaqqin, Volume IV, p. 371
[253] Ibn Qadamah, al-*Mughniu*, Volume IX, p. 173.

The third view freely recognizes the validity of presumption in all cases including *hudud*. It is argued that evidence is whatever brings the truth to light including presumption. It is argued that if a presumption is susceptible of doubt, so is the testimony of witness and it should, therefore, be judged in the same manner. Indeed testimony by witnesses is more susceptible to illusions, lies and errors than presumptions. Thus presumptions have at least as much validity as testimony by witnesses.[254] Practically the Muslim judges, throughout the Islamic history, have greatly relied upon the circumstantial evidence.[255]

5.4 *Al-Qiyafah* (Art of Tracing Lineages)

Al-Qiyafah is the proving of a person's *nasab* (paternity), based on apparent similarities between that person and another person,[256]during the early period of Islam, the Tribe of *Madlaj* were known for their expertise in the field of *Qiyafah.*[257]The Maliki is of the view that *Qiyafah* may be used to established *nasab*.

Maliki school further gives justifications on *qiyafah* as a means of proof based on the *hadith* that the Prophet of Allah (P.B.U.H) had at one time met Aisha (R.A.) with his face beaming (so happy) and said to the effect that "Almad aji observed Zaid and Uthamah,

[254] Audan, Abdul Qadir, *al-tashri'a al-jinai-al-Islami*, Volume II, p. 339-341.
[255] Ibn Qudamamah, al-Mughni, Volume IX, p. 176.
[256] Zaidan, A. (1984) *Nizam al-Qada Fi Sharia; Islamiyyah*, Matba'a al-Ni, Baghdad, p. 227.
[257] Ibid. P. 227.

(RA) after covering their heads, while examining their feet, and after making the observation he said "Their feet have similarity with each other.[258]

The Prophet (P.B.U.H) would certainly have not indicated his pleasure at the above matter if he had not believed in the opinion of the *qiyafah*.Hence, to accept *Qiyafah* is to judge in the basis of a strong suspicion. The ruling on this, is therefore, permissible and this is similar to relying on the opinion of an expert values when appraising the value of a thing[259]. That is to say, the resort to the use of *qiyafah* is like that of an expert evidence.[260]

On the basis of the above explanation it is therefore established that, *qiyafah*is acceptable by the Maliki to establish *nasab* and not more than that. It is however not used as a method of ascribing an illegitimate child's paternity by all means to a suspected man but only used to determine the *nasab* of a child in case where two or more persons are claiming custody over, child alleged belonging to them.

5.4.1 Ascribing Paternity to a Non-Muslim by *Qa'if*

If a person has been linked by way of *qiyafah* to a non-Muslim or to a slave, the jurists are of the view that under these circumstances, the judge shall not pass his judgment that that child is a non-Muslim or slave, since what is apparent on the person is

[258] Ibid. p. 227.
[259] Op. Cit; Zaidan A, p.228.
[260] Ibid.

that he is a Muslim and a free person, until the contrary is proved particularly if this person lives in an Islamic state.[261] Furthermore, the status of being a Muslim and free person shall not be nullified merely on an allegation of being linked with paternity to a non-Muslim or slave. Under such circumstances, only the paternity is established and not the religion or status.[262]

5.4.2 Linking Paternity to Two Persons by *Qa'if*

The Hanafi jurists are of the opinion that, the child's paternity can be linked to two persons and it has the right to inherit from each of them, as an heir.[263]

The Shafi'i jurists on the other hand, are of the opinion that this claim shall be rejected including the opinion of the *Qa'if.* They rely on ruling of Umar (R. A) when he said that:"It is unbelievable that a person to be the child of two men".[264]

5.5 The Evidence Based on the Personal Knowledge of a Judge

One of the sources of proof in Islamic Law, is the knowledge of the judge about the case before him in the court. The Muslim jurists differ as to whether a judge can decide a case on the basis of his knowledge or not. In this situation, there are two

[261] Zaidan, A. (1984) *Nizam al-Qada Fi Shariatil Jslamiyyah*, op cit.. p.228
[262] Ibid
[263] Ibid
[264] Ibid

sources of knowledge and information from which the judge could have known about a fact and the circumstance surrounding the case before him.

Firstly, the judge could have obtained such knowledge in his capacity as an ordinary citizen of the state. In this situation, it would not be proper for him to hear and try the case based on that knowledge. Secondly, he could have obtained such knowledge in his capacity as a judge in the trial and observing the parties to the case and their witnesses, inspection of the site of crimes, exhibits, etc. In this situation, the judge can decide the case on such knowledge.[265]

The issue which frequently arises in Islamic law of evidence is that, would the knowledge of a judge be admissible as evidence to prove a particular charge? In other words, could a judge rely on his personal knowledge to decide a case brought before him? The Muslim jurists differ in answering the above questions. If the judge happens to know about a fact and the circumstances leading to a claim before him, such as the fact that the defendant had admitted a claim or rejected it by way of swearing an oath. Upon being asked by the judge in the course of the trial, the judge in this case, may give a decision without requiring two witnesses, this is the view of Imam Ahmad Ibn Hanbal.[266]

[265]Bahnasy, A. F. *Nazariyyatul Ithbat,* op cit, pp. 20-21.

[266]Ibn Qudama, *Al-Mugni*, op cit., Vol. 9, p.55

In situations where the judge receives the knowledge and information out of the trial outside the parameters of a case whose trial is pending before him; for example, the judge heard someone divorcing his wife by triple divorce outside the court, with regard to this kind of situations, there are some views of the jurists as follows:

1. According to Imam Malik and the majority of his followers, it is not proper for a judge to decide a case based on his own personal knowledge in all cases, regardless of whether the facts were obtained before or after his appointment as a judge, within or out of his jurisdiction. Generally, the Maliki jurist's view is the same as that of Hanbali jurists, that if a judge were to kill his brother on the excuse that he knew personally that his brother had committed murder, it is the same as if he (the judge) had committed intentional homicide. Therefore, by way of inference, he will not be entitled to inherit the property of his deceased brother.[267]
2. The most authoritative view as far as the Hambali School is concerned, is that, a judge shall not decide according to his own personal knowledge whether in *hudud or non-hudud* cases and irrespective of whether such knowledge was obtained before or after he became a judge. In holding the view, the jurists of the school rely on the hadith in which the Prophet (P.B.LI.H.) said to his Companions:

[267]Ibn Rushd, *Bidayatul Mujtahid Walnihayatul Muqtasid,* op cit., Vol. II, p."393

> I am a human being and you may come before me to decide your cases. It may be that some of you are more eloquent than others in presenting their case and I can give judgement based on his presentation. Whoever I give judgement which is not his, I am giving him a Hell fire which he may take or reject.[268]

The jurists argue that it is implied from this hadith that the Prophet (P.B.U.H.) himself decided cases based on what he could hear and not what he knew.

In another hadith, the Prophet (P.B.U.H) has said: "Bring two witnesses for you or the oath (on the defendant) and there is no other way except by this". The jurists do not accept that a judge is permitted to decide a case based on his own personal knowledge, relying on the hadith in which the Prophet (PBLJH) said to Hind the wife of Abu Suryan:"*Take from Abu Sufyan (RA) a portion for you and your children reasonably".*[269]

This is because the hadith is *afatwa* (legal opinion) and not a ruling, because if it were a ruling, the Prophet (P.B.U.H) would not have announced it in the absence of Abu Sufyan (RA). The jurists also do not agree with the view that a decision by a judge based on his personal knowledge is valid regardless of the testimony of the witnesses. According to

[268]Reported by al-Bukhari and Muslim.

[269]Reported by Imam Muslim.

them, the decision given by the judge based on the testimony, of just witnesses will not give way to *tuhumah* (suspicion) while a decision based on the knowledge of a judge will merely lead to suspicion.[270]

[270]Ibn Qudama, *Al-Mugni*, op cit, Vol. 9, pp. 400 - 401

5.6 *Khabar* - Information as a Means of Proof

Khabar refers to information brought to the attention of the court. Although it may be mere information, but it is required to be recurrent ***(****mulawatir****).***[271]According to Ibn Al-Qayim, a judge can decide a case based on the *mutawatir* information, even if the information was obtained from a *fasiq* (unjust) person or from a non-Muslim. This is because *mutawatir* information is the clearest and strongest form of evidence.[272] For example, a person who is known in his locality to be unjust or a person whose righteousness is known through *mutawatir* means, or a person whose enmity is obvious against another person or a destitute who requires assistance, or a deceased person whose death is known to everybody through *mutawatir* information. In all these instances, the judge should act based on this form of information.

The evidence based on *mutawatir* information carries with it the status of *al-yaqin* (clear proof), while the strongest evidence based on the testimony of two witnesses may at most be only based on *al-Zann al-ghalib* (strong suspicion). Ibn Al-Qayyim has also advanced the opinion of several jurists to the effect that even the testimony of four witnesses cannot be considered as *mutawatir* evidence. This is because the judge in a

[271]Muhammad, S. (2006) The Dictionary (Qamusul Amm), Arabic-English, Dar al-Kutub al- Ilmiyyah, Beirut, Lebanon, p. 784.
[272]Ibn Juzai, *Al-Qawanin Al-Fiqhiyyah*, Dar Al-Fikr, Beirut, p. 79

Zina case, where there are four witnesses, has to satisfy himself, as to their competence to give evidence.

It is therefore, no doubt that the *al-Khabar al-Mutawatir* is the strongest form of evidence, as the probability for error in such evidence is removed by the fact that almost impossible for a large number of people to concoct such an evidence. In the science of hadith a *Mutawatir hadith* is regarded as the most authentic form of hadith. Similarly, in Islamic law of evidence, *Khabar al-mutawatir* is the most convincing and conclusive kind of evidence.[273]*Khobar Mashur* is of a lower standard than *Khabar Mutawatir.* According to Ibn al-Qayyim, a *Mashhur* information is the one known to the public and common on everybody's mouth, it is ranked between *Khabar Mutawatir* and *Khabar ahad.* The Hanaf jurists divided *khabar* into three as follows:

(i) *Khabar Ahad*
(ii) *Khabar Mutawatir* and
(iii) *Khabar Mashhur*

According to them, *khabar* can be used to interpret and specify a general *Nass* (rule/text) of the *Glorious Quran* (text of the Glorious Qur'an). Ibn Al-Qayyim says that, *Khabar Mashhur*is one of the clearest forms of evidence. A judge who relies on it as the basis of sentencing should not be subject to *tuhma*. Giving a decision on the basis of *khabar Mashhur* means giving a sentence on the basis of

[273]Darwish, S. *Turuq al-Hukmfi Sharia al-Islamiyyah, op cit.*, p. 351.

argument and not on knowledge alone. *"A judge should accept witness, testimony if he is well known among the people".*[274]

5.7 *Alkitabah* (Documentary Evidence)

Al-Kitabah means information inscribed in documents written by someone who may be in position of authority or a judge or an ordinary citizen.[275] The writing may be made on official paper and seal or otherwise. The issue in *al-Kitabah* is whether documents may be used as proof in all cases or only in *non-httdud* or non *qisas* cases, such as those that relate to property, bequest etc.

Muslim jurists have divergent opinions on this issue. The Hanafi jurists contend that documentary evidence may not be used as a means of proof even in the property cases, as writing may bear resemblance with other writing and documents may be copied or forged.

But Maliki jurists accept documentary evidence to safeguard public interest and their opinion are further divided into two as follows: The first one is of the opinion that documentary evidence may be used as a means of proof in all cases. This includes *hudud* and *qisas,* regardless of whether it may be government document, a

[274]Ibid.
[275]Ibn Juzai, *Al-Qawanin Al-Fiqhiyyah,* op cit., p. 86

judicial document or an ordinary citizen's document and whether it is officially sealed or not.[276]

Generally, the evidence of a document executed by a dead person is admissible as a means of proof in circumstances where the original maker of the document is dead or missing.[277] To Ibn Al-Qayyim, *Qarinah* is the basis for the admissibility of documentary evidence, as a means of proof. If the *Qarinah* is strong, then the documentary evidence should be accepted and judgement be given based on such documentary evidence.[278]

Ibn Al-Qayyim further stresses that, caliph, judges, kings and governors were in the habit of accepting and relying on documentary evidence between themselves. They had not asked for testimony on the contents of documents from messengers and they did not read it in the presence of the messengers. This state of affairs continues until today.[279]

[276]Ibn Qudama, *Al-Mugni,* op cit, Vol. 9, p. 258

[277] Ibid.

[278]Ibn Qudama, *Al-Mugni,* op cit., Vol. 9, p. 5

[279]Ibid

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

This research work comprise of six chapters. In chapter one, researcher have laid the general background of the subject matter where in statement of research problems, aim and objective, scope of the research, research methodology and literature review on the research work were discussed

In this study the researcher have also explained the nature and scope of the means of proof under Islamic law of evidence. The concept of proof is a matter of supreme importance in the process of administration of justice under Islamic law. The fundamental principle of Islamic law of evidence is that, it is the responsibility of the claimant to establish his case by adducing evidence to satisfy the court about his claim and the defendant is saddled with the task of repudiating the allegation made against him. And as a matter of principle, the judge must decide the matter based on the evidence presented before him wherein in the event of any doubt in the evidence, it should be resolved in favour of the accused/defendant.

The object of the Law of Evidence is to lay down principles for the proof of the facts relevant for the decision of a court. In every dispute, there are at least two litigating parties, the plaintiff and the defendant. The latter denies the claim and the former claims what is contrary to the apparent fact. The burden of proof lies on the

plaintiff because what is apparent is presumed to be the original state. If a defendant can produce evidence to disprove the claim of the plaintiff and to establish his non-liability; he is allowed to present such evidence. The defendant is also allowed to disprove the credibility of the plaintiffs witness of submitting evidence to that effect.[280]

However, any fact can be proved by any evidence which proves the facts in issue to the satisfaction of the court. The term *"bayyinah"* is normally used for evidence which means anything which proves or disproves the fact disputed in a court - whether it be the statement of a witness, circumstantial evidence, documentary evidence, opinion of an expert, oath or any other thing with which the court is satisfied.[281]

6.2 Findings

The following are the findings of this study:

1. It has been observed that the Islamic law of evidence has, suffered distorted application so much so that a gap has been created within the Islamic legal system.
2. It has been observed that the rules of Islamic Civil Procedure as enunciated by

[280]Anwarullah, *Principles of Islamic Law of Evidence,* op cit., pp. 5-13; Al-Kafawi M.S. *Murafa 'at: Islamic Law of Evidence,* (Unpublished Monograph) CELS, ABU Zaria, pp. 1-7

[281]Emairi, M. T. *Murafaat: Procedure and Evidence in Shari'ah Courts,* (Unpublished Monograph) CILS, ABU Zaria, *pp. 1-5*

the classical Muslim jurists are yet to be comprehensively codified to guide Nigerian Courts in conducting trials. Unfortunately the poor level of knowledge of Islamic procedure rules among lawyers and the lower court judges has led to incorrect appreciation and application of the rules. Hence, there is a lack of proper understanding and appreciation of Islamic procedural rules pertaining to means of proof in civil litigation among the lower court judges. So also, most of the legal practitioners that are appearing in Shari'ah cases are not adequately conversant with Islamic procedural rules.

3. It has been observed that there have been several complaints against the decisions passed by our Shari'ah courts judges in the implementation of Shari'ah penal laws in some states implementing Shari'ah, especially as it affects women such as Zamfara, Kaduna and Kano States. Generally speaking, the problems associated with the implementation of shairah penal laws by Shari'ah courts concerned not the substantive laws of crimes and punishment, but rather on the law of procedure and evidence.
4. It has been observed that rules of court applicable to Shari'ah courts and Shari'ah Courts of Appeal are full of lacunae as adequate rules of Islamic practice and procedure enunciated by Muslim jurists have not been incorporated into them.

6.3 Recommendations

1. It is recommended that Shari'ah Court Judges should imbibe the habit of

consulting

Muslim jurists in determining complex cases filed in their courts. It is the opinion of this researcher, that had it been the judges were in the habit of consulting jurists learned in Islamic Procedural law before giving their judgments in complicated cases, such decisions might not have been reversed by the Appellate Courts.

2. The classical works of Islamic procedure rules should be translated into English and other local Nigerian languages. Translation of these reputable works would assist judges in appreciating the procedural laws; because most of the judges of Shari'ah Courts are not literate enough in Arabic language. Translating the classical works will also save the time of judges in searching for persons that can assist them in translating the works from Arabic to the language of the court. The translated works should be annotated.
3. It is recommended that it is imperative on the Muslim *Ummah* to insist on the application *of Shari'ahh* in all its dimensions. Once a person is a Muslim, the only law that should govern his life is the *Shari'ahh.* Therefore, the quest for the application of *Shari'ahh* cannot be a demand, as it is a fundamental right of the Muslim *Ummah,* which ought to be granted to them. It is thus suggested that the Shari'ahh implementing states, through their ministries of justice, judiciaries, should intensify efforts in training their Shari'ahh judges in our institutions of higher learning, for the effective performance and implementation

of the Shari’ah legal system in our states. There is also a need to sensitize our scholars, judges, court registrars, through conferences, workshops, public enlightenment, etc. with a view to empower them on the best way to implement the Shari’ah legal system in our country, Nigeria.

4. It is recommended that Judicial Service Commissions should ensure that persons to be appointed judges of Shari'ah Courts and other courts that are entertaining Islamic cases in Nigeria must be well versed in the science of Islamic jurisprudence and are capable of making independent research from classical works of Islamic jurisprudence. In addition to that, these judges should be able to understand the general Nigerian laws, and must be capable of reading and appreciating decisions of Superior Courts on Islamic law practice and procedure since the doctrine of judicial precedence is applicable to Shari'ah Courts. Without clear understanding of classical procedural rules and general Nigerian laws; judgments of Shari'ah Courts may be painfully set aside on appeal.

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