

defect in number of men which removed by two women like in money and property.<sup>32</sup>

Arguments of the Jurists who approved the general application of Women's Evidence in all rights and cases

Allah Ta'ala said "And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses."<sup>33</sup>

This verse points out that two women stand for one man in case of shahādah.

Abo Huraira narrates that Muhammad (S.A.W.) said "O, troop of women given alms, do more repentance because I have seen most of women in fire. Among them one intelligent and prudent woman asked why most of us will be in fire? He replied that you (women) abuse mostly and infidel of your husband and that I have seen them defective in religion and wisdom, then she asked O, Rasōlullah what is meant by defective in religion and wisdom? He (S.A.W.) replied that defective in wisdom is that the shahādah of two women is equal to shahādah of one man. While defective in religion means that they spend nights and have not to pray and they have not to fast in Ramadhan (at the time of menses).<sup>34</sup>

Abo Saeed Al-Khudri narrated that Rasōlullah (S.A.W) asked , "Is shahādah of women half of the shahādah of men?"

We replied "Yes O Messenger of Allah".<sup>35</sup>

So these Ahadith (sayings of Messenger of Allah) have general grammatical form of words "Al-Mara't" (women) and "Al-Rajul" (man) and these words are general words. In Arabic language when a word has before it "AL" becomes general word and has general application. Therefore, these words have general application in all types of cases. Therefore shahādah of women is accepted in all cases and rights, whether these cases are civil or criminal.

Evaluation of the arguments of approvers

1. The Qurānic text is to prove fiscal rights, because it is known to us by the consequence of the verse.
2. Ahadith (Verses of Prophet P.B.U.H) have general application of permissibility of women's evidence in all cases while the arguments of majority of the jurist are on impermissibility of

to be continued....

Arguments from Sunnah (Sayings of Muhammad S.A.W.) , Rasöl-u-Allah (Swallala hu alahé Wassalam) said "Four men witnesses if not then Hadd (punishment) on your back."<sup>27</sup>

In Hadith, Sa'd Bin Ubadah that he asked Rasölullah ((S.A.W.) "If I found a man with my wife (who commits illegal sexual intercourse) should I wait till I bring four witnesses. He (Muhammad S.A.W.) replied, "Yes"<sup>28</sup>

Imam Az-Zahree said in this respect that there are precedents of Rasölullah (S.A.W.) and of His two successors after him that shahādah of women is not admissible in prescribed punishments and Retaliation (Hadöd & Qisas).<sup>29</sup>

#### Rationale:

Hudöd and Qisas must be proved by evidence which must be free from any kind of doubt and suspicion. It is an established rule in Islamic procedural law that Hudöd punishments and Qisas are suspended and are not implemented when any doubt or suspicion is found in evidence and shahādah of women is not free from doubt because forgetfulness, carelessness and negligence are in nature of women. And there is defect in their wisdom and religion (naturally they are weak in wisdom and less responsible in action of religion). Due to these reasons their shahādah inherits doubt in cases of hudöd and Qisas but except these punishments their shahādah is accepted with doubt in all other cases.

The permissibility of shahādah of women is alternative of shahādah of men. And an alternative is not accepted in Hadöd punishments.<sup>30</sup>

Second view point that the shahādah of women is accepted in all cases and rights, and has general application whether they are only women or with men. This is the view point of Zahiriah (who see to the apparent text). Atta and Hamad have also this view point. Their arguments and statements are as below:

Imam Ibn-e-Hazam said that shahādah in case of adultery will not be less than four probit and Muslim men or two probit Muslim women in place of one man, so they will be three men and two women or two men and four women or one man and six women, or eight women only.<sup>31</sup>

In Al-Mughni, it has been reported from A'ta and Hamad that said "shahādah of three men and two women is permissible because there is one

کسی سرزمین پر ایک حد کے نفاذ کی برکت وہاں چالیس روز نازل ہونے والی بارش کی برکت سے بہتر

which negates the probity but if he repents and his good condition appeared then his shahādah will be accepted.<sup>17</sup>

### The Rights Which Can Be Proved By Shahādah of Women With Men

Jurists are agreed on permissibility of shahādah of women with men. In this respect they bring forth proof from the Holy Qurān. Allah (S.W.T) said, "Have two witnesses from among your men, and if two men are not there, then one man and two women from those witnesses whom you like, so that if one of the two women errs, the other woman may remind her."<sup>18</sup>

But in this respect the Jurists are disagreed upon the selection of rights which can be proved by shahādah of women with men. This can be discussed it into two topics.

1. Shahādah of women in Hudōd (prescribed punishments) and Qisas (Retaliation). In this case the jurists divided into two groups.
  - (a) They are majority of the jurists i.e. Hanafīa, Maliki, Shaf'ee and some statements of Humbali jurists are as below:

In Mudawwana, the statement is as "Are you accept shahādah of man and two women on shahādah of one man in retaliation, said: shahādah of women are not admissible in prescribed punishment and retaliation."<sup>19</sup> While in Mughni-al-Muhtaj four men as witnesses are stipulated in case of adultery.<sup>20</sup> In book of Al-Mughni of Ibn-e-Qudama, the punishments are only Hudōd (prescribed punishments) and Retaliation, only evidence of two men is admissible.<sup>21</sup>

### Arguments of These Jurists:

Allah (W.W.T) said in verse, An-Nur "Why did they not produce four witnesses? Since they (the slanderers) have not produced witnesses, then with Allah they are the liars"<sup>22</sup> and in other verse that "And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever. They indeed are the Fasiqun (liars, rebellious, disobedient to Allah)."<sup>23</sup> Allah's saying is that "And those of your women who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them."<sup>24</sup> And in other verse of Al-Baqara, and get two witnesses out of your own men."<sup>25</sup>

In part of At-Talaq Allah (SWT) said "And make two just persons from among you (Muslims) witnesses."<sup>26</sup>

and challenged by the adverse party and he is also true in his suspicious. A conflict is created between these two apparent so therefore one will be preferred and this is the role of judge to decide the statements before giving a judgment. There are some important and preferred suspicious which we are going to discuss as below:

1. That the shahādah may not be for repelling of damages and taking benefit.

Shahādah of Usōl (parentage ancestors), is not permissible for furoo' (off spring), and also shahādah of a lawyer is permissible for his client and shahādah of a partner is not admissible for his partner in their partnership case. And a shahādah of a servant is not permissible for his lord or master and likewise where ever it leads to attract benefit and repel damage or loss.

2. If shahādah is given in anticipation in the rights of people are also leads to suspicion because the rights of people cannot be proved without their claim. But the rights of Allah can be proved without claiming.
3. Evidence will also not be accepted in cases which cannot be perceived. For example if shahādah of eye witness on the death and life of a man.
4. Shahādah of a friend is permissible and can be accepted for his friend. But if their friendship is finished and they interfere and control in the property of his friend then their shahādah will not be accepted for each other.
5. That there is no enmity between Shahid and Mashhōd alaih (against whom shahādah is given).
6. That one person may not be eye witness and plaintiff at the same time. Therefore shahādah of a testator will not be accepted for orphan and also of a lawyer for his client.<sup>16</sup>
7. Shahādah of fornicator is also not acceptable. Like who has committed adultery, has taken wine, false allegation. Likewise false statement, false evidence, to leave prescribed prayers, fasting and commits any act which leads to fornication or un-believing in God (in-fidelity) and also shahādah of an Murtad (converted from Islam to any other religion), magician, or who is playing game of chance etc,

While Maliki jurists and Hanbali jurists have permitted the shahādah of a blind man when a voice is recognized and familiar due to the generality of verses in shahādah.<sup>11</sup>

#### 4. Al-Nutq (Speaking):

According to Hanafi, Shafayee and Hambali jurists shahādah of a dumb is not accepted although he can understand gesture because gestures and signs are not amounting to evidences and because evidence a firm belief and indubitable truth and these can be achieved by uttering words. But according to Maliki jurists a shahādah of dumb man is accepted when he can understand the gestures because gestures can be taken as words in cases of divorce, marriage and Zihar.<sup>12</sup> According to shiah school of thought, shahādah of a dumb is acceptable but it is better that two men assist him and explain his gestures.<sup>13</sup>

#### 5. Al-adalat (Probity)

Al-adalat technically means to avoid Al kabayer (Big vices) and not repeat Al-Saghaer (small vices). Adalat is considered apparently in every Muslim and the witnesses will not be asked until the opposite party of the case abuses them and refuses to accept the evidence on the base of the probity of witness. But they will be cross examined in cases of Hudōd and Qisas (punishments and Retaliation) although they may not be abused by the opposite party. Most of the jurists have preferred this view point.<sup>14</sup>

And that is why shahādah of a blind man is not permissible in case of murder, Ghasb (Taking property by force), zina (Fornication), and in statements like in contract and leasing, but shahādah of blind is permissible in case of publication and translation.

#### Abuse in Shahadat:

The apparent probity of a person is to be defended and this to be proved by isteshab al-hal (they thing remains in condition as it was in past) not on proof. And that the probity must be proved by proof while Abu Hanifa recommended only apparent probity, because Allah (S.W.T) praised and described this nation (Ummah Islamia) by Ummah alwasatah (just and equitable nation) which means probity.

So therefore the probity is the original condition of Muslim which may be suspended accidentally.<sup>15</sup> (16) Apparent probity is sufficient until suspected

characteristics' of the people and rules are applied on this for a long time from the past. If hearsay evidence is not accepted in these cases then it will lead to hardship and suspension of the rules.

According to Abu-Hanifa hearsay evidence is only accepted when it is prevailed and publically known among the people. And according to Sahibain (companions), that he is informed by two probit men or one man and two women, and in case of shahadat-al-Hisbah' (Shahādah relates to the rights of Allah or which can be named in public interest).<sup>8</sup>

### General Conditions of Shahādah

#### 1. Possession Of Wisdom And Age Of Majority:

All jurists are agreed on this condition of shahada and that the shahada of the person who does not possess wisdom, will not be accepted, like insane person, intoxicant and child because his statement is not authenticated. Shahada of that child who has not attain the age of majority, will also not be accepted. Because he is not eligible for shahādah. While according to Imam Malik shahādah of a child in favour of a child or against him will be accepted in injuries.

Majority of jurists are agreed with this opinion. According to them that shahādah of children is accepted if the children are agreed on shahādah and they present their shahādah in court of justice before their separation and without any major person interference in their shahādah.<sup>9</sup>

#### 2. Islam:

Jurists are agreed upon this condition that shahādah of non-muslim will not be accepted against Muslim. Because non-Muslim is considered to be in case of Mulsim suspected. But in case of wasiat (will, testament) will be accepted when this wasiat given in journey.

Non-Muslim is eligible to do oral testimony according to Hanafi jurists because the shahādah of Zimmies (non-Muslims living in an Islamic State) is permissible among themselves if they are probit in their own religion.<sup>10</sup>

#### 3. Sight:

According to Hanafi jurists and shafay'ee jurists, a witness must be able to see therefore an oral testimony of a blind man is not accepted because a blind man cannot differentiate among the voices of the quarrelling parties. And there is doubt because voices are resembling with one another.

meaning of eye witness and information upon the occurrence of event. Someone said "Shahidto" (I have seen) is not permissible because the past is for information or report of the thing which has been already taken place, while shahādah is for a report which is taking place in presence of witness.

#### Hukm of Shahādah:

It is obligatory upon the judge to give judgement on the shahādah which fulfills requirements and stipulations. To qualify shahādah and to deliver shahadah are two different things. To qualify shahādah is (Fardh Kifayee) while to deliver shahādah after its qualifying is (Fardh E'ain). It is obligatory to deliver shahādah without demand in rights of Allah like in divorce, suckling, waqf, Hilal of month of Ramdan, khule, Eila, and Zihar.<sup>3</sup>

#### Conditions to qualify Shahādah

To qualify shahādah means to understand the events and to take full information by examining it with the help of Eye and by listening. According to hanafi Jurists, there are three conditions for shahādah:

1. That he has wisdom. To qualify shahādah needs an understanding and comprehension and these cannot be achieved without wisdom. That is why an insane and child are not eligible to qualify shahādah because they cannot understand.<sup>4</sup>
2. That he can see at the occurrence of incident. A blind man cannot qualify shahādah. To qualify shahādah, it is a condition for a witness to listen the quarrelling partner and it is not possible without seeing him because the voices intermixed and resembled voice of someone to others.<sup>5</sup>
3. That the evidence of an eye-witness of the incident is completed by his own eye not by others but only in those cases is permissible where shahādah is accepted like hearsay evidence in publication and translation.<sup>6</sup>

Hearsay evidence is also accepted and permissible in cases like, marriage and heritage. (Nasab), death, intercourse of husband with his wife, administration of justice (wilayat-ul-Qazi) waqf (conservate to a pious purpose), and suckling. So for a witness has to give evidence in these cases whenever he is improved by an authentic person on the basis of Istehsan (Taking as a favour), because these things are relating to the particular

## STATUS AND ADMISSIBILITY OF WOMEN'S EVIDENCE IN ISLAMIC LAW

Hidayat Khan

**Abstract:** This article aims to elaborate the status of women's Evidence in proving the rights through it in Islamic law. Evidence of woman is admissible and it has a great status in Islamic law. Although it has no general application in all cases because there are different rules for different cases in Islamic law. There are certain conditions for its application and admissibility in cases relating to different civil and criminal rights. While there is no such concept of these kinds of rights in common law. There is also a detailed discussion of different Islamic Jurists on application and admissibility of women's evidence in civil and criminal rights. This article also highlights that Islamic law has its own concept, circumstances and needs which is totally different from common law. It also clarifies that the scholars of Islamic law must not be influenced by un-Islamic culture and civilization which are not similar to Islamic culture and civilization. Islamic society needs its own Islamic law which suits to its culture and civilization.

### DEFINITIONS:

#### Literal Meaning of Shahādah

Presence in place of occurrence or the place has been seen or he has seen the quarrel, occurred in his presence. And Almushahada means that he has seen with his presence. And shahada is on authentic information given by the person who has got in his presence or he is an Eye witness. And also upon information and publication. It has also been said that Alshahada is extracted from knowledge. "Ushhido" and it is a source of shahada from Alshuhōd which means presence.<sup>1</sup>

#### Technical meaning of Shahādah

It means true information (report) to prove right by word of Shahādah in the court of justice.<sup>2</sup> Word of Ushhido will not be used for any other because the text has stipulated this word and also there is more stress in this word. The word Ushhido is from the words of Oath and this word has both

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