The Testimony of Woman in Hudūd Cases

(A Critical Appraisal)

By

Hafiz Muhammad Siddique

380-FSL/LLM Shariah & Law/F05

Supervised by

Dr. Muhammad Munir

Head Department of Law

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Final Approval

It is certified that I have read the dissertation submitted by Hafiz Muhammad Siddique entitled "The Testimony of Woman in Hudūd Cases, (A Critical Appraisal)" as a partial fulfillment for the award of degree of LLM (Shariah & Law). We have evaluated the dissertation and found it up to the requirements in its core and quality for the award of degree.

1. Supervisor
   Dr. Muhammad Munir
   Head Department of Law
   IIU, Islamabad.

2. Internal Examiner
   M. Mushtaq Ahmed
   Assistant Professor Law
   IIU, Islamabad

3. External Examiner
   Dr. Mohammad Motiaur Rahman.

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To Parents

For their prayers

To Teachers

For their kind guidance

To Friends

For their encouragement, support and assistance
in times when I required it most

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Preface

Allah Almighty has instinctively inculcated in us the ability to judge right and the wrong. It is also a universally admitted truth that "To Err is Human"; man cannot help committing wrongs. At times, he advertently or inadvertently commits wrongs to the person or property of others or any other belongings tangible or intangible. On the other hand, living peacefully is also an instinctive quality of man, which is a sine qua non to maintain peace in his life.

In order to make the world peaceful, human friendly and worth-living; a legal system comprising penal laws is established by the society to prevent commission of offences, crimes and discrimination and further to promote peace, tranquility and equality amongst the human beings and in the society. A system of punishments is established by making laws in order to punish offender for his wrong deeds so that others do not suffer by his wrong deeds. Such a system of laws providing punishments for wrong doings and commission of crimes by the people is called the Penal Law of a country. In Pakistan, the Pakistan Penal Code 1860 is enforced as the penal law side by side, the special laws, inter alia the *Hudūd* Laws promulgated in 1979. The operationalization and implementation of penal laws depends on various forms and modes of proof of commission of offence. Of such forms of proof, the testimony of eye witness, oral or in writing, secures highest position as a direct proof of commission of offence.

Testimony is the statement of a witness in a court and a solemn attestation and affirmation as to the truthfulness of a matter. Testimony is one of those modes of proof which conveniently leads to the determination of a fact in a matter of controversy, which is mainly relied upon by the courts of law in order to reach a judicious decision. The testimony also leads to the determination of the truthfulness, sagacity, and integrity of a person or if someone has committed a crime, to the determination of the commission of such offence by the person alleged. The testimony of witness helps the judges to explicitly establish innocence or delinquency of a person or to make a judicious opinion of commission or non-commission of the offence.

The law of evidence enforced in Pakistan is the Qanun-e-Shahadat Order of 1984. Muslim classical jurists and scholars of the modern time cast doubts over the said law and deem it not in complete conformity with the injunctions of the Quran and the Sunnah. In this law, the testimony of women has been recognized as admissible in certain matters. However, the debate at hand is as to whether the testimony of women is also admissible and reliable in *Hudūd* cases as that of men or not? A considerable dissonance has been seen on the instant issue amongst the Muslim scholars and jurists arguing for and against the question of admissibility of testimony of women in *Hudūd* cases. This thesis endeavours to seek consonance and dissonance on the subject matter in the light of arguments given by the scholars and jurists.

Testimony under Islamic law falls in three categories:

1. Testimony in *Ḥudūd* and *Qisas*
2. Testimony in matters relating to rights and dealings
3. Testimony in matters exclusive to women

Muslim classical Jurists agree that in *Hadd*-e-*Zina* and *Qazf* four witnesses are must but in all kinds of transactions and other criminal matters two men or one man and two women have been made necessary. They exclude a woman to give testimony in all kinds of *Hudūd* cases whether quantum is of four witnesses or less than that. Shafi'iyyah make another distinction in civil matters especially which are not financial like *Nikah* based on the verse of Surah Al-Talaq, two men are must; Zahiris like Imam Ibn-e-Hazm and other great scholars like Imam Ibn-e-Taimiyyah and Imam Ibn-e-Qayyim allow the testimony of women in all categories, whether the quantum is four witnesses or two witnesses, including *Hudūd* with the condition that two women are equal to one man. Imam Ibn-e-Qayyim says that the intent of Lawgiver is to protect the rights with any kind of evidence and the testimony of one man, if he is just, his testimony cannot be rejected but the fact is when it is clear that a witness is just then a case should be decided on his testimony alone as the Holy Prophet (PBUH) accepted the testimony of Abu Qatadah and made

admissible the testimony of Khuzaima alone.[1] Besides this, there are instances which suggest that cases had been decided on circumstantial evidences alone.[2]

The Holy Quran has mentioned the number of witnesses in case of fornication in this verse:

وَالّٰتِیۡ یَاۡتِیۡنَ الۡفَاحِشَۃَ مِنۡ نِّسَآئِکُمۡ فَاسۡتَشۡہِدُوۡا عَلَیۡہِنَّ اَرۡبَعَۃً مِّنۡکُمۡ

"As for those of your women who are guilty of immoral conduct, call upon four from amongst you to bear witness against them."[3]

This verse shows that for the establishment of charge of fornication evidence of four witnesses is essential. Evidence of woman shall not be accepted, Imam Zuhri says that this was the practice during the era of Holy Prophet Muhammad (PBUH) and the era of Caliphs in matters relating to *Hudūd* and *Qisas,* the evidence of woman had not been acceptable.[4]

Majority of the Muslim classical jurists expound, including Imam Abu Hanifa[5], Imam Malik[6], Imam Shaf'i[7] and Imam Ahmad bin Humbal [8] that a witness in *Hudūd* and *Qisas* cases must be male and thus the testimony of a woman is not admissible in *Hudūd* and *Qisas* cases. Other than *Hudūd* and *Qisas* cases, the testimony of two women and one man is admissible. The matters, which are generally known to women only like virginity, menstruation, suckling etc, the testimony of women alone is admissible. Furthermore, according to Imam Abu Hanifa and Imam Ahmad, the testimony of only one woman is sufficient in these matters, and according to Imam Shafi'i, the testimony of four women is required.[9]

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[1]Abu Abdullah Muhammad bin Abi Baker bin Qayyim, *I'lamul Muwaqqe'in*, vol. 1 (Beirut: Dar-ul-Jail), 100-104.
[2]Ibn-e-Qayyim, *I'lamul Muwaqqe'in,* vol. 1, 130.
[3]Al-Nisa:15
[4]Abu Baker bin Mas'ood Al-Kasani, *Badae' al sanae'*, vol.6, (Beirut: Dar Al-Fikr, 1996), 424
[5]Abubakr Abdullah bin Muhammad bin Abi Shaiba, *Musannaf Ibn-e-Abi Shaiba*, vol. 10 (Karachi: Idarat ul Quran wa Al 'uloom Al Islamiyyah, 1986), 58.
[6]Ibn-e-Rushd, *Bidayat ul Mujtahid*, vol. 2 (Beirut: Dar ul Fikr), 348.
[7]Abu Zakaria Muhyuddin Bin Sharaf, An-Nawavi, "*Al-Majmoo' Sharh Al-Muhazzab*", vol. 20, (Dar Al-Fikr), 252.
[8]Abdullah bin Ahmad bin Qudama ,*Al Mughni,* ,vol. 10 (Beirut: Dar ul Fikr ,1984), 155.
[9]Abu Abdullah Muhammad bin Abi Baker bin Qayyim, *Al-Turuq-ul-Hukmiyyah*, (Egypt: Dar Al Madni), 165.

Imam Ibn-e-Taimiyyah and Ibn-e-Qayyim say that the testimony of woman is admissible in every matter even in Hudud and Qisas, if her testimony is authentic and the testimony of man is man is not available in any matter.[10]

Imam Ibn-e--Qayyim said that the Lawgiver wants to protect the rights of individuals with any kind of evidence and lawgiver did refuse any true evidence but accept all the times whether the witness is man or woman even in *Hudūd* and *Qisas* cases. There are some evidences in which the companions enforced the punishment of *Hadd* only by circumstantial evidences.[11] It has been reported that Hazrat Mu'awiyah decided a case of a house on the single testimony of Umm-e-Salamah, a woman.[12]

Tawoos accepted the testimony of women along with men in every offence except *Zina.*[13] Furthermore, Ata Ibn-e-Abi Rabah said that if eight women gave testimony on the adultery of a woman, I shall punish her with stoning to death.[14] He also made admissible the testimony of woman with man in all matters including *Zina.*[15]

Imam Ibn-e-Shahab opined that Allah has directed that the matters are to be decided by the testimony of two men and in the absence of two men by the testimony of one man and two women and did not prohibit the testimony of women along with men. He also stated that testimony of women along with a man is sufficient to prove a case of murder.[16] Hammad Ibn-e-Abi Sulaiman has said: "The Testimony of one man and two women is admissible in *Hudūd* and *Qisas.*"[17] He quoted some scholars opinion without mentioning their names that they accept the testimony of woman in *Hudūd* cases.[18]

The admissibility of the testimony of women in *Hudūd* cases seems to be a controversial issue and has not been given much weightage. Whereas, in cases punishable with *Ta'zirat* and other incidental matters, the testimony of women is acceptable and reliable after corroboration wit other circumstantial evidences.

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[10] Ibn-e-Qayyim, *Al Turuq Al Hukmiyyah*, 170, 171.
[11] Ibn-e-Qayyim, *I'lamul Muwaqqe'in,* vol. 1, 103.
[12] Ibn-e Qayyim. *Al-Turuq-ul-Hukmiyyah*,166.
[13] Ibid., 163
[14] Ibid,164
[15] Ibid.
[16] Abu Muhammad Ali bin Ahmad bin Hazm, *Al Muhalla,* vol. 9 (Beirut: Dar Al Afaq Al Jadidah), 397.

[17] Ibn-e Qayyim. *Al-Turuq-ul-Hukmiyyah*,151.
[18] Ibid, 88

It is important to mention here that there is no express or implied text of the Holy Quran and the Sunnah of the Holy Prophet (PBUH) which prohibits the admissibility of the testimony of a woman and in documentation of certain monetary transactions, no discrimination has been made in the testimony of a man and a woman, only one man is equal to two women in quantum, nothing else. Thus the testimony of a woman is acceptable in all matters if her testimony is otherwise authentic as that of a man. As regards the testimony of two women, it being equal to the testimony of one man in documentation of certain monetary transaction as mentioned in Surah Al-Baqara.[19]

Purpose of study

The process of Islamization initiated and started in the era of General Zia in 1979 and it remains controversial. *Hudūd* laws are at the height of controversy because of their widespread effect. They are assailed by human rights groups because of their failing to conform to human rights principles of gender equality and upholding of human dignity. The religious communities led by ulama regard the *Hudūd* laws as the divine law, hence, unchangeable and a woman to them is exempted to give testimony in it.

The first source of proof of a crime is testimony. We get help from testimony in all controversial matters. In financial matters, a woman can testify but her testimony is half to that of a man, based on verse 282 of Surah Al-Baqra. In all other matters, she can give testimony except *Hudūd* cases, based on the tradition of Imam Zuhri. They say that it does not mean that testimony of a woman is not accepted, it is accepted and the accused is liable to be punished under *Ta'zir* but not for *Hadd*. This is a view of majority of classical Muslim jurists like Hanfiyyah, Malikiyyah, Shafi'iyyah and Hanabilah. But Imam Ibn-e-Hazm does not agree with them and made admissible the testimony of a woman in *Hudūd* cases. Along with Ibn-e-Hazm there are some other jurists like Hammad, Ibn-e-Abi Sulaiman and Ata bin Abi Rabah.

This study will further help analyze and understand the relevant provisions of Qanun-e Shahadat Order, 1984, which is considered to be made in conformity with the injunctions of the Holy Qur'an and the Sunnah.

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[19]Al-Baqrah: 282

Literature review

Islamic law has been developed against diverse political and administrative backgrounds. The lifetime of the Prophet (PBUH) was unique in this respect; it was followed by Caliphs of Madina. The rule of the Umayyads; the first dynasty in Islam represented in many respects, the consummation of tendencies which were inherited in the nature of the community of the Muslims under the Prophet (PBUH). During their rule the framework of a new Arab Muslim society was created, and in this society a new system of administration of justice, Islamic jurisprudence, and through it, Islamic law itself came into being.

No book explains fully the status of the testimony of women but there are some books which cover the matter in issue to some extent. Some are as follows:

- Al Turuq ul Hukmiyyah Fi Al siyasah Al shariyah (Ibn-e-Qayyim)
- I'lam Al Muwaqq'in (Ibn-e-Qayyim)
- Al Muhalla (Ibn-e- Hazm)
- Al Majmoo' (Al Nawavi)
- Al Mughni (Ibn-e-Qudama)
- Women in Islam, a discourse in rights and obligations (Umar Naseef and Fatima)
- The right of Muslim Women (Jalaluddin Umri)
- Faith and 'Freedom, women's human rights in the Muslim World (Mahnaz Afkhami)
- Women Empowerment and social Improvement (Laxmi Devi)
- Islam ka Qanun-e-Shahadat (Muhammad Mateen Hashmi)
- Kitab al-Fiqh ala al-Madhshib al-Arba'ah. (Abd Al-Rahman Al-Jaziri)
- Al-Tashri ul Jinai' Al Islami (Abdul Qadir Awdah)
- Al-Fiqh al-Islami wa Adillatuhi (Wahbah Al-Zuhayli)
- Al-Ta'zir fi al-Shariah al-Islamiyyah (Abd al-Aziz Amir)
- Pakistan Min *Hudūd*-o-Qawanin (Shahzad Iqbal Sham)
- Hudūd-o-Qawanin, A Critical Analysis of IIC Report, (Mushtaq Ahmed)
- The Criminal Law of Islam (Dr. Anwarullah)
- Islamic Law of Evidence (Dr. Anwarullah)

The testimony of women is acceptable and desirable on a place which is predominated by the women themselves e.g. girls hostel, nursing homes, women centers etc, but in this situation the testimony of women shall not render the accused persons liable to *Hadd.* This philosophy and rule has been expounded / interpreted by the Federal Shariat Court.[20]

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[20] *Begum Rashida Patel v. Federation of Pakistan,* PLD 1989 FSC 95.

It says that the punishments of *Hudūd* are stringent and inflexible in order to deter the persons to keep themselves away from any sinful activities or any social crimes. The essence of these punishments lies in transparent, uninfluenced, unbiased and impartial testimonies that are direct evidences and have witnessed the commission of crime with their own eyes and perceived with their own senses.

Methodology

The study is built upon existing literature. Both classic fiqhi literature and modern work on *Hudūd* laws is analyzed. Special attention is paid to the literature produced for and against the *Hudūd* laws as well as Testimony laws.

While analyzing the works of early schools of thought and other jurists, I have tried to get benefit from original Arabic, English as well as electronic sources. I used English translation of Pickthal; the electronic link is available at http://quranexplorer.com/quran/.

The research has been bifurcated and classified into three chapters for better, easy and sequential understanding of this study. First chapter comprises as to what is a testimony and its importance in law, qualifications of witnesses, modes of proof and number of witnesses. Second chapter consists of the thoughts of the Muslim classical jurists on the testimony of women, the opinion of Imam Ibn-e-Taimiyyah, Ibn-e-Qayyim, Imam Ibn-e-Hazm and Modern scholars, approach of the Companions of the Holy Prophet (PBUH) about the testimony of women and a critical analysis of Imam Zuhri's tradition. Third chapter consists of Islamization of criminal law and evidence law in Pakistan. Similarly, chapters have been compiled on the same pattern, in order to carry out an exhaustive study upon the issues involved. All such supporting and reference books have been mentioned in the bibliography at the end of this thesis.

Abstract

It is to determine as to whether the testimony of women in *Hudūd* cases is admissible or not? Muslim classical jurists and modern scholars who are the followers of different Schools of Thoughts vary in their juristic opinions on the issue of testimony of women in *Hudūd* cases. Many Muslim classical jurists and modern scholars offer their views in the light of Traditionalist and Modernalist theories by relying their argument on the basis of the Holy Quran, Sunnah of the Holy Prophet (PBUH), consensus of opinion and analogy.

During the primitive times, the testimony of women in day to day affairs received due importance both in matters of theory and practice. Since then it became a consistent practice to rely upon the testimony of women and decide matters of a domestic nature accordingly. As the time changes rules and practices also follow the change in the society as is demanded by the contemporary circumstances. With the passage of time and emergence of new questions of law and facts coupled with complicated situations and circumstances, reliance on the testimony of women became dim in practice. On the other hand, the testimony of men began to be heavily relied upon in social, economic and commercial matters.

Today, the societal state of affairs has taken a turn in all spheres of human life and the testimony of women, particularly, in *Hudūd* cases has become a matter of concern and discussion. In this context, controversies have arisen as to the admissibility of the testimony of women. Islam confers due rights on the women in every sphere of life, similarly, the right to render testimony also rests with them. Now, the question has to be determined as to whether the testimony of women is admissible in *Hudūd* cases as well and on what ground it is said that the women can give testimony in *Hudūd* cases? The process of Islamization in Pakistan since 1979 in the name and tag of *Hudūd* laws also sheds some light on the issue under discussion and prevents the testimony of woman in *Hudūd* cases. This study mainly focuses on and engulfs the above mentioned issues concerning the testimony of women with particular emphasis of its admissibility in *Hudūd* cases.

CHAPTER I

TESTIMONY AND ITS IMPORTANCE IN LAW AND SHARIAH

CHAPTER I

Testimony and its Importance in Law and Shariah

1. Testimony and its importance to establish an offence

Man is a social being as such he owns an individual as well as social facet of his existence. Society includes family, neighbours, relatives, friends, community and the country. He is though a free being but also bound by some limitations as he is to exist within the societal framework. He has the right to do good to himself and to others, but he has no right to do wrong either to himself or to others. He must live in the society in such a way and with such freedom that he does not do wrong to others. This restricts individual's freedom in so far as it is necessary for guaranteeing the maximum freedom to all. Being a social animal, he wants to live and spend his life collectively with others. This is a fact that when we live together in a society or community, some controversies and disputes arise even in the same family. Sometimes these controversies and disputes are normal and sometimes very serious in nature. To resolve these disputes and controversies and to abstain from evils and committing crimes in the society, laws, rules and regulations are made in order to maintain peace, promote justice and equality and to make the society law abiding.

In order to ensure justice and make the society peaceful, there must be some mechanism or a system of justice to control the crimes and ills of the society. If someone commits a crime, he must be punished in order to create deterrence and respect for the law. For the true administration of justice in the society we need to have a strong system called the judicial system. A good and strong judicial system ensures the implementation of rights of the citizens and provides justice above board. The courts do not act in abstract while adjudicating a matter, they have to rely heavily on evidences, testimony and records of a matter in controversy to prove or disprove the issue. Therefore, in a judicial system, testimony and evidence stand on a high stature and footing. They secure high significance for determining the innocence or delinquency of the litigants. Testimony or evidence may be assessed in

various forms like oral, in writing, confessional, oath, circumstantial and documentary..

Evidence or Bayyinah means clear expression or irrefutable and clear proof which cannot be denied. It is a broader term which includes all kinds of evidences. Now we have to see what *Bayyinah* is?

Encyclopedia of Islam defines *Bayyinah* as below:

Bayyinah is a singular and its plural is *Bayyinat,* etymologically the feminine adjective "clear evident", was already in use as a substantive with the meaning of "manifest proof". In legal terminology the word denotes the proof *per excellentam* – that is established by oral testimony, although from the classical era the term came to be applied not only to the fact of giving testimony at law but also to the witnesses themselves.[21] And in Al-Majallah Al-Ahkam Al-Adliyyah, *Bayyinah* consists of the adduction of reliable testimony.[22]

Imam Ibn-e-Qayyim explains what *Bayyinah* means as he states:

> "The word '*Bayyinah*' in the language of the Qur'an, of the Prophet (PBUH) and of his Companions (RA) is the name of everything by which the truth becomes evident. Hence contrary to its connotations in the terminology of the jurists, it has a wider meaning because they only use it for two witnesses or an oath and a witness."[23]

He further states that eye witness, documentary evidence, oath, admission and all kinds of circumstantial evidences includes *Bayyinah* and one from all of them is equal to one witness that is why if in any case eye witnesses are less than the required number or witnesses are not available then any kind of *Bayyinah* which is authentic, would be accepted and decision could be made on that as such.[24]

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[21] *The Encyclopedia of Islam,* s.v. "Bayyinah"
[22] *Majallat Al-Ahkam Al-Adliyyah,* (Karachi:Ashraf Brothers), Art. 1676.
[23] Abu Abdullah Muhammad bin Abi Baker Ibn-e-Qayyim, *I'lamul Muwaqqe'in*, vol. 1 (Beirut: Dar-ul-Jail), 90.
[24] Ibid. 91

The word *Bayyinah* includes all kinds of evidences, testimonies, whether they are oral, documentary or circumstantial evidences. In relation to law of evidence we have to know that what evidence is!

1.1 Evidence as defined in Article 2 (c) of Qanun-e-Shahadat Order, 1984

"Evidence" includes;

i. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; and

ii. All documents produced for the inspection of the Court; such documents are called documentary evidence;[25]

The term *evidence* according to its interpretation provided by article 2(1)(c) of the Qunoon-e-Shahdat Order, 1984 means "all statements that a court may permit or require to be made before it by witnesses in relation to matters of fact under inquiry and the documents produced for inspection of court", evidence signifies all statements that a court may permit or require to be made before it by witnesses in relation to matters of fact under inquiry and the documents produced for inspection of the court.[26] Evidence' being a comprehensive word includes statements of witnesses, parties and documents which are produced in court or judicial forum to prove or disprove the case.[27]

The meaning of the word *evidence* given in the definition is not exhaustive. This word denotes the state of being evident i.e., plain or apparent. It includes in its parlance oral evidence and documentary evidence. The former speaks of all statements permitted by the court or required to be made before it by witnesses in the context of matters of fact under inquiry while the latter covers all documents produced for the inspection of the court. A statement made by a witness before the

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[25]M. Mahmood, *Qanun-e-Shahadat Order, 1984*, (Lahore: Pakistan Law times Publications, 2007), 70.
[26]KLR 1997 civil case, 399.
[27]PLD 1994 SC 501.

court is evidence unless such a statement was made by a person who is dead or can not be found as provided in Art.46 of Qanun e Shahadat Order,1984.[28]

The word *evidence* considered in relation to law includes all legal means, exclusive of mere arguments, which tend to prove or disapprove any matter of fact, the truth of which is submitted to judicial investigation. It also means testimony, whether oral, documentary or real, which may be legally received in order to prove or disapprove some fact in dispute.[29]

The definition of evidence covers the evidence of witnesses and documentary evidence, evidence can be both oral and documentary and also the electronic record can be produced as evidence. This means that the evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing etc.[30]

In Black's law dictionary, evidence is defined as "any species of proof or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, concrete objects etc., for the purpose of including belief in the minds of the court or jury as to their contention."[31]

Webster's new world dictionary of American languages defines evidence as "Something legally presented before court, as a statement of a witness, an object, etc; which hears or on establishes the point in question: distinguish from testimony and proof a person who presents testimony; witness as states evidence.[32]

Encyclopedia of Britannica defines "evidence" as a term which may be defined briefly as denoted the facts presented to the mind of a person for the purpose of enabling him to decide a disputed question. Evidence in the widest sense includes all such facts. In the narrower sense employed in English law, however, it includes only

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[28]PLD 1985 Kar. 35.
[29]Ratanlal & Dhirajlal's *The Law of Evidence*, 1872, (India: Wadhwa and Company Nagpur Publishers, 2007), 8.
[30]*State of Maharashatra v. Dr. Praful B. Desai,* AIR 2003 SC 2053-2059.
[31]*Black's Law Dictionary,* s.v. "evidence"
[32]*Webster's new world dictionary of American languages*, s.v. "evidence"

such facts, testimony and documents as may be received in legal proceedings in proof or disproof of the fact under inquiry.[33]

The very first mode to prove or disapprove the fact and matter in issue for the decision of the case is "testimony". Testimony secures an important position in judicial system because without it we cannot be able to decide as to who is right and who is wrong. In every dispute, there are at least two parties, plaintiff and the defendant. The plaintiff claims what is contrary to the apparent facts and defendant denies the claim. The burden of proof lies on the plaintiff and oath on the defendant. As the Holy Prophet (PBUH) has said:

> "To substantiate a crime is the claimant's responsibility, and the person who refutes it will have to swear on oath"[34]

Testimony is to give true information before a court of what one has seen or knows for the purpose of proving or disapproving a right or a crime.[35]

It is the duty of witnesses to bear testimony and it is not lawful to conceal it, when the party concerned demands it from them. In Islam, the testimony of a witness is very significant. Adducing the testimony before a court of law is the collective duty of those who have the information or knowledge of the facts of an incident. As Ibn-e-Qudama stated in Al- Mughni:

تحمل الشهادة وأداؤها فرض على الكفاية لقول الله تعالى: ''ولا يأب الشهداء إذا ما دعوا''،[36] وقال تعالى: ''ولا تكتموا الشهادة ومن يكتمها فإنه آثم قلبه''،[37] وإنما خص القلب بالإثم لأنه موضع العلم بها، ولأن الشهادة أمانة فلزم أداؤها كسائر الأمانات. إذا ثبت هذا فإن دعي إلى تحمل شهادة في نكاح أو دين أو غيره لزمته الإجابة، وإن كانت عنده شهادة فدعي إلى أدائها لزمه ذلك، فإن قام بالفرض في التحمل أو الأداء اثنان سقط عن الجميع، وإن امتنع الكل أثموا.

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[33] *Encyclopedia of Britannica,* s.v. "evidence"

[34] Abu 'Isa Muhammad Bin 'Isa Al Tirmazi, *Sunan Tirmazi,* Hadith No.1261.

[35] Dr. Anwarullah *"Islamic law of evidence"* (Islamabad: Shariah Academy IIU, 2007), 4.

[36] Al-Baqarah: 282

[37] Ibid., 283

> "Bearing out the testimony and giving it before a court is *Fard kifaya* based on these two verses as Allah has said "The witness should not refuse when they are called on for evidence" and "Conceal not evidence; for whoever conceals it his heart is tainted with sin" and sin has specified to the heart because that is a place of knowledge. Bearing out the testimony is a right, and to protect is like other rights. When someone has testimony in marriage or debt or in other matters and called to bear it, it is necessary to give it. If someone gives testimony, done by others too, but if they all denied then all of them are sinful".[38]

As Allah said in Holy Qur'an:

وَأَشْهِدُوٓا إِذَا تَبَايَعْتُمْ ۖ وَلَا يُضَآرَّ كَاتِبٌ وَلَا شَهِيدٌ

"But take witnesses whenever you make a commercial contract and let neither scriber nor witness suffer harm". [39],[40]

Imam Al Nawavi states about the testimony as under:

The testimony would be with knowledge based on the verse of the Holy Qur'an, "And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) will be enquired into (on the Day of Reckoning"[41] without knowledge giving testimony is inadmissible). He also quoted a narration which has been narrated by Ibn e Abbas (RA) that when the Holy Prophet (PBUH) was asked about *shahadah*, he replied, are you seeing the sun? The questioner said yes then the Holy Prophet (PBUH) said to him, when you have seen something like this then give testimony otherwise leave it.[42]

He further states that bearing out the testimony is a right, if that is not the right of Allah almighty but it is the right of man, and is an individual's duty. If someone

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[38]Abdullah bin Ahmad bin Qudama , *Al Mughni,* ,vol. 10 (Beirut: Dar ul Fikr ,1984), 154-155.

[39]Al Baqra:282

[40]The English Translation has been used of Pikhtal, the electronic link is available at http://quranexplorer.com/quran/

[41]Al Isra: 36

[42]Abu Zakaria Muhyuddin Bin Sharaf, An-Navavi, *Al-Majmoo' Sharh Al-Muhazzab*, vol.20 (Beirut: Dar Al-Fikr), 261.

gives testimony, done by others too, but if no one does the same, then the person available is liable to give testimony.[43]

As is laid down in the Holy Qur'an:

وَ لَا يَأبَ الشُّهَدَاءُ إِذَا مَا دُعُوا

"The witnesses should not refuse when they are called on (for evidence)" [44]

Not discharging this duty and concealing it is a great sin and the entire community will be held responsible for it, when there is only one witness, evidence becomes individual duty(*Fard Ain*).

The Holy Qur'an says:

وَمَنْ اَظْلَمُ مِمَّنْ كَتَمَ شَهَادَةً عِنْدَه مِنَ اللّٰهِ وَمَا اللّٰهُ بِغَافِلٍ عَمَّا تَعْمَلُوْنَ

"Ah! Who is more unjust than those who conceal the testimony they have from Allah? But Allah is not unmindful of what ye do!" [45]

It is incumbent upon witness to bear testimony as it is not lawful for them to conceal it as Allah Almighty says in the verse of Surah Al Baqrah in The Holy Qur'an :

وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَّكْتُمْهَا فَاِنَّه اٰثِمٌ قَلْبُه

"Conceal not evidence; for whoever conceals it his heart is tainted with sin"[46]

In this verse Allah has specified the heart with sin and that is a place of knowledge from that we do give testimony in trust (*Amanah*) and delivery of this trust is necessary like other trusts.[47]

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[43]Ibid., 267

[44]Al Baqara: 282
[45]Al Baqara: 140
[46]Ibid., 283
[47]Ibn-e-Qudama, vol. 9, 146.

Generally a witness cannot refuse to give evidence when he is called upon to do so, but he should go to the court when he is called by the party that wants to produce him as a witness. If it is apprehended due to the absence of a witness, right of party will be destroyed. Then it is obligatory for him to go to the court voluntarily and to give evidence to indicate the right of aggrieved party.[48]

When a plaintiff calls a witness to give a testimony he has to be there because that is a right of plaintiff to call him for testimony like all other rights.[49]

If a person has the information as to the existence of fact and he withholds the information there is very likelihood that the right of the aggrieved party will be destroyed causing injustice to that party.[50]

The object of testimony should be for the sake of Allah alone, as He describes that the rights of the people must be indicated.

As Allah has stated in the Holy Qur'an;

وَاَقِيمُوا الشَّهَادَةَ لِلّٰهِ

"And keep your testimony upright for Allah" [51]

يٰاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُوْنُوْا قَوّٰمِيْنَ لِلّٰهِ شُهَدَآءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلٰٓى

اَلَّا تَعْدِلُوْا اِعْدِلُوْا هُوَ اَقْرَبُ لِلتَّقْوٰى وَاتَّقُوا اللّٰهَ اِنَّ اللّٰهَ خَبِيْرٌ بِمَا تَعْمَلُوْنَ

"O ye who believe! Stand out firmly for Allah as witnesses, to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice.

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[48]Dr. S.M.Haider, ed., *Shariah and Legal Profession:* Islamic Law of Evidence by Qazi Muhammad Hussain Siddiqui (Lahore: Feroz Sons, 1985), 349.

[49]Imam Muhammad Bin Abdul Wahid, *Sharh Fath ul Qadir,* vol. 2 (Beirut: Dar Ahya ul Turath Al Arabi), 447.

[50]Dr. S.M.Haider, ed., *Shariah and Legal Profession:* Islamic Law of Evidence by Raja Bashir Ahmad Khan (Lahore: Feroz Sons, 1985), 337.

[51]Al Talaq: 2

Be just: that is next to Piety: and fear Allah for Allah is well-acquainted with all that ye do." [52]

Allah enjoins upon in the Holy Qur'an to be witness for this sake even if the testimony is against them or their close relatives.

يٰۤاَيُّهَا الَّذِيۡنَ اٰمَنُوۡا كُوۡنُوۡا قَوّٰمِيۡنَ بِالۡقِسۡطِ شُهَدَآءَ لِلّٰهِ وَلَوۡ عَلٰۤى اَنۡفُسِكُمۡ اَوِ الۡوَالِدَيۡنِ وَالۡاَقۡرَبِيۡنَ‌ ۚ اِنۡ يَّكُنۡ غَنِيًّا اَوۡ فَقِيۡرًا فَاللّٰهُ اَوۡلٰى بِهِمَا‌ فَلَا تَتَّبِعُوا الۡهَوٰۤى اَنۡ تَعۡدِلُوۡا‌ ۚ وَاِنۡ تَلۡوٗۤا اَوۡ تُعۡرِضُوۡا فَاِنَّ اللّٰهَ كَانَ بِمَا تَعۡمَلُوۡنَ خَبِيۡرًا

"O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do"[53]

One of the essentials of bearing out testimony that the witness should depose in accordance with best of his knowledge and belief and a witness should not follow a thing for which he has no information or knowledge. This principle is enunciated in the following verse of the Holy Qur'an:

يٰۤاَيُّهَا الَّذِيۡنَ اٰمَنُوۡۤا اِنۡ جَآءَكُمۡ فَاسِقٌ ۢ بِنَبَاٍ فَتَبَيَّنُوۡۤا اَنۡ تُصِيۡبُوۡا قَوۡمًا ۢ بِجَهَالَةٍ فَتُصۡبِحُوۡا عَلٰى مَا فَعَلۡتُمۡ نٰدِمِيۡنَ

"O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards becomes full of repentance for what ye have done." [54]

The Holy Qur'an has also enunciated this principle in Surah Al Maida:

ذٰلِكَ اَدۡنٰۤى اَنۡ يَّاۡتُوۡا بِالشَّهَادَةِ عَلٰى وَجۡهِهَاۤ اَوۡ يَخَافُوۡۤا اَنۡ تُرَدَّ اَيۡمَانٌۢ بَعۡدَ اَيۡمَانِهِمۡ‌ ؕ وَاتَّقُوا اللّٰهَ وَاسۡمَعُوۡا‌ ؕ وَاللّٰهُ لَا يَهۡدِى الۡقَوۡمَ الۡفٰسِقِيۡنَ

[52] Al Maida: 8
[53] Al Nisa: 135
[54] Al Hujrat:6

"That should make it closer (to the fact) that their testimony would be in its true shape (and thus accepted), or else they would fear that (other) oaths would be admitted after their oaths. And fear Allâh and listen (with obedience to Him). And Allah guides not the people who are Al-Fâsiqûn (the rebellious and disobedient)." [55]

Islam is the most favorite Din (religion) of Allah; Allah has made it perfect from every aspect. Qur'an provides extreme moral consideration and any act individually discredit to such moral consideration is taken as highly obnoxious and severely condemned. It is therefore ordered by Allah that the witness should not bear false evidence, as Allah states;

وَالَّذِينَ لَا يَشْهَدُونَ الزُّورَ ۙ وَ إِذَا مَرُّوا بِاللَّغْوِ مَرُّوا كِرَامًا

"Those who witness no falsehood and, if they pass by futility, they pass by it with honourable (avoidance)" [56]

The Holy Qur'an does not approve the practice of following information for which one has no knowledge as states:

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ ۚ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَٰئِكَ كَانَ عَنْهُ مَسْئُولًا

"And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) will be enquired into (on the Day of Reckoning."[57]

The Holy Qur'an has in no way bound the Muslims to adopt a particular method in proving a crime, it is absolutely certain that a crime stands proven in Islamic law just as it is in accordance with the universally acceptable methods of legal ethics endorsed by sense and reason. Consequently, if circumstantial evidence, medical check-ups, post mortem reports, finger prints, testimony of witnesses, confession of criminals, oaths and various other methods are employed to ascertain a crime, then this would be perfectly acceptable by Islamic law.

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[55] Al Maida: 108
[56] Al Furqan: 72
[57] Al Isra: 36

1.2 Testimony –Definition

Testimony is an account of facts before a court of law by a person, concerning any matter which he has personally seen, observed and perceived. The word *Shahadah* frequently appeared in the Holy Qur'an has a particular significance in connection with the testimony. It literally means to watch, to be present and to inspect. Technically it means conveying true information to a court of law in connection with a matter pending adjudication before it. As defined in The Encyclopedia of Islam as below:

The literal meaning of *Shahadah* (testimony) is irrefutable and clear proof and *shahid* (witness) is that person who prescribed what he knows.[58]

Testimony *(Shahadah)* literally means information of what one has witnessed or seen or beheld with his eyes, declaration of what one knows, decisive information, as in Encyclopedia of Islam different literal meanings are prescribed as under:

i. To be present somewhere as opposed to be absent
ii. See with one's own eyes, be witness of an event
iii. Bear witness to what one has seen

Attest or certify something *tout court Shahadah* can thus mean in the first place that something which is there, whence that which can be seen, as in the Qur'anic formula in which God has described it as:

عٰلِمِ الْغَيْبِ وَالشَّهَادَةِ (*'alem al ghaib wa al shahadah*)

"He who knows what is invisible and the visible."[59]

Another sense more commonly used is that of witnessing, the declaration by means of which the witness to an event testifies to the reality of what he has seen or claims to have seen.[60]

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[58] Muhammad bin Mukrim bin Mazoor Al Afriqi *Lisanul 'Arab,* vol. 3(Beirut: Dar Sadir) ,239
[59] Al Momenoon: 92
[60] *The Encyclopedia of Islam,* v.s. "shahadah"

In terms of Islamic law, testimony means, to give true information of what one has seen or known for the purpose of proving or disapproving a right or crime before a court as is stated in Encyclopedia:

Testimony is a statement in courts based on observation, introduced by the words, I testify (Ashhadu), concerning the right of others.[61]

Ibn e Abdin defines testimony as "testimony is telling the truth to prove the right in the court of judge with the word of *shahadah* (testimony)".[62]

In other words, testimony is giving information truthfully in a court what he has seen or heard.[63]

Majallah Al Ahkam Al Adliyyah defines *Shahadah* as it consists of the giving of information by a person in Court and in the presence of the parties by employing the word "evidence", that is to say, by saying formally; "I give evidence", in order to prove the existence of a right which one person seeks to establish against another.[64]

2. Who May Testify?

A judgment based on different kinds of evidences but the basic and main evidence is testimony, in testimony we have to see whether a witness is just or not? Whether he qualifies to give a testimony or not? There are some conditions for a witness to bear a testimony in Islamic law of Evidence as well as in Qanun e Shahadat Order, 1984. Art.3 of Qanun e Shahadat Order, 1984 prescribes as to who can give a testimony is as under:

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

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[61] Ibid.
[62] Ibn e Abdin, *Raddul Muhtar ala Durril Mukhtar*, vol. 7 (Egypt: Mustafa Al babi Al Halbi), 64.
[63] Abu bakr Jabir Al Jazaeri, *Al Ta'rifat,* (Jaddah: Dar Al Shurouq), 69.
[64] *Majallah Al Ahkam Al Adliyyah,,*(Karachi: Ashraf Broders), Art. 1684.

> Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:
>
> Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:
>
> Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah for a witness, and where such witness is not forthcoming the Court may take the evidence of a witness who may be available.
>
> Explanation: A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.[65]

This order lays down two tests of competence of witness, (i). Capacity to understand and rationally answer the questions put to him and (ii). Possession of qualifications prescribed by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, but where such a witness is not forthcoming, the court may take the evidence of a witness who may be available. However, a person who has been convicted of perjury or of giving false evidence is not a competent witness unless the court before which he appears to give evidence is satisfied that after conviction, he has repented, amended his conduct and way of life. This provision contained in first proviso to Art.3 is based on Surah Al Noor verse 4 and 5 which reads:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا ۚ وَأُولَٰئِكَ هُمُ الْفَاسِقُونَ ۙ إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَٰلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterwards) accept their testimony - They indeed are evil-doers - Save those who afterward repent and make amends. (For such) lo! Allah is Forgiving, Merciful."[66]

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[65]M. Mahmood, *Qanun e Shahadat Order, 1984*, (Lahore: Pakistan Law times Publications, 2007), 129.

[66]Al Noor: 4, 5

Incapacity to understand the questions or to answer them in a rational manner may be due to infancy, old age, disease of mind, e.g. insanity or of body or to any other cause of a like nature, e.g. unconsciousness, or extreme bodily pain.[67]

A lunatic, when he is in lucid intervals is not incompetent to testify if he can understand and rationally answer the questions put to him. The explanation also applies to the case of maniac or a person affected with partial insanity, who may be a very good witness as to the other points than that on which he is sane.[68]

2.1 Qualifications of Witnesses as laid down in The Holy Qur'an and Sunnah

Testimony of a witness is a juristic act of the category of information. The right and the obligation of the witness is however, to give true evidence but as men do not always give correct information either from error of perception or some moral aberration, it is incumbent on law to take precautions with a view to prevent the court as far as possible from being misled by falsehood. True information alone being regarded as evidence though there may be conflict of statements, one of which alone can be called evidence, the other being falsehood or an error.[69]

All Muslims are just with respect to bear and give evidence excepting such as have been punished for slander from these injunctions, the Muslim jurists have evolved rules called the conditions or prerequisites of Testimony. There are three kinds of conditions as under:

i. Conditions for bearing testimony
ii. Conditions for competent witness
iii. Conditions for giving testimony[70]

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[67]Justice Khalil UR Rahman, *Qanun e Shahadt order, 1984*, vol. 1, 57.
[68]Ibid., 57
[69]Abdur Rahim, *Muhammedan Jurisprudence*, 374-376
[70]Anwar Al Amroosi Al Mustashr, *Usul Al Murafe'at Al Shariah*, (Egypt: published), 783.

2.1.1 Conditions for bearing testimony

A person is capable of bearing testimony who is possessed with the capacity to see a fact which is capable of being seen, of hearing a fact which is capable of being heard and of perceiving a fact which is capable of perception. According to *Ahnaf,* there are three conditions to bear a testimony.[71]

a. A witness must be of sound mind and unsound mind baby who is not having intellect is not eligible to bear a testimony.

b. A witness must be capable to see at bearing a testimony and blind is not capable to bear a testimony.[72]*Hanabela* said that bearing testimony will be with sight and hearing and blind can bear a testimony in those matters are related to hearing as contract and leasing.[73]

c. A witness has to be seen a thing himself. This is based on as the Holy Prophet (PBUH) said: when you see or know a thing like sun then give testimony otherwise leave it.[74] And knowledge like sun is not possible except you see yourself.[75]

A person is capable of bearing testimony who is possessed with the capacity to see a fact which is capable of being seen, of hearing a fact which is capable of being heard and of perceiving a fact which is capable of being perception.[76]

2.1.2 Conditions for competent witness

The conditions for a competent witness, who is called (a man of rectitude and probity), evolved are:

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[71]Al Kasani, vol.6, 266.
[72]Abu al Hasan Burhanuddin Al Marghinani, *Al Hidaya,* Trns. Charles Hamilton, vol, 1 (Karachi: Darul Ishat), 779.
[73]Ibn-e-Qudama, vol. 10, 163.
[74]Ahmad bin Ali bin Hajr Al Asqalani, *Al Deraya fi Takhrij Al Ahdith Alhedayah*, Kitab Al-Shahadat, vol. 2 (Lahore: Dar Nashr Al kutb Al Islamiyyah), 172.
[75] Wahbah Al Zuhaili,, *Alfiqh Al Islami wa Adilltuho,* vol. 6 (Damuscus: Dar al fikr), 559.
[76] Justice Khalil ur Rahman, vol. 1, 59.

a. Intellect (*'Aql*)

A witness must be *aqil* having an intellect and reasoning faculty. All the jurists agree that a witness must be sound.[77]

b. Puberty (Age factor)

The orthodox agreed that puberty is stipulated on the basis of *Adala.* They disagreed about the testimony of minors against each other in bodily injuries and homicide. According to Imam Malik it (the testimony of minors) does not, in fact, amount to testimony but is circumstantial evidence.[78]

c. Eye sight in case of facts capable of being seen.

Abu Hanifa, Muhammad and Shaf'iyya say that a witness must be having eye sight in case of facts capable of being seen as the testimony of blind is inadmissible.[79] But Malkiyya, Hanabila and Abu Yusuf say that the testimony of blind is accepted when he is certain to a voice of someone.[80]

d. Capacity to seek or communicate.

A witness has to be capable to speak and does not be a dumb as Hanfiyya, Shaf'iyya and Hanabila opined.[81] But Malkiyya make admissible the testimony of dumb and mute person when his signs and signals are known and understood.[82]

e. Probity and rectitude (*Adalah)*

The witness must be a just one and it is inadmissible to accept the testimony of *fasiq* whether that is from men or women.[83]

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[77]Wahbah Al Zuhaili, vol. 6, 562.
[78]Ibn e Rushd, *Bidayt Al Mujtahid,* Trans. Nyazee, vol.2 (Garent Publishing Limited), 557.
[79]Wahbah Al Zuhaili, vol. 6, 563.
[80]Ibid., 563.
[81]Ibid.
[82]Ibid.
[83]Ibn e Hazm, *Al Muhalla,* vol.9 (Berut: Dar Ahya Al Turath Al Arabi), 264.

The condition of justice for a witness is based on the verse 2 of Surah Al Talaq in which Allah says: and call to witness two just men among you.[84]The orthodox Jurists say that a witness must be just and they agree that the testimony of Fasiq is not acceptable due to the words of the Exalted, O ye who believe! If an evil-liver brings you tidings, verify it, lest ye smite some folk in ignorance and afterward repent of what ye did.[85]

f. To be a male in case of *Hudūd* and *Qisas*

The orthodox jurists say that a witness must be a male in *Hudūd* and *Qisas* cases [86] while some differ in this opinion too.[87]

g. Not convicted of perjury or giving false evidence

There is a consensus of opinion amongst all the jurists as to the testimony of the person who accuses another person of committing adultery and then fails to produce four witnesses on his accusation is to punished with *Hadd* e *Qazf*. This is based on Verse 4 and 5 of Surah Al Noor as Allah Says; "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers - Save those who afterward repent and make amends. (For such) lo! Allah is Forgiving, Merciful. As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth;" [88] Ibn-e-Rushd states that the Jurists did not disagree, however, that a fasiq's testimony is acceptable after he is known to have repented, except the person whose fisq arises from the offence of *Qazf* as Abu Hanifa

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[84]Al Talaq: 2
[85]Al Hujrat: 6
[86]Abdullah bin Ahmad Ibn e Qudama ,*Al Mughni,* vol. 10 (Berut: Dar ul Fikr, 1984) , 155.
[87]Ibn-e-Qayyim, *Al Turuq Al Hukmiyyah,* 162.
[88]Al Noor: 4, 5

says that his testimony is not acceptable even if he repents differs from the majority who say it is (accepted).[89]

h. Evidence with the hope to receive any worldly gain, interest or to avoid any temporal evil

The testimony which is given to get worldly benefit or to hurt someone is not admissible.[90] This is based on the Hadith of the Holy Prophet (PBUH) who said that the testimony of suspicious person and enemy is not accepted.[91] On the basis of this, Imam Al Nawavi said that testimony of *Wasi* for orphan and *wakil* for *muakkil* is inadmissible.[92]

i. To be a Muslim

The jurists agreed that in Islam it is a condition for the acceptance of testimony, and that the testimony of a disbeliever is not permitted, except their disagreement regarding its permissibility in bequest made during a journey because of the word Exalted, "O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest - two witnesses, just men from among you, or two others from another tribe."[93] Abu Hanifa said that it is permitted upon the conditions mentioned by Allah, while Imam Malik and Imam Al Shafi'i said that it is not permitted and considered the verse abrogated.[94]

j. Enmity

The testimony of enemy against a party is inadmissible.[95] This is based on the narration of the Holy Prophet (PBUH) as He said the testimony of suspicious person and enemy is not accepted.[96]

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[89]Ibn e Rushd, *Bidayt Al Mujtahid,* Trans. Nyazee, vol.2 (Garent Publishing Limited), 556.
[90]Al Nawavi, *Al Majmoo'*, vol. 20, 232.
[91]*Kanzul ummal,* vol. 7 (Beirut: published Muassah Al Risalah), 22.
[92]*Al Majmoo'*, vol. 20, p. 232
[93]Al Maida: 106
[94]Ibn e Rushd, *Bidayt Al Mujtahid,* Tran. Nyazee, vol.2, p. 557
[95]Al Nawavi, *Al Majmoo'*, vol. 20, 234.

k. Blood Relations

The testimony of the major and minor branches of families for each other is not admissible.[97] This is based on the Hadith in which the Holy Prophet (PBUH) said that the testimony of enemy and suspicious person is not admissible.[98] Testimony in favour of son or grandson or in favour of father or grandfather is not admissible as the Holy Prophet (PBUH) has so ordained. Besides, there is a kind of communion of benefit between these degrees of kindred. It follows that their testimony in matters related to each other is in some degree a testimony in favour of themselves, and is, therefore, liable to suspicion.[99] Abu Thaur and Muzni regards it admissible based on this verse as Allah Has said, "And call to witness, from among your men."[100] That is a general rule and not specific to a particular group of men and they are just alike.[101]

l. Husband and wife

The evidence is not admitted between a husband and wife. The Holy Prophet (PBUH) has said, "We are not to credit the evidence of a wife concerning her husband or of a husband concerning his wife."[102] This doctrine of the inadmissibility of the evidence of husband and wife in favour of each other prevails only amongst the Sunnis and has given rise to much contention with the shi'as who maintain the opposite doctrine.[103] Shi'as doctrine is that the testimony of husband or wife in favour of each other is admissible or valid when corroborated by the testimony of other witness.[104] Imam Nawavi said

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[96]*Kanzul ummal,* vol. 7 (Beirut: published Muassah Al Risalah), 22.
[97]Al Nawavi, *Al Majmoo'*, vol. 20, 231.
[98]*Kanzul ummal,* vol. 7, 22. Hadith.17778
[99]Al Marghinani, *Al Hidaya,* Trns. Charles Hamilton, vol, 1, 781.
[100]Al Baqra: 282
[101]Al Nawavi, *Al Majmoo'*, vol. 20, 234.
[102]Ahmad bin Ali bin Hajr Al Asqalani, *Al Deraya fi Takhrij Al Ahdith Alhedayah*, Kitab Al-Shahadat, vol. 2 (Lahore: Dar Nashr Al kutb Al Islamiyyah), 172.
[103] Justice Khalil, ur Rahman, *The Law of Evidence*, vol. 1, 67.
[104]Shara'I al Islam, vol. 4, 130.

that the testimony of husband in favour of wife and vice versa is admissible but the testimony of husband against women in *Zina* is not inadmissible.[105]

m. Hurriyyah (Free)

The majority of the jurists of the regions inclined towards stipulating freedom for the acceptance of testimony, while the Zahiries said that the testimony of slaves is valid as the fundamental condition is *Adala* and bondage is not effective in the rejection of testimony unless this can be established from the book of Allah or from Sunnah or consensus. It was as if the majority maintained that bondage was a relic of the times of disbelief and, therefore, must be effective in the rejection of testimony.[106] Imam Maghinani says that the testimony of any person who is property, that is to say a slave, male or female is not admissible because testimony is of an authoritative nature and so a slave has no authority over his own person, it follows that he can have no authority over others, a fortiori.[107]

2.1.3 Conditions for giving Testimony by a witness

a. Existence of a claim or complaint and the requisition of testimony in it.

The evidence must be in conformity with the claim or complaint in respect of the subject matter. But any difference between evidence and the claim or complaint which can be reconciled does not render the evidence inadmissible. The evidence against a fact which is perceptible or generally admitted is not admissible.[108]

b. Testimony is to be given before a court.

The evidence must be before a *qadi* (judge) in the court and the evidence given outside the court is inadmissible.[109]

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[105]Al Nawavi, *Al Majmoo'*, vol. 20, 235.
[106]Ibn-e-Rushd, *Bidayt Al Mujtahid,* Trans. Nyazee, vol.2, 557-558.
[107]Al Marghinani, vol. 1, 780.
[108]Dr. Anwarullah, *Islamic law of evidence,* 28.
[109]Ibid., 30

c. Witness has the personal knowledge of the facts to be stated except in cases where hearsay evidence is admissible.[110]

d. Statement is to be given by first uttering the word "Shahadah", e.g. witness first of all to say that: I give Shahadah that I have seen this and that with the word of Shahadah.[111]

e. A Witness must remember the incidence or the fact to be deposed.[112]

The Witness must be able to identify the parties at the time of making the statement.[113]

f. Conformity of statement with the claim

The testimony must be in respect of the facts in issue and of such other facts which are relevant to the facts in issue and of no other fact.[114]

g. Statement of the witness of the parties should be corroboratory of each other and not conflicting.[115]

h. In *Hudūd* cases excepting *Qazf*, the fact sought to be proved should not have occurred in the distant past. [116]

3. Competence and number of witnesses

We discussed above that who can give testimony and what are the requirements and qualifications for the witness but now we are going to discuss the competence and especially the number of witnesses in Qanun-e-Shahadat Order, 1984 as well as according to the injunctions of Islam laid down in the Holy Qur'an and the Sunnah.

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[110]Abdul Malik Irfani, *Islamic Law of Evidence,* 41.
[111]Ibid., 41
[112]Ibid.
[113]Ibid.
[114]Dr. Anwarullah, *Islamic law of evidence,* 28.
[115]Abdul Malik Irfani, *Islamic Law of Evidence,* 42.
[116]Ibid.

Art.17 of Qanun e Shahadat Order, 1984 says as under:

Competence and number of witnesses:

i. The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah:"

ii. Unless otherwise provided in any law relating to the enforcement of *Hudūd* or any other special law:-

   a. In matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

   b. In all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.[117]

If we see Article 17 of Qanun-e-Shahadat Order, 1984 and Evidence Act, 1872, the same has been Islamized because Art. 134 of Evidence Act, 1872 does not mention any particular number of witnesses, the same is as under:

> "No particular number of witnesses shall in any case be required for the proof of any fact."[118]

This Article is based on the verse 282 of Surah Al Baqrah in which Allah Almighty says:

> "O ye who believe! When ye contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity. No scribe should refuse to write as Allah hath taught him, so let him write, and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof. But if he who oweth the debt is of low understanding, or weak, or unable himself to dictate, then let the guardian of his interests dictate in (terms

[117]M. Mahmood, *Qanun e Shahadat Order, 1984*, 201.
[118]Ratanlal & Dhirajlal's *The Law of Evidence*, 1872, 732.

> of) equity. And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if one of the two erreth (through forgetfulness) the one of them will remind. And the witnesses must not refuse when they are summoned. Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof. That is more equitable in the sight of Allah and more reliable for testimony, and the best way of avoiding doubt between you; save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it is no sin for you if ye write it not. And have witnesses when ye sell one to another, and let no harm be done to scribe or witness. If ye do (harm to them) lo! it is a sin in you. Observe your duty to Allah. Allah is teaching you. And Allah is knower of all things."[119]

The numerical requirement of a proof envisaged in Islamic law is not something new. Under the Roman and Common law, the effect of evidence is governed strictly by the numerical system. Testimony was counted, not weighed; on oath case is not being sufficient. In Anglo Sexsan and Norman times, proof was according to the importance of the case, he who has the grater number of witnesses prevailed. Under Evidence Act, 1872, the evidence of one witness if belief was sufficient to establish any fact to which he spoke directly and a judge was well entitled to believe one witness in preference to the three others but in practice judges did look for the collaborating material so as to receive satisfaction as to the truthfulness of testimony of sole witness. In murder cases where rest of the evidence was rejected, the accused could not be convicted on the solitary statement of one witness only but was given benefit of doubt. It has been held that if such a testimony is found by the court to be entirely reliable there is no legal impediment of the conviction of accused on such proof.

In England the general rule is the same as enacted by section 134, Evidence Act 1872, though there are certain exceptions where testimony of a single witness is

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[119]Al Baqra: 282

declared by statute to be insufficient to prove a particular fact, e.g. in case of treason, perjury, and personating at election, the testimony of a single witness is insufficient. In certain other cases, corroboration of the testimony of a single witness is required by statute e.g., in cases of breach of promise, the testimony of plaintiff must be corroborated. By the rule of practice at common law, the courts require corroboration of testimony of the claimants to the property of deceased person. In communal cases, it is unsafe to convict on evidence of one witness alone unless there is unsatisfactory circumstantial evidence in addition.

In Pakistan, significant changes have been introduced in the law on the subject. Art, 17, sub-article(1), lays down the general rule that the competence of witness to testify and the numerical requirement of the proof in each case shall be determined by in accordance with the injunctions of Islam as laid down in the Hholy Qur'an and Sunnah. Sub-article (2) saves the provisions relating to the mode of proof contained in any other special law and *Hudūd* cases with the result that the *Hudūd* cases and the cases covered by any special law are required to be proved by producing the number of witnesses prescribed under those laws. Sub-article (2) further provides that matters pertaining to future or financial obligations if reduced to writing, the document shall be attested by two men, or one man and two women so that one may remind the other, if necessary, thus sub-article (2) provides for compulsory attestation of documents evidencing transactions as is mentioned therein. The mode of proof of such an attested document has also been provided by adding the words "And evidence shall also be lead accordingly." Sub-article (2) in clause (b) further provides that in matters other than *Hudūd* cases and transactions pertaining to financial or future obligations and the cases provided for by any special law, the court may accept or act upon the testimony of one male or one female witness or any other evidence as the circumstances of the case may warrant.[120]

The framers of the Qanun-e-Shahadat Order, 1984 have however adopted the view that where a transaction involving financial or future obligation has been reduced

[120]Justice Khalil ur Rahman, *The Law of Evidence,* vol. 1, 201.

into writing the document must be attested by the two male witnesses or by one male or two female witnesses as this is what is provided by sub-article (20) of art.17 of the Order. Thus this article provides for the compulsory attestation of documents which contain any matter pertaining to financial or future obligation.

3.1 Modes of Proof

The general principle laid down by Article 17 is that the number of witnesses required proving a legitimate right or liability in the subject matter of a case is to be determined in accordance with the injunctions as laid down in the Holy Qur'an and Sunnah. For the purpose of mode of proof, the cases and documents can be categorized as under:

i. Hudūd Cases
ii. Cases provided for by any special law
iii. Documents evidencing financial or future obligations
iv. Proof in other cases

i. Hudūd cases

An offender can be held liable to *Hadd* only when he pleads guilty of the offence charged or when at least two Muslim adult male witnesses other than the victims of the theft or Harabah give evidence as eye witnesses of the occurrence. Proof of *Zina* or *Zina* –bil-jabr liable to *Hadd* is rendered either when the accused makes before a court of competent jurisdiction of plea of guilty of the commission of the offence or at least four Muslim adult male witnesses about whose probity and truthfulness the court is satisfied, give evidence as eye witnesses of the act of penetration necessary to the offence. Likewise, in order to prove the offence of *Qazf* liable to *Hadd*. The proof is rendered either by plea of the guilty of the accused before the court, or the *Qazf* is committed in the presence of the court or by direct evidence of two Muslim adult male witnesses of probity and truthfulness. If the accused is non-Muslim, the witness can also be non Muslim in all cases of *Hudūd*. The offence of drinking liable to *Hadd* is an offence for Muslims only and is to be proved either with the plea of

guilty of the offender made before the court or with the evidence of two male adult Muslim of known probity and truthfulness.

ii. Special Case Law (Cases provided for by any special law)

The mode of proof of a particular matter provided by any special law has been specifically saved as otherwise all rules of evidence contained in other Statutes, Acts or Regulations have been declared ineffective by Article 165 of the Order. One of such matters has been enumerated i.e., *Hudūd* articles in the sub article (2) itself.

iii. Documents evidencing financial or future obligations

Sub Article (2) of Article 17 provides that such a document is to be attested by two male witnesses or one man and two women. Clause (a) of sub Article 2 is reproduced hereunder:

> "In matters pertaining to financial or future obligations, if reduced to writing the instrument shall be attested by two men, or one man and two women, so that one may remind the other if necessary, and evidence shall be led accordingly."

The words "so that one may remind the other if necessary" are important and significant. The relevant part of verse 282 of Surah Al Baqra reads "And if there are not two men, then a man and two women such as you choose for witnesses, so that if one of them errs, the other can remind her. The old masters and the jurists have consistently expressed the opinion that the female witnesses take the place of male witnesses as a necessity when the second male witness is not available.

iv. Proof in Other cases

In cases and matters other than the above, no particular number of witnesses is required to prove a right or liability or a fact. Clause (b) of sub Article (2) of

Art 17 does not say that no fixed number of witnesses is needed to prove a fact, rather it lays down that a court may accept or act upon the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.[121]

3.2 Number of witnesses in the Holy Qur'an , Sunnah and among Jurists

Allah has prescribed a quantum of Shahadah in the Holy Qur'an at five places. In Surah Al Nisa and Al Noor, in case of *Zina* four witnesses and besides *Zina*, in all kinds of transactions, two men or one man and two men as prescribed in *Ayat-e-Mudayena* of Surah Al-Baqrah. In Surah Al-Talaq, in case of *Raj'ah* two just men in Surah Al Maida in case of *Wasiyyah* in journey two just men among you or others among you.[122]

There is a narration in which the number of witnesses has been prescribed as Ibn-e-Abbas narrated that the Holy Prophet (PBUH) decided on the evidence of one witness along with the oath of plaintiff.[123]

Imam Marghinani says that in *Zina* four men witnesses based on Zuhri's statements are necessary and in all other criminal cases two men as witnesses but in all other matters two men or one man and two women are necessary as witnesses.[124]

Ibn-e-Rushd says that the Muslims agreed that the offence of *Zina* cannot be proved with less than four male *adil* (just) witnesses. They agreed that all claims with the exception of *Zina* are proved by two male *adil* (just) witnesses. Al Hasan Al Basri disagrees by saying that no right is to be acknowledged with less than four witnesses on the analogy of *Rajm* (stoning to death) but this is a weak one because of the word Exalted, "And call to witnesses from among your men

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[121]Ibid.
[122]Ibn-e-Qayyim, *I'lamul Muwaqqe'in,* vol. 1, 91.
[123]Muslim Bin Hajjaj, *Sahih Muslim,* Kitab Al Aqdhiya, Bab al Qadha bil yamin wa alshahid, Hadith. 1712
[124]Al-Marghinani, vol. 1, 769-770.

two witnesses."[125]All are agreed on the point that a judgment becomes obligatory with the testimony of two witnesses without the oath of the Plaintiff except that Ibn-e-Abi Layla said that he must take an oath as well. They agreed that financial claims are established through one male *adil* (just) witness and two female witnesses because of the word Exalted, "And if two men be not then a man and two women of such as ye approve as witnesses.[126,127]

Imam Al Nawavi says that to prove the civil matter relevant to finance and wealth like *Bai'* (selling), *Ijarah* (leasing) *Hibah* (gift), *Wasiyyah* (will), *Rahn* (mortgage), *Dhaman* (monetary compensation), we need one man and two women,[128] based on verse 282 of Surah Al-Baqarah, as Exalted, "And call to witness, from among your men, two witnesses and if two men be not (at hand) then a man and two women".[129] But in matters not related to finance and in other matters, only men are informed like *Nikah* (Marriage contract), *Raj'ah* (Recourse), *Talaq* (Divorce), *'Itaq* (set a slave free), *Wakalah* (Agency) and *Wasiyyah* (Will), *Qatl-e-Amd* (Intentional murder), and *Hudūd* except *Zina*, we need two male witnesses to prove these matters.[130] Based on verse 2 of Surah Al Talaq as Exalted, "And call to witness two just men among you."[131]And he makes inadmissible less than four men as witnesses in *Zina*.[132]

And the testimony of one woman alone suffices concerning matters which do not admit the inspection of men like virginity and crying the baby at the time of birth.[133]

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[125]Al Baqra: 282
[126]Ibid.
[127]Ibn-e-Rushd, *Bidayat Al Mujtahid*, vol. 2, 559.
[128]Al-Nawavi, *Al Majmoo'*, vol. 20, 254.
[129]Al Baqra: 282
[130]Al-Nawavi, *Al Majmoo'*, vol. 20, 255.
[131]Al Talaq:2
[132]Al-Nawavi, *Al Majmoo'*, vol. 20, 252.
[133]Al-Marghinani, *Al Hidaya*, vol. 1, 771.

4 Conclusion

To conclude that Muslim classical Jurists agree that in *Hadd*-e-*Zina* and *Qazf* four witnesses are must but in all kinds of transactions and other criminal matters two men or one man and two women have been made necessary. They exclude a woman by giving a testimony in all kinds of *Hudūd* cases whether quantum is four witnesses or less than that. Shafi'iyyah make another distinction in civil matters especially which are not financial like *Nikah* based on the verse of Surah Al-Talaq, two men are must; Zahiris like Imam Ibn-e-Qayyim, Imam Ibn-e-Hazm and Imam Ibn-e-Taimiyyah allow the testimony of women in all categories, whether the quantum is four witnesses or two witnesses, including *Hudūd* with the condition that two women are equal to one man. Imam Ibn-e-Qayyim says that the intent of Lawgiver is to protect the rights with any kind of evidence and the testimony of one man, if he is just, his testimony cannot be rejected but the fact is when it is clear that a witness is just then the case should be decided on his testimony alone as the Holy Prophet (PBUH) accepted the testimony of Abu Qatadah and made admissible the testimony of Khuzaima alone.[134] Besides this, there are instances which suggest that cases had been decided on circumstantial evidences alone.[135]

[134]Abu Abdullah Muhammad bin Abi Baker bin Qayyim, *I'lamul Muwaqqe'in*, vol. 1 (Beirut: Dar-ul-Jail), 100-104.
[135]Ibn-e-Qayyim, *I'lamul Muwaqqe'in*, vol. 1, 130.

CHAPTER II

OPINIONS OF MUSLIM CLASSICAL JURISTS AND MODERN SCHOLARS ON THE TESTIMONY OF WOMEN IN HUDūD CASES

CHAPTER II

Opinions of Muslim Classical Jurists and Modern Scholars on the Testimony of Women in Hudūd Cases

The Muslim classical jurists differ on the testimony of women in *Hudūd* cases. The majority of Muslim classical jurists hold that a woman cannot give testimony in *Hudūd* cases at all. But Imam Ibn-e-Hazm, Imam Ibn-e-Taimiyya, Imam Ibn-e-Qayyim and the modern scholars opine that a woman can give testimony in *Hudūd* cases as well like in other matters. Both the groups rely on the Holy Qur'an, the *Sunnah*, traditions of companions and their own reasoning while arguing on the matter. The purpose of this chapter is to critically analyze the stand points of both the classical and the modern Muslim jurists in the light of historical experiences and the current debates. In the following debate, the arguments of both sides will be evaluated and analyzed along with their arguments.

1. The opinion of Muslim classical Jurists

The testimony of a woman is not acceptable in *Hudūd* cases whether she tenders it alone or along with men. This is the view of Ahnaf[136], Malikiah[137], Shawafi'[138] and Hanabilah[139]. The same view is upheld by Saeed bin Musayyib, Al sha'bi, Al Nakh'i, Al Zuhri, Rabi'ah, Abu Thaur and others[140].

2. The opinion of Imam Ibn-e-Hazm and Modern Scholars

The view point of Imam Ibn-e-Hazm is that the testimony of woman is admissible and acceptable in *Hudūd* cases but there must be two women against the testimony

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[136]Abu al Hassan Ali bin abi bakr Al Marghinani, *Al Hidaya,* vol. 5 (Karachi: Idarat Al-Qur'an wa Al- 'uloom Al-Islamiyyah, Pakistan), 417.
[137]Ibn-e-Rushd, *Bidayat ul Mujtahid,* vol. 2 (Beirut: Dar ul Fikr), 348.
[138]Abu Zakaria Muhyuddin Bin Sharaf, An-Nawavi, *"Al-Majmoo' Sharh Al-Muhazzab"*, vol. 20, (Dar Al-Fikr), 252.
[139]Abdullah bin Ahmad bin Qudama ,*Al Mughni,* vol. 10 (Beirut: Dar ul Fikr ,1984), 155.
[140] Ibid., 6

of one man.[141] Beside Imam Ibn-e-Hazm there are some other opinions about the admissibility of the testimony of woman as Tawoos,[142] Ata[143] and Hammad[144] , Imam Ibn-e-Taimiyya and Imam Ibn-e-Qayyim[145] make admissible the testimony of a woman in *Hudūd* cases. Imam Ja'fir Sadiq[146] also accepts the testimony of woman in *Zina* case. The same viewpoints have been upheld by some of the other modern scholars like Mahmood Ahmad Ghazi,[147] Maulana Umar Usmani,[148]Javed Ahmad Gamidi,[149]and Maulana Muhammad Taseen[150] that the testimony of a woman is admissible and acceptable in *Hudūd* cases.

3. The Arguments

The fundamental argument of classics relied upon the Qur'anic verses where *'Adad, Ma'dud,* and Masculine, Feminine words have been used, related to the testimony and witnesses as follows:-

3.1. *Adad* and *Ma'dud*, Masculine and Feminine words used in Qur'an

1. وَالّٰتِیۡ یَاۡتِیۡنَ الۡفَاحِشَۃَ مِنۡ نِّسَآئِکُمۡ فَاسۡتَشۡہِدُوۡا عَلَیۡہِنَّ اَرۡبَعَۃً مِّنۡکُمۡ ۚ فَاِنۡ شَہِدُوۡا فَاَمۡسِکُوۡہُنَّ فِی الۡبُیُوۡتِ حَتّٰی یَتَوَفّٰىہُنَّ الۡمَوۡتُ اَوۡ یَجۡعَلَ اللّٰہُ لَہُنَّ سَبِیۡلًا

"As for those of your women who are guilty of lewdness, call to witness four of you against them." And if they testify (to the truth of the allegation) then confine them to

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[141] Abu Muhammad Ali bin Ahmad bin Hazm, *Al Muhalla,* vol. 9 (Beirut: Dar Al Afaq Al Jadidah), 399.
[142] Ibid., 397
[143] Ibn-e- Qudama, *Al Mughni,* vol. 10, 155.

[144] Ibid.
[145] Ibn-e-Qayyim, *Al Turuq Al Hukmiyyah*, 170.
[146] Abu Al Qasim Ja;fir bin Al Hassan Al Hula, *Sharae' l Islam,* vol. 4 (Najaf: Al Ishraf, 1969), 136.
[147] Mahmood Ahmad Ghazi, "The Testimony of women in Hudūd and *Qisas* cases" ,*Fikr o Nazar* (,Jan-Mar,1993): 18.
[148] Maulana Umar Ahmad Usmani, *Fiqh-ul-Quran,* vol. 3 (Karachi: Idara Fikr Islami, 1984), 118.
[149] Javed Ahmad Gamidi, *Burhan*" (Lahore: Al- Maurid), 33.
[150] Maulana Muhammad Taseen, "The Testimony of women in the light of Quran and Hadith" *Fikr o Nazar*, (Jul-Sep, 1990): 154.

the houses until death take them or (until) Allah appoint for them a way (through new legislation)."[151],[152]

2. لَوْلَا جَاءُوْ عَلَيْهِ بِاَرْبَعَةِ شُهَدَآءَ ۚ فَاِذْ لَمْ يَاْتُوْا بِالشُّهَدَآءِ فَاُولٰٓئِكَ عِنْدَ اللّٰهِ هُمُ الْكٰذِبُوْنَ

"Why did they not produce four witnesses? Since they produce not witnesses, they verily are liars in the sight of Allah."[153]

3. وَالَّذِيْنَ يَرْمُوْنَ الْمُحْصَنٰتِ ثُمَّ لَمْ يَاْتُوْا بِاَرْبَعَةِ شُهَدَآءَ فَاجْلِدُوْهُمْ ثَمٰنِيْنَ جَلْدَةً وَّلَا تَقْبَلُوْا لَهُمْ شَهَادَةً اَبَدًا ۚ وَاُولٰٓئِكَ هُمُ الْفٰسِقُوْنَ

"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evil-doers."[154]

4. فَاِذَا بَلَغْنَ اَجَلَهُنَّ فَاَمْسِكُوْهُنَّ بِمَعْرُوْفٍ اَوْ فَارِقُوْهُنَّ بِمَعْرُوْفٍ وَّاَشْهِدُوْا ذَوَىْ عَدْلٍ مِّنْكُمْ وَاَقِيْمُوا الشَّهَادَةَ لِلّٰهِ ۚ ذٰلِكُمْ يُوْعَظُ بِهٖ مَنْ كَانَ يُؤْمِنُ بِاللّٰهِ وَالْيَوْمِ الْاٰخِرِ ۙ وَمَنْ يَّتَّقِ اللّٰهَ يَجْعَلْ لَّهٗ مَخْرَجًا

"Then, when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men among you, and keep your testimony upright for Allah. Whoso believeth in Allah and the Last Day is exhorted to act thus. And whosoever keepeth his duty to Allah, Allah will appoint a way out for him."[155]

The first main argument of the classical jurists is on the basis of which the testimony of women has been rendered inadmissible is *'adad, ma'dud* and the masculine words used in the Holy Qur'an about the testimony and witnesses, which have solely been used for the men. Therefore, in the light of these verses not only the four Muslim classical jurists but also considerable majority of other jurists, following the classics have restricted the testimony of women in cases of *Hudūd.*

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[151] Al Nisa:15
[152] English Translation has been used of Pickthal, which is available at http://www.quranexplorer.com/quran/
[153] Al Noor:13
[154] Al Noor:4
[155] Al Talaq:2

In these verses the arguments are based on the words اَرْبَعَةً مِّنكُمْ *arba'atan minkum* (four witnesses among you), بِأَرْبَعَةِ شُهَدَا *arba'ata shuhada* (four witnesses) and ذَوَىْ عَدْلٍ مِّنكُمْ *Dhawai 'adlim minkum* (two just witnesses among you). The Muslim Classical jurists say that the word *arba'ah* is in the feminine gender and according to the established principle of Arabic grammar if the *'Adad* (number) is feminine then the *Ma'dud* must be masculine and if *'Adad* is masculine then *Ma'dud* must be feminine. In these verses the word *arba'ah* is feminine *'Adad* in the first three verses, there the *Ma'dud* (the counted object) must be masculine.

Qiyas (Analogy)

And in the last verse the word ذَوَىْ عَدْلٍ مِّنكُمْ *Dhawai 'adlim minkum* also indicates that the witness must be a male in *Talaq* (Divorce) and *Iddat* (Period)' and jurist make an analogy in *Hudūd* and *Qisas* cases based on *Talaq* and *Iddat* cases that if women can not give testimony in *Talaq* and *Iddat* then how can we accept her testimony in *Hudūd* cases they say that it is a very serious matter more than *Talaq* and *Iddat* that's why the testimony of woman would not be admissible in *Hudūd* cases[156] Consequently, by these words of *'Adad* , *Ma'dud*, they conclude that the women cannot be included to give a testimony in *Hudūd* cases.

3.2 Masculine words used in the *Sunnah*

عن أبي هريرة رضي الله عنه أن سعد بن عبادة رضي الله عنه قال: يا رسول الله - صلى الله عليه وسلم - إن وجدت مع امرأتي رجلاً أمهله حتى آتي بأربعة شهداء؟ فقال رسول الله صلى الله عليه وسلم: "نعم"

"Abu Huraira narrated from Sa'd bin Ibadah that he asked the Holy Prophet (PBUH) , if I find anyone with my wife then I have to come with four witnesses then the Holy Prophet (PBUH) replied: yes."[157]

The Muslim classical jurists argue that in this *Hadith* the Holy Prophet (PBUH) said in the response when the question asked about the testimony of four witnesses to prove the crime of it (*Zina*). The answer with the word *Na'am* (yes) and word *Arb'ata Shuhada* (four witnesses) has been prescribed which indicates that the

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[156]Muhammad Mutawalli Al-Sha'ravi,*Almarah fi al Qur'an al karim,* (Muassasah Akhbar Alyaum), 75.

[157]Abu Al-Hussain Muslim Bin Hajjaj, *Sahih Muslim*, Kitab Al-Le'an, (Riyadh: Dar Al-Ssalam, 1998), Hadith No. 3762.

witnesses must be male in *Hudūd* cases and if the testimony of women is accepted then the Holy Prophet (PBUH) must have guided in reply. But he did not; it means that the testimony of women is not admissible in *Hudūd* cases.

3.3 Discussion of Masculine and Feminine and *'Adad* and *Ma'dud*

Some of the later jurists have justified the condition of male evidence in the light of masculine words used in the text of the Holy Qur'an. Although, the great Imam of Fiqh and an expert in the study of Arabic; Imam Shafi'i in Kitab-ul-Umm has expressed it as his own juristic opinion and has not taken it as justification by the Qur'an. On the other hand, some of the Shafi'i jurists like Abu Ishaq Shirazi has laid the opinion on the same justification. Apparently, this justification keeps weight and many late jurists have made it the basis for their argument. Some of the jurists have gone so far that they regarded it as an absolute text. On the other hand, if this issue is looked into pragmatically then this argument/justification is neither an absolute text nor is it so strong that the matter in issue is resolved on its basis. This argument, more or less may amount to an acknowledgment for a juristic opinion.[158]

The general expression of the text of the Holy Qur'an is such that it uses masculine words and connotations for both men and women unless women are specifically excluded from the text. This expression not only signifies the Qur'an and the *Sunnah* but a general expression of the Arabic language which cannot be denied. Where the Qur'an has used both masculine and feminine words simultaneously it does not mean that the women were not to be addressed by masculine words but the specific use of feminine words addressed to women is to signify the importance of women on the whole.[159] For example:

إِنَّ الْمُسْلِمِينَ وَالْمُسْلِمَاتِ وَالْمُؤْمِنِينَ وَالْمُؤْمِنَاتِ وَالْقَانِتِينَ وَالْقَانِتَاتِ وَالصَّادِقِينَ وَالصَّادِقَاتِ وَالصَّابِرِينَ وَالصَّابِرَاتِ وَالْخَاشِعِينَ وَالْخَاشِعَاتِ وَالْمُتَصَدِّقِينَ وَالْمُتَصَدِّقَاتِ وَالصَّائِمِينَ وَالصَّائِمَاتِ وَالْحَافِظِينَ فُرُوجَهُمْ وَالْحَافِظَاتِ وَالذَّاكِرِينَ اللَّهَ كَثِيرًا وَالذَّاكِرَاتِ ۙ أَعَدَّ اللَّهُ لَهُمْ مَغْفِرَةً وَأَجْرًا عَظِيمًا

[158]Mahmood Ahmad Ghazi, "Hudud aur Qisas key Muqaddemat min 'aurtun ki gawahi" *Fikr o Nazar* (Jan-Mar,1993), 14-15.
[159]Ibid., 15

"Verily, the Muslims (those who submit to Allah in Islam) men and women, the believers men and women (who believe in Islamic Monotheism), the men and the women who are obedient (to Allah), the men and women who are truthful (in their speech and deeds), the men and the women who are patient (in performing all the duties which Allah has ordered and in abstaining from all that Allah has forbidden), the men and the women who are humble (before their Lord Allah), the men and the women who give *Sadaqât* i.e. *Zakat*, and alms, the men and the women who observe *Saum* (fast) (the obligatory fasting during the month of *Ramadân,* and the optional *Nawâfil* fasting), the men and the women who guard their chastity (from illegal sexual acts) and the men and the women who remember Allah much with their hearts and tongues. Allah has prepared for them forgiveness and a great reward i.e. Paradise."[160]

But wherever the Holy Qur'an has used only masculine words they automatically and undoubtedly include address to the women as well. For example, in these verses, only masculine words have been used but it categorically includes address to the women as well:

i.

وَاٰتُوا الْيَتٰمٰٓى اَمْوَالَهُمْ ۖ وَلَا تَتَبَدَّلُوا الْخَبِيْثَ بِالطَّيِّبِ ۖ وَلَا تَاْكُلُوْٓا اَمْوَالَهُمْ اِلٰٓى اَمْوَالِكُمْ ۭ اِنَّهٗ كَانَ حُوْبًا كَبِيْرًا

"And give unto orphans their property and do not exchange (your) bad things for (their) good ones; and devour not their substance (by adding it) to your substance. Surely, this is a great sin."[161]

ii. اِنَّ الَّذِيْنَ يَاْكُلُوْنَ اَمْوَالَ الْيَتٰمٰى ظُلْمًا اِنَّمَا يَاْكُلُوْنَ فِيْ بُطُوْنِهِمْ نَارًا ۭ وَسَيَصْلَوْنَ سَعِيْرًا

"Verily, those who unjustly eat up the property of orphans, they eat up only a fire into their bellies, and they will be burnt in the blazing Fire!"[162]

iii. وَاعْبُدُوا اللّٰهَ وَلَا تُشْرِكُوْا بِهٖ شَيْـــًٔا ۡ وَّبِالْوَالِدَيْنِ اِحْسَانًا وَّبِذِي الْقُرْبٰى وَالْيَتٰمٰى وَ الْمَسٰكِيْنِ وَالْجَارِ ذِي الْقُرْبٰى وَالْجَارِ الْجُنُبِ وَالصَّاحِبِ بِالْجَنْۢبِ وَابْنِ السَّبِيْلِ ۙ وَمَا مَلَكَتْ اَيْمَانُكُمْ ۭ اِنَّ اللّٰهَ لَا يُحِبُّ مَنْ كَانَ مُخْتَالًا فَخُوْرَۨا

[160]Al Ahzab :35
[161]Al Nisa: 2
[162]Ibid., 10

"Worship Allâh and join none with Him (in worship), and do good to parents, kinsfolk, orphans, *Al-Masâkin* (the poor), the neighbour who is near of kin, the neighbour who is a stranger, the companion by your side, the wayfarer (you meet), and those (slaves) whom your right hands possess. Verily, Allâh does not like such as are proud and boastful;"[163]

iv. "الَّذِينَ يَبْخَلُونَ وَيَأْمُرُونَ النَّاسَ بِالْبُخْلِ وَيَكْتُمُونَ مَا آتَاهُمُ اللَّهُ مِن فَضْلِهِ وَأَعْتَدْنَا لِلْكَافِرِينَ عَذَابًا مُّهِينًا

"Those who are miserly and enjoin miserliness on other men and hide what Allah has bestowed upon them of His Bounties. And we have prepared for the disbelievers a disgraceful torment"[164]

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنتُمْ سُكَارَىٰ حَتَّىٰ تَعْلَمُوا مَا تَقُولُونَ وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّىٰ تَغْتَسِلُوا ۚ وَإِن كُنتُم مَّرْضَىٰ أَوْ عَلَىٰ سَفَرٍ أَوْ جَاءَ أَحَدٌ مِّنكُم مِّنَ الْغَائِطِ أَوْ لَامَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ ۗ إِنَّ اللَّهَ كَانَ عَفُوًّا غَفُورًا

"O you who believe! Approach not *As-Salât* (the prayer) when you are in a drunken state until you know (the meaning) of what you utter, nor when you are in a state of *Janâba,* (i.e. in a state of sexual impurity and have not yet taken a bath) except when travelling on the road (without enough water, or just passing through a mosque), till you wash your whole body. And if you are ill, or on a journey, or one of you comes after answering the call of nature, or you have been in contact with women (by sexual relations) and you find no water, perform *Tayammum* with clean earth and rub therewith your faces and hands (*Tayammum*). Truly, Allâh is Ever Oft-Pardoning, Oft-Forgiving."[165]

These are some verses of *Surah Al Nisa* where plural masculine words have clearly been used and these include women as well; now we see briefly all these verses one by one:

In the first verse Allah has said that give unto orphans their property and do not exchange (your) bad things for (their) good ones, is it possible that if a woman

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[163]Ibid., 36
[164]Ibid., 37
[165]Al Nisa: 43

having the property of orphan in her custody, she is allowed not to give his property or she is allowed to exchange her bad thing with orphan's good thing, no, this is not so.

In the second verse Allah says that those who unjustly eat up the property of orphans, they eat up only a fire into their bellies, and they will be burnt in the blazing Fire! Can we say that this verse is only about men and women can eat orphan's property, no not at all?

In the third verse Allah says that Worship Allah and join none with Him (in worship) and do good to parents, is it possible that any jurist can say that women can associate anyone with Allah Almighty or worship any thing else, no never, and the second thing in this verse is do good with parents. Is this command only to men and not to women, no one agrees with this.

In the fourth verse Allah says that those who are miserly and enjoin miserliness on other men and hide what Allah has bestowed upon them of His Bounties. And we have prepared for the disbelievers a disgraceful torment; can we say that it is about men only?

In the fifth verse Allah says that O' you who believe! Approach not the prayer when you are in a drunken state, who can say that command was only about men at that time, obviously not but it includes men as well as women.

The word شُهَدَاءَ *"Shuhada"* (Witnesses)

There are some verses in the Holy Qur'an in which the word شُهَدَاءَ *"Shuhada"* (Witnesses) has been used which includes men and women without any discrimination. A well known scholar Mahmood Ahmad Ghazi says that the study of the text of the Qur'an and the *Sunnah* of the Holy Prophet (PBUH) shows that so far as the competency and admissibility of witness is concerned, it is available both to men and women. The word شُهَدَاءَ *"Shuhada"* (witnesses) has been used in the Qur'an many times which is absolutely comparative to men and women."[166]

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[166]Mahmood Ahmad Ghazi "The Testimony of Women in Hudūd and *Qisas* cases" *Fikr o Nazar*,(Jan-Mar,1993): 6.

For example, the word شُهَدَآءَ *"Shuhada"* (witnesses) includes both men and women in the following verses:

- وَ لَا يَأبَ الشُّهَدَآءُ إِذَا مَا دُعُوا

"The witness should not refuse when they are called on (for evidence)"[167]

- يٰۤاَيُّهَا الَّذِيۡنَ اٰمَنُوۡا كُوۡنُوۡا قَوّٰمِيۡنَ لِلّٰهِ شُهَدَآءَ بِالۡقِسۡطِ وَلَا يَجۡرِمَنَّكُمۡ شَنَاٰنُ قَوۡمٍ عَلٰۤى اَلَّا تَعۡدِلُوۡا اِعۡدِلُوۡا هُوَ اَقۡرَبُ لِلتَّقۡوٰى وَاتَّقُوا اللّٰهَ اِنَّ اللّٰهَ خَبِيۡرٌۢ بِمَا تَعۡمَلُوۡنَ

"O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety: and fear Allah for Allah is well-acquainted with all that ye do."[168]

- يٰۤاَيُّهَا الَّذِيۡنَ اٰمَنُوۡا كُوۡنُوۡا قَوّٰمِيۡنَ بِالۡقِسۡطِ شُهَدَآءَ لِلّٰهِ وَلَوۡ عَلٰۤى اَنۡفُسِكُمۡ اَوِ الۡوَالِدَيۡنِ وَالۡاَقۡرَبِيۡنَ

"O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin"[169]

- فَاِنۡ لَّمۡ يَكُوۡنَا رَجُلَيۡنِ فَرَجُلٌ وَّامۡرَاَتٰنِ مِمَّنۡ تَرۡضَوۡنَ مِنَ الشُّهَدَآءِ

"And if there are not two men (available), then a man and two women, such as you agree for witnesses"[170]

These are those verses in which the word "*Shuhada"* (witnesses) came clearly and absolutely having the meaning of men and women. I do not think that any *Mufissir* (Interpreter) do not agree with it.

General terms like *"Al Nas", "Bani Israel", "Bani Adam"*

Beside this there are general terms like *"Al Nas"* (people) includes men and women and term *"Bani Israel"* (Sons of Israel) has been used in the Qur'an for forty times which categorically includes *"Banat-e-Israel"* (Daughters of Israel) and term *"Bani Adam"* (Sons of Adam) many times which also includes *"Banat-e-Adam"* (Daughters of Adam) as well.

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[167]Al Baqra: 282
[168]Al Maida: 8
[169]Al Nisa: 135
[170]Al Bara: 282

All the above instances categorically and explicitly show that Qur'an has used masculine words mainly for addressing the Muslim *Ummah* or the believers which comprises the Muslim women as well. Addressee of the Qur'an in this case is the whole Muslim *Ummah* including men and women, only where men or women have been specifically addressed.

The masculine plural pronoun like هُم *"Hum"* and كُمْ *"Kum"*

Similarly, the masculine plural pronoun like *"Hum"* and *"Kum"* have been used but they include both men and women. There are some instances where these words have been used to address the women only. For example:

1. إِنَّمَا يُرِيدُ اللَّهُ لِيُذْهِبَ عَنكُمُ الرِّجْسَ أَهْلَ الْبَيْتِ وَيُطَهِّرَكُمْ تَطْهِيرًا

"Allah wishes only to remove *Al Rijs* (evil deeds and sins) from you, O members of the family (of the Prophet (PBUH), and to purify you with a thorough purification"[171]

Here, all the Sunni interpreters are in consensus to regard it as *Azwaj-e-Mutaharaat* (Mothers of the Muslims). The *Shi'i* Muslims term it as *Ahl-e-Bait* which includes both men and women.

2. ذَٰلِكُمْ أَزْكَىٰ لَكُمْ وَأَطْهَرُ

"That is more virtuous and purer for you"[172]

Here, both these words have been used for husbands and wives.[173]

There are some other examples from the Holy Qur'an that the masculine plural words include women also, if we do not agree with this then women will be free probably from basic obligations of Islam, which have been mentioned in the Holy Qur'an . For example:

- **Prayer (*Salat*)**

وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ وَارْكَعُوا مَعَ الرَّاكِعِينَ

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[171]Al Ahzab: 33
[172]Al Baqra: 232
[173]Mahmood Ahmad Gazi,"The testimony of women in Hudūd and *Qisas* cases" *Fikr o Nazar*, (Jan-Mar,1993): 17.

Establish worship, pay the poor-due, and bow your heads with those who bow (in worship). [174]

- **Fasting (*saum*)**

يَـٰٓأَيُّهَا الَّذِينَ اٰمَنُوا كُتِبَ عَلَيْكُمُ الصِّيَامُ كَمَا كُتِبَ عَلَى الَّذِينَ مِن قَبْلِكُمْ لَعَلَّكُمْ تَتَّقُونَ

O ye who believe! Fasting is prescribed for you, even as it was prescribed for those before you that ye may ward off (evil); [175]

- **Pilgrimage (*Hajj*)**

وَاَتِمُّوا الْحَجَّ وَالْعُمْرَةَ لِلّٰهِ

Perform the pilgrimage and the visit (to Mecca) for Allah.[176]

- **The Obligatory Charity Tax (*Zakat*)**

وَاَقِيمُوا الصَّلٰوةَ وَاٰتُوا الزَّكٰوةَ وَارْكَعُوا مَعَ الرّٰكِعِينَ

Establish worship, pay the poor-due, and bow your heads with those who bow (in worship). [177]

Now we can easily understand that plural masculine words used in the text of the Holy Qur'an are for men and women.

All the above instances categorically and explicitly show that Qur'an has used masculine words mainly for addressing the Muslim *Ummah* or the believers which comprises the Muslim women as well. Addressee of the Qur'an in this case is the whole Muslim *Ummah* including men and women, only where men or women have been specifically addressed.

Masculine Plural Words used in *Sunnah*

The same expression of the Qur'an has also been followed in the text of the *Sunnah* which mainly entails the expression of masculinity. This does not mean that only men are the subjects of address of the *Sunnah* but it also includes the women. Some examples to this effect are given below:

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[174] Al Baqra: 43
[175] Al Baqra: 183
[176] Al Baqra: 196
[177] Al Baqra: 43

Masculine Plural Words used in *Sunnah* Including Men as well as Women

a) "لا يغتسل أحدكم في الماء الدائم وهو جنب".

"None of you should not take bath in stagnant water he is sexually impure".[178]

b) "لا تشربوا في آنية الذهب والفضة ولا تأكلوا في صحافها، فإنها لهم في الدنيا ولكم في الآخرة".

"Don not drink in silver or gold utensils, and do not eat in plates of such metals, for such things are for them (the disbelievers) in this worldly life and for you in the Hereafter".[179]

c) "لو لا أن أشق على أمتي لأمرتهم بالسواك مع كل وضوء".

"Had I not feared burdening my *Ummah* (followers), I would have commanded them to use *Siwak* (stick toothbrush) before every *Salat* (prayer)".[180]

d) "إذا استيقظ أحدكم من نومه فلا يغمس يده في الإناء حتى يغسلها ثلاثا، فإنه لا يدري أين باتت يده"

"When one of you wakes up from his sleep, he must not put his had in a utensil till he has washed it three times, for he does not know where his hand was (while he slept)".[181]

e) "إذا توضأتم فابدءوا بميامنكم".

"When you perform ablution, begin with your right limbs".[182]

f) "ما منكم من أحد يتوضأ فيسبغ الوضوء، ثم يقول: أشهد أن لا إله إلا الله، وحده لا شريك له، وأشهد أن محمدا عبده ورسوله، إلا فتحت له أبواب الجنة".

"If one after performing ablution completely recites the following supplication: (*ash-hadu an la laha ill-Allahu wahdahu la sharika lahu, wa ash-hadu anna Muhammadan 'abduhu wa Rasuluhu*) 'I testify that there is no one worthy of worship but Allah, He is Alone and has no partner and Muhammad is His slave and

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[178] Abu Al-Fazl Ahmad bin Ali bin Hajar Al-Asqalani, "*Buloogh Al-Maram Min Adilla-til-Ahkam*", Kitab Al-Taharah, (Riyadh: Dar As-Salam Publications), 14.
[179] Ibid., 18
[180] Ibid., 22
[181] Ibid., 25
[182] Ibid., 27

Messenger,' all the eight gates of Paradise will be opened fro him and he may enter through any gate he wishes".[183]

g) "أعطوا الأجير أجره، قبل أن يجف عرقه".

"Give the hireling his wage before his sweat dries".[184]

h) "لا تحلفوا بآبائكم، ولا بأمهاتكم، ولا بالأنداد ولا تحلفوا بالله إلا وأنتم صادقون".

"Do not swear by your fathers, by your mothers, or by rivals to Allah; and swear not by Allah except when you are speaking the truth".[185]

i) لا تحاسدوا، ولا تناجشوا، ولا تبغضوا، ولا يبع بعضكم على بيع بعض، وكونوا عباد الله إخواناً، المسلم أخو المسلم، لا يظلمه ولا يخذله، ولا يحقره، التقوى ههنا".

"Do not feel envy against one another, do not outbid one another (with a view to raising the price), do not bear aversion against one another, do not bear enmity against one another, one of you should not enter into a transaction when the other has already entered into it; and be fellow brothers and slaves of Allah. A Muslim is a Muslim's brother. He does not wrong, desert, or despise him. Piety is found here – (pointing three times to his chest) – despising his Muslim brother is enough evil for any man to do. Every Muslim's blood, property and honour are unlawful to be violated by another Muslim".[186]

Expression of Arabic Literature

In spite of the expression used in the Qur'an and the *Sunnah*; the same expression is also a general lingual expression of the Arabic language. The masculine words used in the language connote both men and women or only women are addressed. Some examples are as follows:

زهير بن أبي سلمى قال:

فلا تكتمن الله ما في صدوركم
ليخفى ومهما يكتم الله يعلم
يؤخر فيوضع في كتاب فيدّخر

[183] Ibid., 30
[184] Ibid., 322
[185] Ibid., 483
[186] Ibid., 526

ليوم حساب أو يعجّل نينقم[187]

قال عمرو بن كلثوم:

وقد علم القبائل من معد
إذا تبب بأبطحها بنينا
بأنا المطعمون إذا قدرنا
وأنا الناز لون بحيث شينا
وأنا التاركون إذا سخطنا
وأنا الآخذون إذا رضينا[188]

وقال أيضاً:

إذا بلغ الفطام لناصبي
تخر له الجبابر ساجدينا[189]

حطية قال:

وإن كانت النعماء فيهم جزوا بها
وإن أنعموا لا كدّروها ولا كدّوا
مطاعين في الهيجا مكاشيف للدّجى
بنى لهم آباؤهم وبنى الجدّ
ويعذلني أبناء سعد عليهم
وما قلت إلا بالذي علمت سعد[190]

قال أخطل:

خلوا المكارم لستم من أهلها
وخذوا مساحيكم بنى النجار
ذهبت قريش بالمفاخر كلها
واللؤم تحت عمائم الأنصار[191]

وقال أيضاً:

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[187]Ahmad Hassan Ziat, *History of Arabic Literature,* (Lahore: Shaikh Ghulam Ali & Sons Publisher), 113.

[188]Ibid., 133

[189]Ibid.

[190]Ibid., 251

[191]Ibid., 260

والناس همهم الحياة ولا أرى
طول الحياة يزيد غير خبال
وإذا افتقرت إلى الذخائر لم تجد
ذخراً يكون كصالح الأعمال[192]

امرؤ القيس قال:

جزى الله قومي بالكلاب ملامة
صريحهم والآخرين المواليا
ولو شئت نجّتني من الخيل نهدة
ترى خلفها حُوّ الجياد تواليا
ولكنني احمى ذمار أبيكم
وكان الرماح يختطفن المحاميا[193]

وقال أيضاً:

كل امرئ راجع يوماً شيمته
وإن تخلق إخلاقاً إلى حين
إني ابيّ ابيّ ذو محافظة
وابن ابيّ ابيّ من ابيّين
وأنتم معشر زيد على مائة
فاجمعوا أمركم كلاً فكيدوني
فإن علمتم سبيل الرشد فانطلقوا
وإن جهلتم سبيل الرشد فأتوني[194]

حسان بن ثابت رضي الله عنه قال:

تعلمتم من منطق الشيخ يعرب
أبينا فصرتم معربين ذوي نفر
وكنتم قديماً ما لكم غير عجمة
كلام وكنتم كالبهائم في القفر[195]

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[192]Ibid.

[193]Ibid., 90

[194]Ibid., 93

[195]Ibid., 53

Not only this but When we see other words used in the Qur'an and the *Sunnah* like *Salasa, Arb'ah, Khamsa, Samaniah, Ashara* etc. We come to know that these words have been used and connote both men and women despite being masculine words. The argument of Muslim Classical Jurists which they have given about *'Adad* and *Ma'dud* seems to be based on strong grounds, since it is in accordance with the rules of Arabic grammar. However, a closer look reveals how baseless this actually is. Anyone who has some knowledge of Arabic language knows that this rule not only states that from three to ten if the *Ma'dud* (the counted object) is masculine the *'Adad* (the numeral) is feminine but also says that if the *Ma'dud* (the counted object) is a noun that is used both for masculine and feminine entities, then also its *'Adad* (the numeral) shall necessarily be feminine. Some examples are below:

- فَكَفَّارَتُهٗۤ اِطۡعَامُ عَشَرَةِ مَسٰكِيۡنَ مِنۡ اَوۡسَطِ مَا تُطۡعِمُوۡنَ اَهۡلِيۡكُمۡ اَوۡ كِسۡوَتُهُمۡ اَوۡ تَحۡرِيۡرُ رَقَبَةٍ

"For its expiation feed ten *Masâkîn* (poor persons), on a scale of the average of that with which you feed your own families, or clothe them or manumit a slave."[196]

- ثَمٰنِيَةَ اَزۡوَاجٍ ؕ مِنَ الضَّاۡنِ اثۡنَيۡنِ وَمِنَ الۡمَعۡزِ اثۡنَيۡنِ

"Eight pairs; of the sheep two (male and female) and of the goats two (male and female)."[197]

- مَا يَكُوۡنُ مِنۡ نَّجۡوٰى ثَلٰثَةٍ اِلَّا هُوَ رَابِعُهُمۡ وَلَا خَمۡسَةٍ اِلَّا هُوَ سَادِسُهُمۡ

"There is no *Najwa* (secret counsel) of three, but He is their fourth (with His Knowledge, while He Himself is over the Throne, over the seventh heaven), nor of five but He is their sixth (with His Knowledge)"[198]

- وَطَعَامُ الِاثْنَيْنِ يَكْفِي الْأَرْبَعَةَ

"The food of two suffices for four"[199]

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[196]Al Maida: 89
[197]Al An'am:143
[198]Al Mujadela:7

- لا يَتَنَاجَى اثْنَانِ دُونَ ثَالِثٍ

"If there are three people [present] two [of them] should not whisper"[200]

- رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ

"Three people cannot be held liable: [one among them is] a person who is sleeping until he awakens."[201]

All these words like *Salasa, Arb'ah, Khamsa, samaniah, Ashara* etc. used in these examples of the Holy Qur'an and the *Sunnah* include men and women as well. The first verse is very significant where *Ashra, Masakeen,* and *Kiswatohum* are all masculine words and according to arguments of the Muslim classical jurists it is necessary to feed only the male poor people. But none of them has made the "male" mandatory and some of them opine that poor women may also be fed and clothed. About the second verse Javed Ahmad Ghamdi says: "Any one who has some knowledge of Arabic knows that this rule not only states that from three to ten if the *Ma'dud* (the counted object) is masculine the *'Adad* (the numeral) is feminine but also says that if the *Ma'dud* (the counted object) is a noun that is used both for masculine and feminine entities, then also its *'Adad* (the numeral) shall necessarily be feminine. Consequently, in the following verses the *'Adad* (the numeral) of *azwaj* (pairs), which is the counted object is (*thamaniyah*) which is in the feminine gender.[202]

Singular Masculine Words used in the *Sunnah*

There are some *Ahadith* in which singular masculine words have been used and include man as well as woman. Some examples are below:

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[199]Abu Muhammad Abdullah bin Abd-ur-Rahman Al-Darmi, *Sunan Al-Darmi*, Kitabul At'mah, Bab T'amulwahid yakfi Alithnain, vol.1 (Lahore: Shabbir Brothers),Hadith No.2081.

[200]Abu Al-Hussain Muslim Bin Hajjaj, *Sahih Muslim*, Kitab Al-Ssalam, Bab Manajat alithnain don althalth beghaire radhah, (Riyadh: Dar Al-Ssalam, 1998), ,Hadith No.5696.

[201]Abu Daud Sulaiman bin Ash'ath, *Sunan Abu Da'ud*,, Kitab Al Salah, (Riyadh: Dar Al-Ssalam, 1999), Hadith No.4398

[202]Javed Ahmad Gamdi, *Burhan*, (Lahore: Al-Maurid), 31.

i)"لا يحل لمسلم أن يهجر أخاه فوق ثلاث ليال. يلتقيان فيعرض هذا ويعرض هذا، وخيرهما الذي يبدأ بالسلام".

"It is not permissible for a Muslim to avoid his brother for more than three nights. When they meet, this one turns away (from this one) and that one turns away (from the other), and the best of them is the one who greets first the other one."[203]

ii) "لا يحل لامرئ أن يأخذ عصا أخيه بغير طيب نفس منه".

"It is not lawful for a person to take his brother's stick except with his good will".[204]

iii) "لا تحقرن من المعروف شيئاً، ولو أن تلقى أخاك بوجه طلق".

"Do not consider any act of goodness insignificant, even if it is meeting your brother with a cheerful face".[205]

iv) "إذا طبخت مرقة فأكثر ماءها، وتعاهد جيرانك".

"When you make some soup, add to it a lot of water and be mindful of your neighbours".[206]

v) "من نفس عن مسلم كربة من كرب الدنيا نفس الله عنه كربة من كرب يوم القيامة، ومن يسّر على معسر يسّر الله عليه في الدنيا والآخرة. ومن ستر مسلماً ستره الله في الدنيا والآخرة، والله في عون العبد ما كان العبد في عون أخيه".

"If anyone removes one of the anxieties of this world from a believer, Allah will remove one of the anxieties of the Day of Resurrection from him; if one smoothes the way for one who is destitute, Allah will smooth the way for him in this world and in the next; and if anyone conceals the faults of a Muslim, Allah will conceal his faults in this world and in the next. Allah helps His salve as long as he helps his brother"[207]

vi) "من دلّ على خير فله مثل أجر فاعله".

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[203]Abu Al-Fazl Ahmad bin Ali bin Hajar Al-Asqalani, "*Buloogh Al-Maram Min Adilla-til-Ahkam*", Kitab Al-Taharah, (Riyadh: Dar As-Salam Publications), 516.
[204]Ibid., 307
[205]Ibid., 516
[206]Ibid.

[207]Ibid., 517

"He who guides to something good will have a reward similar to that of its doer (in the next)".[208]

vii) "من ضار مسلماً ضاره الله، ومن شاق مسلماً شاق الله عليه".

"He who causes harm to a Muslim will be harmed by Allah, and he who acts in a hostile manner against a Muslim, will be treated in a hostile manner by Allah".[209]

viii) "لا تمار أخاك، ولا تمازحه، ولا تعده موعداً فتخلفه".

"Don't dispute with your brother; don't make jokes with him; don't him don't make him a promise which you would break".[210]

The word رجل *"Rajul"* (Man) used in *Sunnah* including man and woman

Not only this but the clear word *"Rajul"* (man) has been used in the *Sunnah* which usually mean *"man"* also includes the women also. Some examples are:

- "إذا ابتاع رجلان فكل واحد منهما بالخيار ما لم يتفرقا وكانا جميعاً، أو يخير أحدهما الآخر، فإن خيّر أحدهما الآخر فتبايعا على ذلك فقد وجب البيع، وإن تفرقا بعد أن تبايعا ولم يترك واحد منهما البيع فقد وجب البيع".

"Both parties in a business transaction have a right to annul the bargain, so long as they have not separated and are together; or one of them tells the other to exercise his right and he does it, then they make the bargain according to that, the transaction becomes then binding; or when they separate after having made the bargain and none of them has annulled it, the bargain becomes then".[211]

- "ولا يبيع الرجل على بيع أخيه ولا يخطب على خطبة أخيه".

"A man to buy in opposition to his brother,"[212]

"من أدرك ماله بعينه عند رجل قد أفلس فهو أحق به من غيره

"If a creditor finds his very property with a debtor who becomes bankrupt, he is more entitled to it than anyone else".[213]

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[208]Ibid.
[209]Ibid., 527
[210]Ibid.
[211]Ibid., 289
[212]Ibid., 283
[213]Ibid., 301-302

"إن المسألة لا تحل إلا لأحد ثلاثة: رجل تحمل حمالة، فحلت له المسألة، حتى يصيب قواماً، ثم يمسك، ورجل أصابته جائحة اجتاحت ماله، فحلت له المسألة، حتى يصيب قواماً من عيش، ورجل أصابته فاقة، حتى يقول ثلاثة من ذوي الحجى من قومه: لقد أصابت فلاناً فاقة، فحلت له المسألة".

"Begging is allowable only to one of three (people); a man who has become a guarantor for a payment, to whom begging is allowed till he gets it, after which he must stop begging; a man whose property has been destroyed by a calamity which has smitten him, to whom begging is allowed till he gets what will support life; and a man who has been smitten by poverty, the genuineness for which is confirmed of his people".[214]

"قال الله عزوجل: ثلاثة أنا خصمهم يوم القيامة، رجل أعطى بي ثم غدر، ورجل باع حراً فأكل ثمنهن ورجل استأجر أجيراً فاستوفى منه ولم يعطه أجره".

"Allah Who is Great and Glorious have said, 'There are three whose adversary I shall be on the Day of Resurrection: A man who gave a promise in My Name and then betrayed; a man who sold a free man and consumed his price; and a man who hired a servant and, after receiving full service from him, did not give him his wages".[215]

- "لا يحل لرجل مسلم أن يعطي العطية ثم يرجع فيها، إلا الوالد فيما يعطي ولده".

"It is lawful for a man (Muslim) to give a gift and then take it back, except a father regarding what he gives his child".[216]

In the above the first argument of the Muslim Classical jurists regarding the testimony of women in *Hudūd* cases is discussed. The Holy Qur'an addresses the human beings in general and uses the masculine pronoun which includes its address to both men and women. Therefore, the argument that since the Qur'an used masculine expression for the testimony of the offence of *Zina* and other *Hudūd* cases is not sound. If we accept this argument then it may cause a huge number of injunctions contained in the Qur'an and the *Sunnah* inapplicable upon the women. As is seen above that there are several verses of the Qur'an and traditions of the

[214]Ibid., 305-306
[215]Ibid.,.321-322
[216]Ibid., 328

Prophet (PBUH) which use only the masculine expressions and it is understood as both male and female are covered. We can easily say that this is a juristic opinion of Muslim classical jurists as Imam shaf'i said and there is nothing from the Holy Qur'an or the Sunnah which assist their opinion so this is a juristic opinion and can be differed. This is also worth mentioning that Imam Shaukani has not admitted the arguments made based on masculine-words.

3.4 Doubt of substitute in women's testimony

The second argument of jurists is that the *Ayat e Mudayena* (indebtedness verse) leads to the fact of admissibility of male's witness originally and has allowed the testimony of one man and two women only in cases of unavailability of men's testimony. This clearly shows that the original testimony lies in men and women's testimony is admissible as a substitute. If one man and two women are substitute then it means there is a doubt in the testimony of women and in doubt *Hudūd* punishments are not enforced but refrained and withdrawn. Imam Kasani says that the testimony of women is substitute of men's testimony and substitution is not permissible in *Hudūd* like *kafala* (taking care) and *wakala* (agency).[217] Ibn e Nujaim says that the testimony of women in *Amwal* (transactions) is accepted as a substitute because the testimony of women is inadmissible in *Hudūd* cases.[218]

The other reason of doubt in the testimony of women is that women intrinsically make mistakes. The jurists consider this phenomenon as the one based on natural incompetence of women. Women's natural tendency to be forgetful and fall into error and their physical disabilities, they argued: *"if one of them should make a mistake, the other could remind her."* [219] Thus the argument follows that *Hudūd* and *Qisas* cannot be imposed in case of any doubt as the saying of Prophet (PBUH) is:

إدرَؤا الحُدُوْدَ بالشُبْهَاتْ

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[217]Abu Baker bin Mas'ood Al-Kasani, *Badae' al sanae'*, vol.6, (Beirut: Dar Al-Fikr, 1996), 424
[218]Sheikh Zain un Din bin Nujaim, *Al Bahr al Raieq Sharh Kanz Al Dakaeq,* vol.7 (Quetta Al Maktaba Al Majidia), 60.
[219]Al Baqra:282

reason given in the Holy Qur'an for equating one man with two women in the matter of giving testimony in business matters is that women in those days did not take part in business and did not understand commercial transactions and financial dealings; therefore they were accepted witnesses in these matters one man equal to two women. This was because of their knowledge in these things was second hand they were more prone to forget, hence two women were made to witness in place of one man, so that if one forgets the other could remind her. This was only because in those days women were not having knowledge of financial transactions as men have, here in this verse only priority given to men and nothing has been said the women's testimony is accepted as a substitute. This is a fact every one is not an expert in all fields and priority has been given to the specialists. The verse does not say it in a disparaging tone, nor does it say that forgetfulness is in the nature of woman. The same nature has men too and this rule pertains to only business transactions, and not to all problems of life, as the Muslim classical jurists have made it to pertain. Now the woman of today is not the woman of old days. Today she competes with man successfully in every walk of life. In the developed and developing countries, millions of talented and highly educated women are working as teachers, professors, journalists, doctors, engineers, business executives and administrators. Many of them are also working as ministers and prime ministers in the great democracies of the world. Women have shown that intellectually, morally and in all other respects they are equal to men. Therefore, neither the theory of natural forgetfulness applies with women only; men have the same nature. Now we have to see what the interpreters and scholars say about this verse:

Muhammad Abduhu, a noted commentator, observes that the stipulation of two women may be substituted for one male witness does not imply any reflection on the woman's moral or intellectual capabilities, it is obviously due to the fact that, as a rule, women are less familiar with business procedures than men and, therefore, more liable to commit mistakes in this respect.[224]

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[224]Sheikh Muhammad Abduhu, *Tafseer Al Qur'an Al Hakeem known as Tafseer Al-Manar,* Vol.3 (Egypt: Darul al-Manar, 1367 A.D), 124.

Imam Ibn-e-Qayyim says that this verse tells us that the testimony of one man and two women is equal to the testimony of two men. Their testimony would only be accepted in the presence of two men, otherwise not. He says that the verse of the Holy Qur'an does not argue that the testimony of one man and two women is the substitute of the testimony of two men but he says that this command has been ordained for the protection of the rights of the rightful. The commands of Allah lead to the straight path, but if things do not go on straight path then some other way or substitute should be adopted. So the testimony of one man is stronger than the testimony of two women. Because, women feel shy and confused in the courts of law and their memory is also weak as compared to that of men. Allah did not ordain that you should decide on the testimony of two male witnesses, and if they are not available then one man and two women. Priority has been attached to the testimony of men over women because of their understanding of the issue. The circumstances in which this verse of the Holy Qur'an was revealed gave predominant position and status to men over women in such legal and social issues and women were not so aware of such issues and their understanding to such issues remained weak.[225] He further says that we do not accept that testimony of two women is a weak one when they are agreed to it. On the basis of which, we judge the matter of men on the testimony of women even if the testimony of two men is available. So the testimony of one man and two women is original and not the substitute. A reliable and trustworthy woman is considered like a man in truthfulness, integrity and trust. As a woman is more vulnerable to mistake and forgetfulness therefore, she is accompanied by another woman to support her. The support of other woman makes her stronger or, at least, brings her equal to a man. There is no doubt that whatever can be perceived from the testimony of a man is lesser in credibility than what is perceived from the testimony of two women or other women like them. [226]

Imam Al-Marghinani states that the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men can't be had; and therefore it is not admitted in any matter liable to drop from

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[225]Ibn-e-Qayyim, *Al Turq Al Hukmiyyah*, 171.
[226]Ibid., 171

the existence of a doubt.[227] He further states that the reasoning of our doctors is that the evidence of women is originally valid, because evidence is founded upon three circumstances, namely, sight, memory, and a capability of communication; for by means of the first the witness acquires knowledge; by means of the second he retains such knowledge; and by means of the third he is enabled to impart to the *Qadi*; and all these three circumstances exist in a woman (whence it is that her communication of a tradition or of a message is valid); and with respect to their want of memory, it is capable of remedy by the junction of another; that is, by substituting two women in the place of one man; and the defect of memory being thus supplied, there remains only the doubt of substitution; whence it is that their evidence is not admitted in any matter liable to drop from the existence of a doubt, namely, retaliation or punishment; in opposition to marriage, and so forth, as those of women is admitted in those instance."[228] The compiler of the *Al-Hidaya* gives one more reason for non-acceptance of evidence of women alone. He says, "The testimony of four women alone, however, is not accepted (contrary to what analogy would suggest), because if it were, there would be frequent occasions for their appearance in public, in order to give testimony; whereas their privacy is the most laudable."[229]

Imam Fakhruddin Al-Razi discusses that part of the Qur'anic verse which says that one man and two women can testify. According to Al-Razi the reason why two women should substitute by one man is that a woman's temperament has coldness (bard) and dampness or moisture and this is the reason for her forgetfulness.[230]

The physiologist and medical experts hardly agree with such statements today but that is how it was understood in those days. Instead of understanding the real intention of the Holy Qur'an, commentators invented all sorts of arguments to justify their own understanding. They maintain that forgetfulness in one woman is much more than in two and that is why two women were stipulated in place of one. Thus, while some jurists maintained that a woman's testimony was made undesirable, as

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[227]Al-Marghinani, *Al- Hidaya,* , vol. 5, 417-418.
[228]Ibid., 770
[229]Ibid.
[230]Imam Fakhruddin Al-Razi, *Al-Tafsir Al-Kabir,* vol. 3 (Beirut: Dar Ihya Al-Turath Al-Arabi,1999), 95.

otherwise she would have to appear publically several times, the other maintained that she was forgetful by nature on account of excess of coldness and dampness in her physiology. These all arguments are invented by human beings and hence cannot be binding on us.

Maulvi Mumtaz Ali Khan also upholds in his book *Huquq-e-Niswan* that the Qur'anic verse on a woman's testimony does not in any way prove the inferiority of women compared to men. He is also of the opinion that since women in those days were kept ignorant and illiterate and never acquired adequate experience in financial matters, the Qur'an stipulated the need for two women witnesses in place of one man. It was only to remind the one if the other forgot or committed any error. Men being competent in such matters could remember better than women. Secondly, he maintains that this injunction of the Qur'an is optional and not compulsory for all the Muslims. Thirdly, he says that except the financial transactions the Qur'an nowhere else in matters such as marriage, divorce, *Hudūd* (punishments), *Qisas* (retaliation), etc., requires two women's testimony in place of one man. Fourthly, he argues that the Prophet (PBUH) has accepted one woman's testimony and refers to the *Hadith* from *Sahih Bukhari* according to which Aqbah bin Harith had married a girl and then a woman came and informed him that she had suckled both man and woman and how can they marry in such an eventuality? According to this *Hadith* the Prophet (PBUH) accepted the testimony of this woman and dissolved the marriage. Maulvi Mumtaz Ali also feels that perhaps the requirement of two women witnesses is not on account of their non-competence but more likely because of their physical problems as when she is going through her period she may not be able to go to tender witness and the other may go and do so. And, according to Maulvi Mumtaz Ali, this shows her superiority rather than inferiority since it is a woman who enjoys this privilege to send another woman to testify in her own place.[231]

The second argument of the jurists is the interpretation of *Ayat-e-Mudayena* (Indebtedness verse) quoted above mentions that a woman might get confused thereby casting a doubt in her testimony, so in accordance with the following words

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[231]Maulvi, Mumtaz Ali, *Huquq al-Niswan*, (Hyderabad: India), 19-20.

attributed to the Prophet (PBUH) whereas a *Hadd* punishment can in no case be given in cases in which they have testified, a *Ta'zir* punishment can be given in such cases based on quoted *Ahadith* above which prescribed clearly that if there is any doubt, the *Hadd* punishment can not be given. This argument is baseless. Because the indebtedness verse does not say that women's testimony is a substitute and forgetfulness is a nature of women only. Imam Ibn-e-Qayyim does not differ in the testimony of man and woman if she is just. No where in the Holy Quran or the Sunnah is prescribed that the testimony of woman is a substitute and having doubt then how can this be made a general principle of law and on its basis a woman's testimony be forsaken forever. Just as there is a chance that she might get forget while giving the testimony, there is an equal chance that she may testify in a clear and unambiguous manner. This is about only financial transactions because she was having less knowledge of these matters and nothing else, here priority has given. The classical jurist say that a *Ta'zir* punishment can be given on the basis of a woman's testimony, its mean that the crime stands proven in their eyes. If the crime stands proven, then why a *Hadd* punishment cannot be given? And if they contend that if a woman's testimony always leaves room for doubt then a crime cannot be considered to be proven; so on what basis should the *Ta'zir* punishment be administered? A crime, obviously, cannot be regarded to be proven ten, twenty, ninety or ninety nine percent. It is either proven one hundred percent or not proven at all. It is absolutely baseless to accept a state between proof and lack of proof in a crime and in no way can it be accepted that a *Hadd* punishment will be administered on certain grounds and *Ta'zir* punishment on certain other grounds.

Maulana Muhammad Taseen states about the Indebtedness verse that the general style and words of this verse tell us that men usually used to go to markets and run business, having more interest than women and can do better than women because of that the responsibility of testimony is on men first then upon women. This responsibility can be rested upon women and they are competent to give testimony. The reason as to why Allah did not give this responsibility to women not only that they are weak and forgetful. In fact Allah doesn't want to put women in difficulty by

giving testimony in a court which they do not like to go. The other reason might be that women usually are engaged in household activities and for the nurturing of the children. Therefore, Allah has protected women from male predominated places like courts otherwise, they are a competent witness.[232]

Muhammad Ali Farooq comments that the testimony of two women is equal to a man which is a proof of the fact that a woman is intellectually and mentally weak but The Holy Qur'an says that the presence of second woman is to remind the first one in case of forgetfulness. If all women are mentally not strong then how can the other one keeps things in mind, reminding the one giving testimony. The reason as to why Allah has ordained two women is because in those days women did not participate in business activities themselves, and naturally they did not have any expertise in that. The inadmissibility of testimony of one woman is not prescribed any where, if woman could not get education and remained ignorant due to some inherent impediments and difficulties of the society then she should not be blamed for possessing lesser intellect than that of men. Similarly, if men are placed in the same situation they will not be treated like them. In the Holy Qur'an, Allah says that "but if the debtor is of poor understanding, or weak, or is unable to dictate for himself then let his guardian dictate in justice."[233] This verse of the Holy Qur'an signifies the illiterate men or of lesser understanding who are unable to justify their position and defend themselves, it also provides for the solution of the problem that a guardian or any other capable person may help him in getting justice. Likewise, the woman who reminds other does not connote that all women are forgetful and of lesser intellect but it only includes those who could not educate themselves or remained ignorant of day to day affairs of their lives. [234]

He further says that we have to think that if a man is better than a woman in intellect then on what basis or rule these two genders are getting the same and equal sentence

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[232]Maulana Muhammad Taseen, *"The Testimony of women in the light of Qur'an and Hadith" Fikr o Nazar*, (Jul-Sep, 1990): 112.
[233]Al Baqra: 282
[234]Muhammad Ali,Farooq, "The Testimony of Woman", *Ta'mir e Insaniyat*, (April 1989): 13-14.

for the commission of various offences. For example in the sentence of *Zina* (fornication), if woman is of less intellect then why she is punished the same way as that of men and whether is this according to the principles of justice? we must think that if woman is a weak gender then how she is punished the same way as that of a man, and how is it said that this is according to the rule of justice or *Na'udhu Billah* (we seek refuge with Allah). Allah says to the people that "*do justice that is near to the piety*"[235]and it is supposed that He is not doing justice,[236] *Malakum Kaifa Tahkumoon* (What has happened to you and how you judge amongst people)?[237]

Allama Umar Ahmad Usmani observes that "*if there are not two men then one man and two women*"[238], It indicates clearly that the testimony of one man and two women will be taken in the absence of two men but the jurists say that the testimony of women will be accepted in the unavailability of men because there is a doubt of substitution and doubt in the *Hudūd* has to be refrained. He says it could be like that in the availability of men the testimony of woman couldn't be accepted but this is not like that and in the presence of men the testimony of women is accepted then how we can say that this is a doubt of substitution and where doubt comes, the testimony of woman couldn't be accepted.

He further says that we are confused to understand the meaning of this verse whether the testimony of one man and two women is original or in the unavailability of two men is a substitute of two men likewise *Wudu* (Ablution) is necessary for *Namaz* (Prayer) but if water is not available then *Tayammum* is done as substitute of *wudu* but *Tayammum* is not an original purification and that is a substitute of *wudu*. If the person who has done *tayammum* and found water then *tayammum* will be vanished, and he has to do *wudu* with water, so some jurists made one man and two women testimony as a substitute of two men and the testimony of one man and two women will be admissible when two men are not available but *Ahl Ijma'* didn't take it and

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[235]Al Maida:8
[236]Muhammad Ali,Farooq, "The Testimony of Woman", *Ta'mir e Insaniyat*, (April 1989): 14,29.
[237]Al Qalam: 36
[238]Al Baqra: 282

they make the testimony of one man and two women original not a substitute and accept their testimony in the presence of two men too. So, they are still confused that the testimony of one man and two women might be a substitute and because of that they do not accept their testimony in *Hudūd* and *Qisas* cases.[239]

Imam 'Alauddin Kasani of the Hanafi School of thought said about evidence and knowledge:

> "No definite and authentic knowledge can be taken from any person but the Prophet (PBUH), because there is always possibility of err. Only the message by the Prophet (PBUH) goes beyond doubt. However, the testimony of a truthful and trustworthy person can be prevailed over others. So, for this purpose, the testimony of a reliable and a trustworthy person is sufficient."[240]

Ibn-e-Hazam stated that this is common to everyone that there is no difference between a man and a woman, two men and two women, four men and four women that they intentionally tell a lie and agree to that. Same is the situation with negligence. Both men and women are victim to this even once. In this context, more satisfaction is gained on the testimony of four men over the testimony of eight women.[241]

It is a fact that women are not physically as strong as men, but their physical weakness in no way implies their inferiority to men. The eyes are the most delicate parts of our body, while the nails are superior to the eyes.

Just as two different kinds of fruit will differ in color, taste, shape and texture, without one being superior or inferior to the other, so also do men and women have their different qualities which distinguish the male from the female without there being any question of superiority or inferiority? If men and women have been endowed with different capacities, it is so that they will play their respective divinely predetermined roles in life with greater ease and effectiveness. Certain feminine abilities will be superior to certain masculine abilities, and vice versa simply because

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[239]Umar Ahmad Usmani, "The testimony of women in the light of Qur'an "*Ta'mire-Insaniyyat*, (Dec, 1983): 34-35.
[240]Al-Kasani,, *Badae' al sanae'*, vol.6, 421.
[241]Ibn-e-Hazm, *Al Muhalla*, vol. 9, 403.

their natural spheres of application are different. Success in life for both men and women can be attained only if they devote themselves to the particular set of activities which has been preordained for them in God's scheme of things. [242]

Women, throughout the history of Islam, have played significant roles and, by their feats, have demonstrated not only the vast arena which Islam affords them for the performance of noble and heroic deeds, but also the exaltedness of the position accorded to women in Islamic society. Ayesha, the daughter of Abu Bakr and wife of the Prophet (PBUH), stands out as a woman of notable intelligence, whose intellectual gifts were fittingly utilized in the services of Islam. Very young in comparison with the Prophet (PBUH), she survived him by almost half a century, during which period she became a great and authentic source of religious learning for the *Ummah* (Muslim community). This was largely thanks to the accuracy with which she had preserved in her memory the speeches, conversations and sayings of the Prophet (PBUH). In all, she related about 2210 of his sayings and was extraordinarily gifted in being able to formulate laws from them. It is said that no less than one quarter of the Shariah injunctions have been derived from her narrations. Her knowledge and deep perception in religious matters was so established that whenever the Companions of the Prophet (PBUH) found themselves in disagreement over any religious matter, they would come to her to seek her assistance. According to Abu Musa Ash'ari, whenever they were in any doubt as to the meaning of any part of the *Hadith*, they would turn to Aisha. It was seldom that she was unable to solve their problems.[243]

From all these arguments it has been clear that testimony of women is not a substitute but an original testimony but Allah has given the priority firstly to two men then one man and two women in *Ayat-e-Mudayena* (Indebtedness verse) [244] not merely because of that she is the substitute of man, but priority has been given to him that he can do so in a better way than that of woman or knows better than her.

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[242]Maulana Wahiduddin Khan, *Woman Between Islam And Western Society,* (Karachi: Hafiz & Sons, 2001), 144.
[243]Ibid., 144-145
[244]Al Baqra: 282

We all agree with this argument that man can do this job, giving the testimony in a court in a better way than a woman. If we see this verse in this context we can analyze that in those days men were familiar to the business matters more than women, relying on this, we can say that Allah has given priority to man over woman in this regard and made woman not a substitute of man.

4. The Approach of Companions and their Successors about the Testimony of Woman

It has been observed by the previous discussion that the jurists opined dissentingly as to the admissibility of evidence of women. Not only this but some of the companions and successors admit the evidence of women and some of them disagree with the notion. They had also decided various issues on the basis of their opinions on the admissibility or inadmissibility of evidence of women. The issue of admissibility or inadmissibility of evidence of women remained contentious amongst the Companions of the Holy Prophet (PBUH), which could be found on many occasions. This fact is also worth-mentioning that the opinions of the Companions have not been supported by the Qur'anic verses or *Hadith* of the Prophet (PBUH) which the jurists mentioning in their arguments, not a single companion or successor prescribed any of those arguments which the jurists relied upon. These arguments were propounded by the late jurists to support the opinions of their predecessors.[245] Moreover, many controversial citations and decisions are attributed to the companions and their successors in authentic books of *Ahadith*. Some of them are as under:

Hazrat Umar (RA)

i. Hazat Saeed Bin Musayyib reported that Hazrat Umar (RA) Said: The testimony of women is not admissible in *Talaq*, Marriage and Murder.[246]

ii. Abu Lubaid reported that a man, who drank wine pronounced three divorces to his wife. Case came to Hazrat Umar and supported by four women

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[245]Mahmood Ahmad Gazi, "Hudud aur Qisas key Muqaddemat min 'aurtun ki gawahi", *Fikro Nazar*,(Jan –Mar,1993): 6.

[246]Ibn-e-Hazm, *Al Muhalla*, vol.9, 397.

witnesses of the pronouncement of divorce, on the testimony of women, Hazrat Umar (RA) decided the case and allowed the separation.[247]

iii. Hazrat Ata bin Abi Rabah reported that Hazrat Umar (RA) admitted the testimony of women with men in Divorce and Marriage.[248]

iv. Hazrat Ata also reported that Hazrat Umar (RA) admitted the testimony of women with one man in Marriage.[249]

v. Imam Zuhri reported that Hazrat Umar (RA) admitted the testimony of a woman in crying of baby at birth.[250]

vi. Hazrat Zaid bin Aslam reported that Hazrat Umar Bin Al Khattab did not make admissible the testimony of one woman in drinking milk (Fosterage).[251]

From the first narration, it is clear that the testimony of women is not admissible in divorce and marriage but in second narration the testimony of four women is accepted in divorce that is contrary to the first one. In the third narration it is clear that the testimony of women is admissible with men in cases of divorce and marriage and fourth narration tells that in marriage the testimony of women is accepted with one man. The fifth narration makes admissible the testimony of one woman in crying the baby at birth and the sixth one is making admissible the testimony of woman in suckling (Fosterage).[252]

Hazrat Usman (RA)

Ibn e Shahab narrated that a black woman came in the era of Hazrat Usman (RA) from Village to city and visited three new marriage couples she said to

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[247]Ibid.,.397
[248]Ibid., 398
[249]Ibid., 398
[250]Ibid., 399
[251]Ibid., 400
[252]Maulan Muhammad Taseen, "The Testimony of women in the light of Qur'an and Hadith", *Fikro Nazar*, (Jul-Sep, 1990) .130

those couples that you are my foster sons and daughters, this case came to Hazrat Usman (RA) who separated all of them.[253]

Hazrat Ali (RA)

i. Hazrat Hakam bin 'uyaina narrates that Hazrat Ali (RA) said that the testimony of women is not admissible in divorce, marriage, *Hudūd* and *Qisas*.[254]

ii. Hazrat Ali bin Abi Talib said that the testimony of women is not admissible even in a one dirham if a man is not with them.[255]Hind bin Talq said that I was sitting in a company of women and a baby was there in a cloth, one of the women stand to do her work and her foot came on that baby and he died, the mother of baby cried that you have murdered my baby, this case came to Hazrat Ali (RA) and ten women gave testimony on that and Hazrat Ali (RA) decided to give *Diyat* to the killed baby's mother and he also helped with two thousand rupees.[256]

iii. Hazrat Sufyan Sauri narrated that Hazrat Ali (RA) admitted the testimony of one midwife (*Qabila)* in case of crying a baby at birth.[257]

In the first narration according to Hazrat Ali (RA) the testimony of women is not admissible in divorce, marriage, *Hudūd* and *Qisas* but in the second one without man the testimony of women is not allowed in various transactions. In the third narration Hazrat Ali accepted the testimony of ten women in *Qatl*, this narration is contrary to the first one and the second one and the fourth one is that the testimony of one midwife is admissible in case of crying of baby at birth. Because this service is provided by the women which comes at the time of baby's birth and the testimony of one woman or midwife is reliable and they all are well known to these matters similar traditions could be found in book of *Ahadith*.

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[253]Ibn-e-Hazm, *Al Muhalla*, vol.9, 403.
[254]Ibid., 397
[255]Ibid., 396
[256]Ibid., 398
[257]Ibid., 399

The cases of the Successors of the Companions are not different from that of the Companions themselves and they hold both the opinions. Majority of them are of the opinion that the evidence of women is not admissible in cases of *Hudūd*. But there are some who opine that the cases of *Hudūd*, *Qisas* and divorce or only *Qisas* can be decided on the testimony of women. Some instances are quoted below which show the admissibility of evidence of women in the cases of *Hudūd*, *Qisas*, Divorce and marriage by the Successors.

Hazrat Saeed Bin Musayyib (RA)

There are two narrations from Hazrat Saeed Bin Musayyib one of them is that the testimony of women is not admissible only in those matters where the men are not aware or having no knowledge of that.[258]And the second narration is that the testimony of women is not admissible in murder, *Hadd*, divorce and marriage.[259]

Hazrat Ata bin Abi Rabah (RA)

i. Hazrat Ata bin Abi Rabah makes admissible the testimony of women in marriage.[260]

ii. Hazrat Ata has said that the testimony of women with men is admissible in all matters and in case of *Zina* the testimony of two women and three men is accepted.[261]

iii. He said that if eight women give testimony about married woman that she has committed *Zina* then I will order stoning to death.[262]

iv. He has said that the testimony of women is admissible in all those matters which are relevant to women and not less than four women's testimony is accepted.[263]

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[258]Ibid., 396
[259]Ibid., 397
[260]Ibid., 398
[261]Ibid.
[262]Ibid.

Hazrat Amir bin Shurahbil Al Sha'bi (RA)

i. He said that the testimony of women is accepted in those matters in which men are not aware or having no knowledge only women know these matters.[264]

ii. He said that, in suckling, the testimony of one woman is admissible only.[265]

iii. He said that the testimony of women is inadmissible in *Hudūd* .[266]

iv. He said that in divorce and wound done by mistake *(jarah khathe)* the testimony of two women with one man is allowed but in wound done knowingly and *Hadd* the testimony of women is inadmissible.[267]

v. He said that in all those matters where men are not having any knowledge, there the testimony of four women is admissible.[268]

Hazrat Ibrahim Al Nakh'i (RA)

i. He said that the testimony of women with men is not admissible in divorce, marriage and *Hudūd.*[269]

ii. He said that the testimony of one woman is accepted in those matters relevant to women only.[270]

iii. He said that the testimony of one woman a midwife is admissible in crying of baby at the time of birth.[271]

iv. He said that the testimony of one woman is accepted in suckling.[272]

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[263]Ibid., 399
[264]Ibid.
[265]Ibid.
[266]Ibid., 397
[267]Ibid.
[268]Ibid., 399
[269]Ibid., 397
[270]Ibid., 400
[271]Ibid., 399
[272]Ibid., 400

Hazrat Ibn-e-Shahab Zuhri (RA)

i. He said that in the time of the Prophet (PBUH) and his two immediate caliphs, it was an invariable rule to exclude the evidence of women in all cases including punishment (*Hudūd*) and retaliation (*Qisas*).[273]

ii. He said that in the era of Holy Prophet (PBUH) and his two immediate caliphs, the testimony of women was inadmissible in *Hudūd*.[274]

iii. He said that in the time of the Prophet (PBUH) and his two immediate caliphs it was and invariable rule to exclude the evidence of women in all cases including *Hudūd* and *Qisas*.[275]

iv. He said that in the era of Holy Prophet (PBUH) and his two immediate caliphs, the testimony of women was inadmissible in *Hudūd*, divorce and marriage.[276]

v. He makes admissible the testimony of women in wills, debts and murder.[277]

Hazrat Qazi Shuraih (RA)

i. He makes admissible the testimony of a midwife woman in crying of baby at birth.[278]

ii. He made admissible the testimony of two women with one man in *Itaq* (to set a slave free).[279]

iii. He allowed the testimony of four women in matter of *Maher*.[280]

Hazrat Sufyan Sauri (RA)

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[273]Al-Kasani, *Badae' al sanae'*,vol. 6, 424.
[274]An-Nawavi , *Al Majmoo'*, vol.20, 255.
[275]Ibn-e-Hazm, *Al Muhalla* ,vol.9, 397.
[276]Ibid., 397
[277]Ibid.
[278]Ibid., 399
[279]Ibid., 397
[280]Ibid.

j. He said that the testimony of women with men is allowed in *Qisas*, divorce and marriage except *Hudūd*, and in all those matters, where the women know, the testimony of single woman is admissible.[281]

ii. He made admissible the testimony of women in matters of divorce and marriage save *Hudūd* and *Qisas*, and all those matters relevant to women, one women is enough to give testimony and in fosterage one man and two women.[282]

iii. He said that the testimony of one woman is accepted in defects of women and in all those matters relevant to women only.[283]

Imam Abu Hanifa (RA)

He opines that except *Hudūd* and *Qisas* the testimony of women is admissible in all other matters e.g. Divorce, marriage etc. and the testimony of one woman in Fosterage and crying the baby at the time of birth is not admissible without man. But in birth and defects of women, the testimony of one is accepted.[284]

Qazi Abu Yusuf and Imam Muhammad Al Shibani (RA)

They are pupils of Imam Abu Hanifa but they differ in opinion in crying of the baby at birth, according to them, the testimony of one woman is admissible but Abu Hanifa makes compulsory a man too.[285]

Imam Zufar (RA)

He said that the testimony of women without man is not admissible at all in birth, nor fosterage or in the defects of women and he further says that the testimony of women with men is admissible in divorce, marriage and to set a slave free.[286]

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[281]Ibid., 398
[282]Ibid.
[283]Ibid., 399
[284]Ibn-e-Qayyim, *Al Turuq Al Hukmiyyah.*, 165.
[285]Ibn-e-Hazm, *Al Muhalla*, vol.9, 399.
[286]Ibid., 396

Imam Malik (RA)

Imam Malik says that the testimony of women is inadmissible in *Qisas*, *Hadd*, Divorce, and Marriage, to free a slave, *rajat* (restitution of conjugal rights), *Nasb*, *walaa* and *Ihsan*, with or without men at all. But in transactions, debts, agency and a will which is not to free a slave, in all these matters, the testimony of women with men is allowed. And in defects of women, birth, fosterage, and crying of the baby at birth, the testimony of women only is admissible and where the testimony of one man with *Qasm* is admissible, there also the testimony of two women with *Qasm* is accepted.[287]

Imam Shaf'i (RA)

Imam Shaf'i is of the opinion that in cases of *Hudūd* the testimony of women is inadmissible with or without men[288] and in all financial transactions including freeing a slave, *Qatl-e-khata* (Accidental Murder) and Will for wealth, the testimony of two women and one man is acceptable but in original Will women's testimony is not acceptable at all but in all those matters relevant to a woman, the testimony of one woman is acceptable.[289]

Besides this, there are some other different opinions regarding the testimony of woman in different matters as Muhammad bin Hanfiah (RA) said that the testimony of women is admissible in *Diyat*.[290] Hazrat Rabiah (RA) said that the testimony of women is inadmissible in divorce, marriage, *Hadd* and to set free a slave, but is admissible in contracts.[291] Hazrat Tawoos (RA) said that the testimony of women with men is admissible in all matters except *Zina* because it is necessary that they couldn't look at that.[292] Hazrat Qatadah (RA) said that the testimony of women is not allowed in *Talaq* (divorce) and *Nikah* (marriage)[293] and Hazrat Makhool (RA)

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[287]Ibn-e-Qayyim, *Al Turuq Al hukmiyyah.*, 165.
[288]Al-Nawavi *Al Mamoo'*, vol.20, 259.
[289]Ibn-e-Hazm, *Al Muhalla*, vol.9, 399.
[290]Ibid, 397
[291]Ibid.
[292]Ibid.
[293]Ibid.

said that the testimony of woman is admissible only in debts.[294] Hazrat Umar Bin Abdul Aziz (RA) said that the testimony of women is inadmissible in divorce.[295] Imam Ahmad Bin Hanbal (RA) opined that in *Hadd-e-Zina* four men are compulsory and the testimony of women is not acceptable.[296] Hazrat Ata and Hammad (RA) opined that the testimony of three men and two women is admissible in *Hudūd* and *Qisas*.[297] Imam Ja'fir Sadiq (RA) said that the testimony of women with men is acceptable in *Hudūd* e.g. three men and two women, two men and four women to prove *Zina* but in *Rajm* the testimony of women is inadmissible.[298] Imam Ibn-e-Hazm Al Zaheri (RA) opined that it is admissible to accept the testimony of four Muslim witnesses in *Zina*, just men or instead of one man, two Muslims, just women then it becomes three men and two women or two men and four women or one man and six women or eight women only.[299]

Similarly, other sayings have been quoted on the issue without mentioning the name of the commentator. They also admit the testimony of women in *Hudūd* as some of the jurists say that the testimony of women is admissible in *Hudūd*.[300]

In addition to the above distinct citations and decisions of the Companions and their Successors, there are some other traditions which symbolically show that the evidence of women in cases of *Hudūd* and *Qisas* is admissible.[301] For example:

i. It is reported from Umar bin Al Khattab (RA) that instead of one male witness two women and the testimony of four women is admissible instead of two men.[302]

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[294]Ibid., 396
[295]Ibid., 397
[296]Ibn-e-Qudama, *Al Mughni*, vol.10, 155.
[297]Ibid.
[298]Muhammad Hassan Najafi, *Sharae' Al Islam*, vol.4 (Najaf: Dar Al-Kutub Al-Islamiyyah), 136.
[299]Ibn-e-Qayyim, *Al Turuq Al Hukmiyyah*, 167.
[300]Ibid., 165
[301]Mahmood Ahmad Gazi, "Hudud aur Qisas key Muqaddemat min 'aurtun ki gawahi", *Fikro Nazar*,(Jan –Mar,1993): 8.
[302]Ibn-e-Hazm, *Al Muhalla,* vol.9, 399.

ii. And same thing is reported from Hazrat Ali bin Abi Talib (RA) and this is a saying of Al Sha'bi, and Al Nakh'i one of his sayings, Ata, Qatada, Ibn e Shubrama, Al Shaf'i and his companions, Abi Sulaiman and his companions.[303]

All of the opinions which are mentioned above of the Companions *(Sahaba)* and their successors *(Tabi'in)* are about the testimony in general whether the case is *Hadd*, *Qisas*, Divorce and Marriage etc. They had different opinions in all these matters which shows that this is an *Ijtehadi masla* and there is no clear text of the Holy Qur'an or the *Sunnah* to exclude a women to give the testimony in *Hudūd* cases. But these all opinions are called juristic opinions, they might be right or wrong because when a jurist tries to resolve a matter he may be right or wrong, but if he does right he gets two rewards, otherwise one.

It is evident from the above discussion and quoted examples that the jurists have not solely relied on the text of the *Qur'an* and the *Sunnah* in deciding cases or giving juristic opinions on any matter in controversy, they have also argued and developed their own opinion on the basis of jurisprudence and their own juristic opinion and have differed in opinions. Their juristic opinions and preferences are prone to objections and there is further room for discussion and arguments on their opinions. It is very difficult and a very bold step to deviate from the consensus developed by the four authentic Imams on any issue and develop ones own juristic opinion. There are some instances and occasions where the later jurists have deviated from the juristic opinions of the Imams and they have been accepted generally by the other Muslim jurists. There are certain examples of deviation from the juristic opinion of the four authentic Imams of Muslims which have been taken from the decisions of the Federal Shariat Court and the Council of Islamic Ideology. [304]

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[303]Ibid.

[304]Mahmood Ahmad Gazi, "Hudud aur Qisas key Muqaddemat min 'aurtun ki gawahi", *Fikro Nazar*,(Jan –Mar,1993): 18.

5. Tradition of Imam Ibn-e-Shahab Zuhri

The inadmissibility of testimony of women in cases of *Hudūd* and *Qisas* is mainly based on the narration of Imam Muhammad Bin Muslim Bin Shahab Al-Zuhri which is generally being quoted by the jurists in their writings. This narration has been quoted by different books in different words and sentences, which are controversial. They as follows:

i. مضت السنة من لدن رسول الله صلى الله عليه وسلم والخليفتين من بعده أن لا تقبل شهادة النساء في الحدود والقصاص.

He said that in the time of the Prophet (PBUH) and his two immediate Caliphs it was an invariable rule to exclude the evidence of women in all cases including punishment (*Hudūd*) and retaliation (*Qisas*).[305]

ii. جرت السنة على عهد رسول الله صلى الله عليه وسلم والخليفتين من بعده أن لا تقبل شهادة النساء في الحدود.

He said that in the era of Holy Prophet (PBUH) and his two immediate Caliphs, the testimony of women was inadmissible in *Hudūd* .[306]

iii. مضت السنة من رسول الله صلى الله عليه وسلم والخليفتين بعده أنه لا تجوز شهادة النساء في الحدود والنكاح والطلاق

He said that in the era of Holy Prophet (PBUH) and his two immediate Caliphs, the testimony of women was inadmissible in *Hudūd*, marriage and divorce.[307]

iv. جرت السنة على عهد رسول الله صلى الله عليه وسلم والخليفتين من بعده أن لا تقبل شهادة النساء في الحدود والدماء.

He said that in the time of the Prophet (PBUH) and his two immediate Caliphs it was an invariable rule to exclude the evidence of women in all cases including *Hudūd* and *Qisas*.[308]

The jurists say that in all these narrations, the testimony of women in cases of *Hudūd* and *Qisas* has been completely regarded as inadmissible.

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[305] Al-kasani, *Badae' al sanae'*,vol.6, 424.
[306] An-Nawavi, *Al Majmoo'*,vol.20, .255.
[307] Ibid., 397
[308] Ibn-e-Hazm, *Al Muhalla,* vol. 9, 397.

5.1 The Tradition of Imam Zuhri – A critical Analysis

There has no explicit and absolute commandment or text been found in the Qur'an and the *Sunnah* regarding the inadmissibility of evidence of women. Even the weakest *Hadith* of the Prophet (PBUH) either by words or by practice does not contain any sign on the issue. The only evidence on the issue is the statement given by Imam Zuhri. This statement is so weak and frail that no tradition of the Holy Prophet (PBUH) may be attributed to it. A brief critical analysis of the Zuhri's statement follows as under:

i. **Not found in *Sahah-e-Sitta, Mauta Imam Malik, Musnad Ahmad* and other authentic books.**

The Zuhri's statement has influenced the late jurists but majority of the jurists have not attributed it to any tradition. This statement cannot be found in the authentic books of *Hadith* i.e. *Sahah-e-Sitta,* or Mauta Imam Malik, or Musnad Imam Ahmed bin Humbal. Only Abu Bakr Bin Abi Shiba has narrated in *Al Musannif,* Shah Waliyullah Mu*haddī*th Dahlavi attributed this book in a third category in authentic book of *Hadith.*

ii. **Contradiction in the statements of Imam Zuhri**

There is a contradiction in the statements of Imam Zuhri, in one statement; he said that in the time of the Prophet (PBUH) and his two immediate Caliphs it was an invariable rule to exclude the evidence of women in all cases including punishment (*Hudūd*) and retaliation (*Qisas*).[309] And in other statement, he himself claims that the evidence of women is admissible in cases of *Qisas.* [310]The *Muhadditheen* regard that narration a weak, which is opposed by the narrator himself.

iii. **Controversies between the opinions of companions, successors and jurists**

It has been clearly pointed out by the narrations of the Companions, their Successors and the jurists that this issue always remained controversial, no consensus was ever developed on it, and this cannot be regarded as absolute

[309]Al-kasani, *Badae' al sanae'*,vol.6, 424.
[310]Ibn-e-Hazm, *Al Muhalla* ,vol.9, 397.

as the *Sunnah*. Therefore, the stance of Imam Zuhri on the issue does not hold ground.

iv. **The opinion of Imam Shafi'i regard Imam Zuhri's statement as juristic Opinion**

The opinion of Imam Shafi'i also does not hold the evidence of women in cases of *Hudūd* as credible but Imam Shafi'i regarded the Zuhri's statement as juristic opinion and not convinced to operate it as the *Sunnah* of the Holy Prophet (PBUH). He did not get support from the statement of Imam Zuhri to exclude a woman from the testimony in Hudud cases. I try to find in different chapters related to the testimony and Hudud in his book Al-Umm but could not find it.

v. **Imam Malik and Imam Zuhri's Statement**

Imam Malik who is one of the closest students of Imam Zuhri has not attributed the statement to any tradition of the Holy Prophet (PBUH) with regard to the admissibility of evidence of women.

vi. **The words like *Nikah* and *Talaq* in the statement of Imam Zuhri**

The statement of Imam Zuhri to exclude the woman by giving testimony in Hudud cases came in books by four different ways and in one he excludes the testimony of woman in *Nikah* and *Talaq*. This would not have become an argument for the *Ahnaf,* because they not only admit the evidence of women in cases of *Nikah* and *Talaq* but also consider her as *Qazi* in such matters. The companions and successors have also different opinions in the admissibility of the testimony of woman in *Nikah* and *Talaq* matters.

vii. **Hajjaj bin Artat a narrator in Imam Zuri's tradition and Muhadditheen.**

Many *Muhadditheen* has traditionally criticized the Zuhri's statement. They say that the narrator i.e. Hajjaj Bin Artat is weak, mudallis and can not be rely upon because he did not met with Imam Zuhri. The sayings of Muhadditheen about Hajjaj Bin Artat are:

Abbad bin Awam: He did not hear anything from Imam Zuhri.[311] The same thing has been said by the father of Ibn-e-Abi Hatim and Aba Dhar'a.[312] Yahya bin Mo'een says that Hajjaj Bin Artat did not hear anything from Nakh'i as well as Zuhri.[313] Hushaim said that Hajjaj bin Artat said to him; did you hear something from Zuhri? I replied, yes and he responded that he did not hear anything from Zuhri.[314] Abu Dhar'a said that he is *Mudallis.*[315]Abu Hatim said he is *Mudallis* and cannot be an authentic narration on which we can rely upon and he got nothing from Zuhri.[316]Hushaim said that Hajjaj bin Artat met with him and requested that give me some information about Imam Al Zuhri because I did not see him.[317]Abdullah Ibn-e-Mubarak said that Hajjaj is *Mudallis.*[318]Imam Nisai said that he is weak.[319]Abdul Rahman bin yousuf bin kharash said that he is *Mudallis.*[320]Abu ahmad bin 'Adi said that he was famous to do *tadlis* from Zuhri and having mistakes in his narrations and may be narrating those narrations which he knows not.[321] Ya'qub bin shaiba said that he is *wahi al Hadith* and in his tradition *idterab.*[322] Imam Ibn-e Hajr Al Asqalani quoted some of Muhadditheen who discussed the credibility of Hajjaj bin Artat. Imam Saji said that he is *Mudallis*, having not good memory and in his tradition are not authentic in *furoo'* and *Ahkam*[323]. Ibn-e-Sad said that he is weak in narrating *Ahadith.*[324] Abu Ahmad Hakim said that he is not strong in narration.[325] Imam Bazzar said that he is Mudallis.[326] Imam Mas'ood said

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[311] Imam Ibn-e-Abi Hatim, *Kitab Al Marasil,* (Sheikhupora: Al maktabh Al Athriyah, Sangla Hill), 47.
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Imam Mazzi, *Tahdhib Al Kamal fi Asma Al Rijal,*vol. 4 (Qahirah: Dar Al Fikr), 149.
[316] Ibid.
[317] Ibid.
[318] Ibid.
[319] Ibid., 150
[320] Ibid.
[321]Ibid.
[322] Ibid.
[323] Ibn-e-Hajar, *Tahdhib Al Tahdhib,* vol.2, (Lahore: Al Maktab Al Athariyyah, Urdu Bazar), 174.
[324] Ibid.
[325] Ibid.

that he is not authentic and can not take his narration as an argument and same thing was said by Imam Dar Al Qutni.[327] Ibn-e-Uyaina said that we were sitting with Mansoor bin Al Mo'tamir, some one prescribe a narration and Mansoor asked from whom you got this narration, the reply was from Hajjaj bin Artat, he advised that if you keep silent then its better to quote him.[328] Ibn-e-Habban said that Ibn-e-Mubarak, Ibn-e-Mahdi, Yahya Alqattan, Yahya bin Mo'een and Ahmad bin Hambal ignored to quote him.[329] Ismael Qazi said that he is not authentic because he used to hide his sheikh and was famous to add something from himself.[330] Muhammad bin Nadar said that he is *Mudallis* and changing the word while narrating a *Hadith*.[331]

viii. **Hadith *Mursal* and its authenticity**

Many Muhaditheen do not accept Hadith Mursal to make a rule and relay on it if in the collaboration other hadith is not there e.g. Saeed Bin Al-Musayyib, Imam Malik, Imam Zuhri himself, Imam Auzai, Abdullah Bin Mubarak and many others. Imam Abu Hanifa and some other jurists regard *Mursal Hadith* as admissible but majority of the jurists do not recognize it as admissible. Moreover, other important thing is that Imam Zuhri is reckoned in the list of youthful Successors of the Companions. This tradition is regarded as *Munqati'* rather than *Mursal*. The experts of *Hadith* opine about the *Muqati' Hadith* that it is unaccepted and cannot be relied upon as an authentic proof.

ix. **Hadith *Mursal* especially with the reference of Imam Al Zuhri**

The *Muhadditheen* have regarded Imam Zuhri's *Mursal* traditions as weak. Some of the jurists e.g. Imam Ibn-e- Abi Hatim Razi in his book Al-Maraseel has narrated the opinion of Imam Yahya Bin Saeed al -Qatan that the *Mursal* traditions of Zuhri and Qatada are no traditions and they have built castles in

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[326] Ibid.
[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid.

the air.[332] Similar opinion has also been expressed by Imam *Hadith* Yahya Bin Mo'een, he said that *Maraseel* of Zuhri are nothing.[333] Muhammad bin Ismael Al San'ani opined that the Maraseel of Imam Al Zuhri's are not acceptable.[334]

x. **The meaning of *Sunnah* according to Imam Al Zuhri**

There are number of reports by Imam Zuhari containing his view that he developed on his research and denoted that with Sunnah, however that is not Sunnah in strict sense of the term or at the least is not agreed upon to be called Sunnah. It may be deduced that perhaps Imam Zuhari used the term Sunnah in a qualified manner ascribing his own understanding of the term[335]. The books of Hadith contain numerous examples of such a description from which it can be established that attributing of an act to Sunnah by iamm zuharri is no more enough to consider that the Sunnah of the prophet. Following are given few examples of:

1. Imam Zuhari said, "it is prevailing Sunnah that there is zakat on ornaments". However his statement is not correct in that regard where as during the period of the companions and the successors the very notion remained controversial. Among the companions, such as Hazrat Aisha, Hazrat Baraa' bin Aazib, Hazrat Jabir bin Abdullah, Hazrat Asmaa' binte Abu Baker and Hazrat Abdullah bin Umer (May God be pleased with them all) and among the successors such as Amrah bite Abd al-Rahaman, Imam Muhammad al-Baqir, Leith bin Saa'd, Saeed bin al-Musuyyab, Hussan Basri, Ta'us, Imam sha'bi etc were not of the view that there is zakat on ornament. If there was an obligation of the zakat on the ornaments in the terms of the holy Sunnah then there would not be such kind of dissonance among the

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[332] Imam Ibn-e-Abi Hatim, *Kitab Al Marasil,* (Sheikhupora: Al maktabh Al Athriyah, Sangla Hill), 3.
[333] Ibid.
[334] Muhammad bin Ismael Al San'ani, *Sabeel Al Islam,*vol. 3, 250.
[335] Mahmood Ahmad Gazi, "The testimony of women in Hudūd and Qisas cases", *Fikro Nazar,*(Jan – Mar,1993): 9-13.

companions and the successors as it is unacceptable that they can remain ignorant of the fact.[336]

2. Imam Zuhari said, " it has been reported to us as Sunnah that no one should see his wife after marriage until he pays her the maintenance or gift her some dress, an this what had been prevailing among the Muslims". However, Ghazi denies the authenticity of the attributed statement from Zuhrai, as neither by the virtue of Hadith such an act is not required to be performed nor can be verified by the practice. Hazrat Uqbah bin Aamir had explained that during the age of the Prophet such an act was not necessarily required and same opined by Imam Hussan basri, Ibrahim al'Nakha'i. Sufyan Thauri, Imam Shafi, Abu Hanifa and Daud al-Zahri. Therefore, this issue remain subject to Ijtehad. Zuhari ascribed the very practice as the Sunnah where as in fact it is not the Sunnah epso facto.[337]

3.Imam Zuhri said, "I am reported by Urwah bin Zubair that Syedna Umer convicted the committers of adulatory by exile, and from that time this is prevailing Sunnah",[338] on the other hand Imam Abu Hanifa does not consider exile as a part of the punishment of the crime of adultery.[339]

4. "It is Sunnah that who so ever has been died because of the injuries inflicted upon him during retaliation (*qisas*) must be compensated. This issue is also of juridical nature and subject to variant opinions. The Rightly guided caliph themselves and some of the successors just as, saeed bin al-Musuyyab, imam hussan basri, Muhammad bin sereen, qasim bin Muhammad, salim, yahya bin saeed ansari, and the renowned jurists malik, shafi, daud zahri, are of the opinion that neither there is any compensation nor any other

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[336] Muhammad Muntasir Al Kattani, *Mu'jam Fiqh Al Salaf*, vol. 3, (Al Makkah Al Mukarramah:Saudi Arabia), 139, 140.

[337] Ibid, vol. 7, 13-15

[338] Muhammad bin Ismael, *Sahih Al Bukhari with Fathul Bari*, vol. 12, 133.

[339] Mahmood Ahmad Gazi, "The testimony of women in Hudūd and Qisas cases", *Fikro Nazar*, 13.

> punishment in such a case. Obviously such a matter of difference can not be maintained as the Sunnah of the holy prophet.[340]
>
> Al Zuhri is supposed to have widened the concept of Sunnah common to his time by recording everything traced to the Holy Prophet (PBUH), even if it was a personal statement made by the Prophet's companions, while his colleagues argued that such a *Hadith* did not from *Sunnah.*[341] Such a criticism of Zuhri's methodology by his contemporaries indicates that the *Sunnah* of the Prophet (PBUH) was valued as a distinguished source of *shar'iah*, more so than the *Sunnah* of his companions. Malignant growth with in the Prophetic Sunnah would soon be noticed and removed.[342]

It is quite evident from the above discussion that Imam Zuhri's statement about the inadmissibility of evidence of women cannot be regarded as the *Sunnah* of the Holy Prophet (PBUH). Firstly, the traditional value of this statement is weak. Secondly, textual aspects in this statement need some consideration. Thirdly, Imam Zuhri has his own peculiar view about the interpretation of the *Sunnah* on the basis of which he equates his personal research with the interpretation of the *Sunnah.*[343]

Conclusion

The Muslim Classical jurists do not accept the testimony of a woman in *Hudūd* cases. They take support for their opinion from the verses of the Holy Qur'an based on 'adad, ma'dud, masculine and feminine words, used for the witnesses and testimony. However, it has been pointed out that this is merely a juristic opinion and is not conclusive text of the Holy Qur'an or Sunnah. We have also provided some examples from the Holy *Qur'an*, the *Sunnah*, Arabic literature and different opinions of *Sahabah*, *Tab'een* and Jurists about the testimony in different matters which indicate that it is a juristic opinion otherwise why did they differ in all these matters?

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[340] Muhammad Muntasir Al Kattani, *Mu'jam Fiqh Al Salaf*, vol. 8, 103.
[341] EI2, Zuhri, by M. Lecker, xi, p. 565
[342] Mawil Izzi Dein, *Islamic Law from historical foundations to contemporary Practice*, (Edinburgh: Edinburgh University Press Ltd., 2004), 8
[343] Mahmood Ahmad Gazi, "The testimony of women in Hudūd and Qisas cases", 14.

The opinion of Muslim classical jurists is also supported by a tradition of Imam Zuhri and the practice of the companions of the Prophet (PBUH). However, Hazrat Ali (RA) is reported to have accepted the testimony of a woman in a *Qazf* case. The view of Muslim classical jurists is also supported on rational grounds by stating that woman is liable to err since she is not equal to man in intelligence and memory. As the *Hadd* offences are liable to the severest punishments and are required to be established beyond any reasonable doubt. Therefore, it follows that the testimony of woman should not be accepted in *Hudūd* cases in order to avoid any iota of doubt.

As against the view of Muslim classical jurists, there are some great scholars like Imam Ibn-e-Hazm, Imam Ibn-e-Taimiyya, Imam Ibn-e-Qayyim, Ata bin Abi Rabah, Hammad bin Abi Salman and other modern scholars scholars like Mahmood Ahmad Ghazi, Maulana Muhammad Taseen and Maulana Umar Usmani tend to accept the testimony of woman in *Hudūd* cases. They argue that the views of Muslim classical jurists is not the absolute principle of Shariah, rather it is based upon the juristic opinion and thus open to change. Therefore, there is nothing in Shariah, which hampers the acceptance of woman's testimony in *Hudūd* cases. In nutshell, I herby conclude that there is no express bar on the admissibility of the testimony of woman in *Hudud* and other cases; however quantum of witnesses would certainly be established considering two women equal to one man in order to establish the corresponding offence whether forms *Hudud* or *ta'zir*, as provided explicitly in the Holy Quran.

CHAPTER III

ISLAMIZATION OF CRIMINAL LAW AND EVIDENCE LAW IN PAKISTAN

CHAPTER III

Islamization of Criminal Law and Evidence Law in Pakistan

1. Introduction

Islam stimulates for initiative, liberates man from bondage known and unknown. The man liberated by Islam develops a personality of great originality and energy. In making a just social order and prerequisite to divine favour, Islam has given its followers a purpose which, when followed, becomes a highly constructive influence in human life.

Recognizing diversity in human life, the development of Islamic view of life entails an association with practical activity. Men of vision weave their dreams into the fabric of actuality. Their attitude is one of victory over one's existence, not escape from it. It is not indifference that is exalted, but equilibrium.

Several key terms used require definition. "Islamization" does not mean conversion to Islam, nor does this mean, the transformation that Muslims must undergo to adhere more strictly to preexisting, already-established Islamic norms. Rather, the term is used to refer to the historical process at work during the formative era of Islam, by which persons and objects were made Islamic in character and became imbued with Islamic principles or forms.[344]

Islamization rightly conceived and practiced is thought to bring a profound renewal, a peaceful revolution through evolution, a process of building a society of love and charity, of truth and creativity. Islamization represents a society in which men are equal before the law, in which men are accorded honour not for their status and privilege but for their merit and contribution towards well being of the society.

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[344]*The Oxford English Dictionary* defines the verb "Islamize" rather narrowly, yet provides more expansive definitions, which I have here adapted, of "Christianize" and "Judaize." It may seem tautologous to speak of the process of "Islamization" in reference to Muslims; such a formulation, if awkward, is necessary to convey the notion that men and women who identified themselves as Muslims were involved in the making and shaping of Islam.

Islamic laws and institutions had given protection to those who need it the most. They have been kind to the unfortunate and fair to the downtrodden. Islamic law aims for a system which assures works and security to all adults, proper education for the youth and equitable distribution of wealth and resources.

Accordingly, objective of Islamization is to bring an economic and social change in a peaceful, non-violent manner. The process of Islamization is not an academic learning alone but an education of the heart and the imagination, and of true adoption of Islamic ethics.

In recent years, an increasing emphasis on Islamic approach to life is being expressed. Islamic bonds appear to provide a sense of cohesion and purpose to various groups and classes[345]. Islamization of laws, therefore, is a must for Pakistani society mainly because Islamic law is the sum and substance of our faith.[346]

2. Islamic Law in Pre British Muslim Rule in India

Muslim era in Pre-British India can be divided into four periods, from advent of Islam with Muhammad bin Qasim in 712 to 991, from 991 until 1206; with a little record for the administration of Justice is found for our purposes, from 1206 to 1526, encompassing slave dynasties (Qutbuddin Aibak, Iltutmish, Balban, Khalji, Tughlaq, Lodhi and Sur); where the Muslims permanently settled in India, and the last period is the rule of glorious Mughals (1526-1757), ending unceremoniously with the slaying of Bahadar Shah Zafar's family by British and his forced exile to Burma.

i. Under Pre-Mughal Muslim Rulers

It is said that throughout the history of India, Indian villages maintained their autonomy. Indian Judicial system was decentralized for obvious reasons of different races, languages, customs, traditions and national outlooks. However, law in the modern sense was only represented by the liability to

[345] Dr. S. M. Haider, *Shariah and Legal Profession,* (Lahore: Feroz Sons, 1985), 1-5.
[346] Ibid., 6

pay certain taxes and to abstain from certain acts which were contrary to the interests of the state.

Shariah laws were applied with a favourable view for local customs and the local institutions retaining their autonomy. Muslim Kings were tolerant towards their subjects and treated them equally without discriminating on the basis of religion, race, caste or status in the society[347].

ii. Under the Mughals

Mughal rulers were generally followers of the Hanafi school of thought as prevailed in the subcontinent. Emperor Akbar was not strict in the enforcement of Shariah and a beholder of secularist thoughts and following him, there was considerable intermingling of the Muslim law and the customary law of various sections of the people who came under the way of Mughal Empire. Under Mughal rule Islamic criminal was in force in major parts of the subcontinent excluding areas where non-Muslims were governed by their own criminal laws.[348]

In Akbar's court attempt was made to synthesize rationalist and classical elements in the Muslim jurisprudence with Sufi's philosophies and Indian experience. Under Aurangzeb, "Fatawa Alamgiri" was prepared under the committee of lawyers. This was a compilation of the approved statement of the law.

In Oudh where the rulers were adherents of the Shia sect, Hanafi law remained prevalent as long as there was allegiance to the Delhi Sultanate. On repudiation of this allegiance, Shia law was made applicable in the society.[349]

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[347] Rubya Mehdi, *The Islamization of the Law in Pakistan*, (Richmond: Curzon Press, 1994), 2-4.
[348] Tahir Mehmood, *Criminal law in Islam and Muslim World; A comparative persepective,(Delhi: Qazi publishers & Distributers, 1996)*, 422.
[349] Zakia A. Siddiqi and Anwar Jaha Zuberi, *Muslim Women problems and prospects,* (New Delhi: M D Publishers PVT Ltd.1993) , 27.

2.1. Islamic Law in British Rule in India

The policy of British government of 'divide and rule' is well known therefore they developed separate laws for various communities except in case where their own interest demanded common legislation. Secondly, in order to appease certain vested interests such as "Indian Princes", *Taluqadars* and *Zamindars,* they perpetuated the encroachment of these sections on common rights of the people supporting customary law.

As a result, Indian states were left free to flout all cannons of law (even ordinary human treatment) when dealing with their subjects. Muslim landlords refusal to give daughters their due share in the father's property was made valid and the Shariah law was set aside concerning "Mehr" or dower of the wife, and the husband was permitted to pay her not the sum stipulated at the time of Nikah but 'according to his means'.

Modern thinkers in India endeavored to bring Muslim law in line with contemporary requirements. Among them Sir Syed Ahmed khan who was a prominent scholar said: "the British have not yet realized that the new age demands totally new legal system to deal with social, political and administrative affairs". Sir Syed called upon Muslims to formulate a new legal code suited to their present needs. Amongst others were justice Karamat Hussain (U.P) Abbas Tyyabiji (Bombay), Syed Amir Ali (Calcutta), Sir Mohammad Shafi (Lahore) so on and so forth.

After World War-I and end of Khilafat, there was a wave of progressive movements in several Islamic countries, in India also progressive men and a large number of Muslim women's organizations clamoured for the reform in the practice of personal law of Muslims.[350]

The following legislation was made during the British period:-

a. Shariat Application Act, 1937

[350] Ibid., 28

This Act, though did not include any progressive measures for amending the personal law of Muslims in India, nonetheless laid stress on such provisions in the Shariah which were beneficial to women but had been denied under the plea of customary law prevailing. Thus the Shariah Act demanded that the share of the daughter in the father's property be restored. This Act received tremendous support from Muslim women in India and was vigorously opposed by the orthodox section who had always sworn by the Shariah.[351]

b. Dissolution of Muslim Marriage Act, 1939

This was another important step to provide relief to Muslim women. This law entitled Muslim women to obtain a decree for dissolution of marriage in the following instances:

- If whereabouts of husband were not known for four years;
- If husband had failed to provide maintenance for two years;
- If husband had been sentenced to imprisonment for seven years or more;
- If husband was impotent at the time of marriage and continued to be so;
- If husband was insane for two years or suffering from leprosy or any venereal disease;
- The wife was given in marriage before age of fifteen and she repudiated the marriage before 18 year age;
- If husband treated her with cruelty.
- Any other ground under Muslim law.

Later, a notable advance was inclusion of section 125 in the Code of Criminal Procedure enacted in 1973. This for the first time gave a statutory right to all women including Muslims to maintenance from the husband after divorce.

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[351]Ibid.

2.2. Anglo Muhammadan Law

British Colonialism, represented by the East India Company, started its penetration of India as early as 1601 and continued under different charters. The British brought to India the legal rules of Common Law. With the Common Law they also brought their traditions, outlook and techniques in establishing, maintaining and developing the judicial system. But the common law they introduced was not pure Common Law; it was intermixed with Islamic law and came to be known as Anglo-Muhammadan law.

Centralization and unification of the legal system was important for British rule. This was seen as a condition of progress toward modern nationhood, and law and legal institutions were seen as the best means to achieve this end. The confrontation with myriad forms of legal authority and variegated local practices highlighted one of the foremost problems of colonial control: how to obtain simple, reliable, and reasonably accurate understanding of indigenous social life without sacrificing great labour and capital? Law and legal institutions provided a solution.

In the beginning, British looked upon the laws of the natives with neutrality, since their basic purpose was the collection of revenue. British penetration of Islamic law was slow. During the later part of the eighteenth century Islamic criminal justice was replaced by British (Fisch, 1983). But Hindu and Islamic law continued to be applied as the personal law of Indians such matters as inheritance, succession and religious endowments. This was the first time that Islamic law became the object of a systematic and constitutional legislation. The British courts also gave verdicts, where no specific rules were laid down in Islamic or Hindu holy books, the judges were to act according to justice, equity and good conscience.

In this way, western legal thought in India came primarily through British sources. Islamic legal rules were retained in personal status in cases involving Muslims. However, these rules were interpreted by British judges or by indigenous judges

with British training. Islamic law was interpreted along the lines of British legal thinking.[352]

3. Islamization of Laws in Pakistan

3.1. Introduction

The Islamic Ideology, according to Objectives Resolution, is the belief of the Sovereignty of Almighty Allah over the whole universe; complete surrender and obedience of man to the sovereignty of Almighty Allah. A complete system of faith and action practiced under His sovereignty; and Faith in Life Hereafter and the Day of Judgment, reward by Almighty Allah for His obedient servants and punishment against those who deny His sovereignty or transgress the limits prescribed by Him, thus making all human beings answerable to Him for all their acts, deeds and things.

Pakistan came into existence as an Islamic State in order to bring this Islamic ideology into a reality. In all the three Constitutions of Pakistan of 1956, 1962 and 1973, it was pledged that measures will be taken to enable the people to order their lives according to the teachings of Islam and in consonance with the injunctions of the Holy Qur'an and the Sunnah. It has been made mandatory in the Constitution of the Islamic Republic of Pakistan, 1973 that no law shall be made repugnant to the injunctions of the Holy Qur'an and Sunnah and all such legislation shall be rendered as null and void.

3.2. The Ideology of Pakistan

Pakistan had not yet came into existence, the Muslims in Indian sub-continent stressed that Hindu and Muslims are two nations but the Hindu majority refused to face the reality. Muslims and Hindus had been living together but no political and ideological concordance was ever existed between the two distinct identities and civilizations. The claim of Indian Muslims for the establishment of Pakistan was thus based on:

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[352] Rubya Mehdi, *The Islamization of the Law in Pakistan*, 4-5.

i. The growing convection of the Muslims that they were quite distinct from the Hindus socially, culturally and spiritually.

ii. Their intense desire to mould their thoughts and behavior on the pattern and traditions of their own distinctive culture.

These were the precise bases of the Pakistan movement. Unique and prominent aspects of the Pakistan movement were precisely its appeal to Islam. Thus, it would be wrong to say that the basis on which Pakistan was founded was communalistic fanaticism, or the anxiety of the Muslims to establish an Islamic theocracy in the areas where they constituted a numerical majority. It was rather normal, although unusually intense, craving of an oppressed community to lead a balanced and a wholesome life in the light of guidance from the faith they professed.

The oppressed Indian Muslims wanted not only to realize their own life but also laid stress that the salvation of humanity lay in practicing the Islamic way of life. Pakistan was founded because the Muslims of the subcontinent wanted to build up their lives in accordance with the teachings and traditions of Islam because they wanted to demonstrate to the world that Islam provides a panacea of many diseases which have crept into the life of humanity today. The demand for Pakistan was thus based on ideological and humanitarian grounds.[353] The Ideology of Pakistan was not to be secular but Islamic. The Objectives Resolution was adopted by the Constituent Assembly in March 1949. Theoretically it was acceptable to the Muslim members of the Assembly that Pakistan would be an Islamic state. [354]

Pakistan came into existence as an Islamic State to bring this Islamic ideology into a reality. In all the three Constitutions of Pakistan, namely, the Constitution of 1956, the Constitution of 1962 and the Constitution of 1973, it was pledged that Islamic Law will be enforced in Pakistan and measures will be taken to enable the people to

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[353] Musa Khan Jalalzai, *Islamization and Minortie in Pakistan*, (Lahore: Jumhoori Publications , 2005), 7- 8.

[354] Rashida Patel, *Islamisation of Laws in Pakistan*,(Karachi: Faiz Publishers, 1986), 7.

order their lives according to the teachings of Islam. But these solemn declarations and constitutional assurances, in fact, never materialized.[355]

The need for ideology led the rulers of Pakistan to resort to Islam, as this was the best possibility. This was understandable because it is commonly known that Pakistan is a homeland for Muslims and Islam has become the foundation of state legitimacy. The Muslim league stressed the existence of two Muslim nations within the subcontinent and insisted that there was no solution to the problems of the two nations other than the creation of a separate homeland for the Muslims.[356]

3.3. Quaid-e-Azam Muhammad Ali Jinnah and Islamization

The Quaid-e-Azam Muhammad Ali Jinnah categorically stated that Pakistan is an ideological state. The objective of the state is to establish Islamic ideology. He was desirous of inducting those persons as administrators in the setting of Pakistani Government who believed in the ideology on which it is based and who adhered to the Divine Law which they are required to administer in the state of Pakistan.[357]

Quaid-e-Azam seemed to have favoured the view that no law should be repugnant to Islam. It would guarantee equality, protection and treatment for all citizens. He also enjoined the contention that no law should prevent the members of a religious community or denomination from professing or from providing instruction in its religion. Coming to the Islamic way of life, Quaid-e-Azam took a very enlightened view in relation to the Muslims. He advised the teaching of Qur'an and Islamic Studies.[358]

Quaid-e-Azam Muhammad Ali Jinnah visualized in the state of Pakistan an opportunity for Islam to mobilize its laws, education and its culture in order to bring the lives of the Muslims into closer contact with the spirit of Islam. He argued that

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[355] Dr. S. M. Haider, *Shariah and Legal Profession,* (Lahore: Feroz Sons, 1985), 47-48.

[356] Rubya Mehdi, *The Islamization of the Law in Pakistan*, 18.
[357] Dr. S. M. Haider, *Shariah and Legal Profession,*, 101.
[358] Ibid.,15,16

Islam could reconcile itself to a status of national freedom of Muslims in Pakistan. It was the obligatory duty of the Muslims of India, in his opinion, to strive for a separate state. In a state so formed, the Muslims would create a society and an administration which would be modeled entirely on the conception of an Islamic state. A great deal of effort was devoted throughout the mission of Quaid-e-Azam to define this state in terms of Islamic Ideology. The Ideal state was sought by him not in any other contemporary system but the Islam itself. He upheld the view that in the Islamic state of Pakistan, the vicegerency of God would fulfill itself and honour its trust, by acknowledging that the ownership of all land vests in God, and by accepting that man's duty is to produce wealth for the benefit of nation.[359]

The objective of establishing a separate homeland for the Muslims of the subcontinent, in his opinion, was to prevent Hindus from exploiting Muslims. He was interested in safeguarding the liberty of Muslims. In the newly created state, Quaid-e-Azam aimed at evolving and developing a well balanced system of social justice which was set forth by Allah in His Holy Book. He had expressed his desire to eradicate all forms of evil and to encourage all types of virtue in Pakistan.[360]

He believed that by living according to the Shariah the Pakistani citizens would place their whole existence under the command of Allah Almighty. He suggested that Shariah should sanctify the whole of social life in Pakistan and should give religious significance to what may appear as the most mundane of human activities.[361]

3.4. Objectives Resolution and Islamization

The Constituent Assembly of Pakistan passed the Objectives Resolution in 1949. This Resolution was designed, in part, to serve as a framework for the drafting of Pakistan's first constitution, an exercise that proved agonizingly difficult. It took nine years from Partition for the Second Constituent Assembly (the first was dismissed in 1954) finally to agree upon a draft of a constitution. To those advocating the

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[359] [359] Dr. S. M. Haider, *Shariah and Legal Profession,,* 13-15.
[360] Ibid., 100
[361] Ibid., 99

adoption of an Islamic constitution, the resultant 1956 document was disappointing. Indeed, the Objectives Resolution was relegated to the status of a preamble. Similarly, the Objectives Resolution was included merely as a preamble in the 1962, interim 1972, and 1973 constitutions. The question whether the Objectives Resolution as preamble provided a basis to challenge other provisions of Pakistan's constitution was answered clearly and unequivocally in 1973 by the Supreme Court of Pakistan in State v. Zia-ur-Rehman.[362] In its decision, the Court ruled that the Objectives Resolution as preamble does not hold sway over the "normal written constitution". From the decision of Chief Justice Hamoodur Rehman:[363]

> "The Objectives Resolution of 1949 even though it is a document which has been generally accepted and has never been repealed nor renounced, will not have the same status or authority as the constitution itself until it is incorporated and made a part of it. If it appears only as a preamble to the constitution, then it will serve the same purpose as any other preamble serves, namely that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof".

However, in the year 1985 the "restored constitution" of President Zia-ul-Haq incorporated the text of the Objectives Resolution as Article 2-A, and thereby made it an operative part of the constitution. It is on the basis of this revision that the doctrine of the supra-constitutionality of the Objectives Resolution relies.

There are several prevalent arguments which support the contention that the Objectives Resolution is supra-constitutional, First, the Founding Fathers of Pakistan, including Liaquat Ali Khan, and the First Constituent Assembly,

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[362] State v. Zia-ur-Rehman , PLD 1973 SC 49.

[363] Charles H. Kennedy, "*Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*," *The International and Comparative Law Quarterly* 41, no. 4 (1992):781, http://www.jstor.org/stable/761030 (accessed November 7, 2009).

considered the Objectives Resolution to be the "foundation" for the creation of the State. The relevant debate before the Constituent Assembly indicates this, as does the text of the document itself. Further, the Objectives Resolution has been consistently seen as a crucial element of the ideology of the State, as evidenced by its inclusion as preamble in each of Pakistan's constitutions. Indeed, even the Supreme Court in Zia-ur-Rehman, which disallowed the contention that the Objectives Resolution as preamble was supra-constitutional, nevertheless admitted that the Resolution constituted the Grundnorm of the State.

Second, the inclusion of the Objectives Resolution through the vehicle of Article 2-A of the constitution changed the constitutional status of the Resolution. The Supreme Court's unwillingness to apply the Objectives Resolution to an interpretation of the constitution in Zia-ur-Rehman did not stem from a deficiency in the authority of the Resolution but rather from the fact that it was not part of the normal constitution. The 1985 constitution (Order) remedied this deficiency.

Third, it was the intention of the framers of the 1985 constitution (Order) that Article 2-A would "normalize" the constitutional status of the Objectives Resolution. This is evidenced by the meetings that were held between President Zia and those responsible for drafting the 1985 constitution; it is also evidenced by President Zia's "consistent devotion" to advancing the cause of Islam, as per his Islamization programme. Indeed, the changes wrought by the revision of the 1985 constitution (Order) not only allow the courts to exercise jurisdiction through the mechanism of the Objectives Resolution (Article 2-A) but enjoin them to exercise it. From this perspective the restrictions upon the jurisdiction of the Federal Shariat Court (FSC) as found in Article 203-B applies only to that Court. In all other matters, not reserved for the FSC, Pakistan's superior judiciary (the High Courts and the Supreme Court) have no limitations, including the constitution itself.[364]

The main purpose of this resolution was that the constitution of Pakistan will be based on this resolution. It proclaimed that the future of the constitution of Pakistan

[364]Gul Muhammad Khan, "Islamization of Laws in Pakistan," PLD 1986 249.

would not be modeled on European pattern but on the ideology and democratic ideas of Islam. In as such as the Holy Qur'an is the only guide to man, both in public and private life.[365]

3.5. Constitution and Islamization

i. The Constitution of 1956

The Islamic provisions of the Constitution of 1956 were not effective. Neither the Preamble nor the Directive Principles, where most of the Islamic provision were to be found, had the force of law. Islam was, in practice, legally enforceable in two major ways only. Firstly, by Article 32(2) requiring the appointment of a Muslim president, and secondly through Articles 107 and 198, providing for the organization of Islamic Research and the appointment of Commission, etc., to bring existing laws into conformity with Islam.

Most writers analyzed the constitution as a compromise between Traditionalists and Modernists, but in the end both sides abused it because of its attitude of hypocrisy and vagueness as to its Islamic provisions. Afzal Iqbal, a Modernist, remarks: 'The Constitution had an Islamic façade, but the hard core was missing. This Constitution was called a compromise between Modernists and Traditionalists as far as the Islamic Provisions are concerned, because the Modernists were satisfied that Islam was woven into the fabric of the state as a matter of policy and not of law. This is why they also avoided the word Shariah – while the Traditionalists hoped that the provision saying that all laws should be made in conformity with the Qur'an would mean adoption of the legal aspects of Islam.

The Constitution of 1956 was basically modern in its character. Islamic provisions were only symbolic in nature. Their practical influence of law was

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[365]Hamid Khan, *Constitutional and political History of Pakistan,* (Oxford University Press,2007), 59.

not visible. The Islamic provisions were mostly a compromise and therefore vague.[366]

iii. The Constitution of 1962

The second Constitution of Pakistan was directly affected by the thinking of President Ayub Khan. As far as the religious provisions of the Constitution are concerned, he stressed a progressive interpretation of Islam. In this constitution no particular effort was made to include Islamic provisions. But after pressure from the Traditionalists a compromise was made. The purpose of rephrasing the Objectives Resolution and other Islamic provisions had obviously been to make room for a more liberal interpretation of Islam. However, such vagueness in the Islamic provisions was not tolerated by the Traditionalists. It was a courageous act of President Ayub to exclude or rephrase the Islamic provisions in the 1962 constitution and he was unable to sustain this approach.

This also shows that the Modernists had to compromise with the Traditionalists on one level or another. For a state founded in the name of Islam, it was important for the reason for its existence to be included in the Constitution. Ayub knew this, especially with reference to East Pakistan: the only uniting factor between West and East Pakistan was Islam.[367]

iv. The Constitution of 1973

The Constitution of 1973 is the only Pakistani constitution to be drawn up by an elected body. The first constitution was made by the Constituent Assembly and the Constitution of 1962 was framed by an army general. As with the previous constitutions, it was a tedious task to frame the 1973 Constitution. Zulfiqar Ali Bhutto's (then Prime Minister of Pakistan), period could be marked by the arrangement of such events as the Islamic Summit Conference of February 1974 in which thirty-five member states of the

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[366]Rubya Mehdi, *The Islamization of the Law in Pakistan*, 82-87.
[367]Ibid., 88-95

Islamic Conference participated, and international Seerat Conference, held in March 1976, which was attended by the Imam of the Ka'aba and 100 prominent scholars and ulema. Another aspect of this period which should be noted, with reference to the Islamic Provisions of the constitution, was the nationalization of major industries and agrarian reforms.

As in the previous Constitutions, the Islamic provisions are again a compromise between Modernists and Traditionalists. Nevertheless, the interesting thing about the Constitution of 1973, was, as Bhutto himself said, 'Nobody can deny that it is an Islamic Constitution. It contains more Islamic Provisions than any of the past constitutions of Pakistan as well as any of the other Constitutions of Muslim countries.

The study of the above discussion shows that there is inconsistency and instability in the Islamic provisions of the constitutions of Pakistan. Inconsistency has existed in the sense that most of the Islamic provisions were just written into the constitutions and there was no intention of implementing them, at least not until 1977. They were provided only as compromise clauses and Modernists and Traditionalists saw different meanings or interpretations of them. Instability existed in the sense that, on the one hand, constitutions could be abrogated without legal authority and, on the other hand, Islamic provisions could be replaced or reinterpreted, depending on which faction of Muslims was ruling. Another important point to note is that, in spite of all efforts to Islamize the Constitutions of Pakistan, the constitution was set out in a modern fashion no different from the one introduced by the British.[368]

4. Islamization and Criminal Law

4.1. Introduction

Crime is a curse and its gravity needs no emphasis. It disturbs the balance of a society and ultimately corrodes it. The secular modern societies, which boast of their resources and theories of crime and punishment, are the living examples of such

[368]Ibid., 97-108

corrosion. These societies are not fully equipped to curb crime as they are devoid of Allah's guidance and conception of accountability in the life of Hereafter and have no moorings in morality. Moreover the man-made laws which control them are fallible and deficient. The only society which has the capability to overcome the menace of crime is the Islamic society as it is based on Divine order and aims at human perfection and peace in this world and felicity in the Hereafter. It conforms to the dictates of laws and principles of morality as enunciated by Islam and is quite different from the modern societies which reflect a variety of ethical values and throw the door open for all sorts of vices, evils and crimes.[369] Islamic law, which controls the Islamic society and guarantees its preservation, takes a serious view of crime and in order to check it postulates, *inter alia*, an ideal and unique punitive system having fixed as well as variable elements, which are essential for a good legal system.[370]

The Shariah consists of two sets of rules. The first set of rules has a religious character and consists of a classification of human behaviour into five categories: obligatory, recommended, indifferent, reprehensible, and forbidden. These categories are related to reward and punishment in the Hereafter. The other set of rules governs the relations between human beings and consists of rules dealing with the legal effects of juridical acts and transactions, i.e. the rights and duties of people with regard to one another. Both sets are interrelated. Complying with a legal obligation, e.g. the obligation of a buyer to pay the price of the commodities he purchased is also the performance of a religious duty, to be rewarded in the Hereafter. Or, to take another example, pigs are impure animals which may not be consumed. As a consequence, they are not regarded to constitute legal property. Their possession is not protected by the law and contracts concerning pigs are null

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[369] Dr. Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists, (Lahore:* Islamic Publications, 1980), 92.

[370] Dr. S. M. Haider, *Shariah and Legal Profession,* 324.

and void. Forbidden and therefore sinful behaviour does not only result in punishment in the Hereafter, but may also be punished in this world.

The Shariah gives the caliph and judges the discretionary power to inflict punishment on those who have committed sinful acts. The penalties they may impose vary, according to the gravity of the act and the social status of the defendant, from reprimand to death. This discretionary power is called ta'zir. Besides this general power of the authorities to mete out punishment, the Shariah knows a number of more precisely defined offences that can be regarded as Islamic criminal law Stricto Sensu. They fall under two headings: Iinayat, or offences against another's person, and crimes with fixed penalties (*Hadd*, plural Hudud), called *Hadd* crimes.[371]

The punishment known as *Hadd*, which is a fixed element in that its quantum has been finally prescribed and can neither be altered nor modified, is the nucleus of the system. It wipes out certain heinous crimes and ensures the preservation of the values that Islam upholds for the dignity of human society and spiritual purification of human soul.[372]

Hadd etymologically means measure, limit[373] or obstruction.[374] Technically it meant a punishment the measure of which has been definitely fixed[375] or punishment ordained by Qur'an and *Sunnah* or the correction appointed and specified by the law on account of the right of Allah[376] or a penalty appointed or specified 2% law on account of rights of Allah (or public justice). The rights of Allah correspond to the

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[371] Rudolph Peters, "The Islamization of Criminal Law: A Comparative Analysis," Die Welt des Islams, New Series, vol. 34, Issue 2 (1994): 246-274, http://www.jstor.org/stable/1570932 (accessed November 7,2009).

[372] Emmanuel Zafar, *Law and Practice of Islamic Hadoods* , (Lahore: Khyber Law Publishers,1981),7.

[373] Sir Abdur Rahim, *Muhammadan Jurisprudence,* (Lahore: All Pakistan Legal Decisions) ,361.

[374]Al Marghinani,, *Al Hedaya,* (Lahore: Premier Book House, 1975), 175.

[375] Sir Abdur Rahim, *Muhammadan Jurisprudence,* 361.

[376]Abu al Hasan Burhanuddin Al Marghinani, *Al Hidaya,* Trns. Charles Hamilton, vol, 1 (Karachi: Darul Ishat), 781.

public rights as they involve benefit to the community at large and are referred to Allah because of the magnitude of the risks involved in their violation and of the comprehensive benefits which result from them. In other words, the rights of Allah are to be construed as rights of society because the punishments of *Hadd* are meant to deter from mischief and harm to people and it is a collective obligation of the Muslim community to enforce them. All *Hadd* crimes essentially involve violation of the Text[377] and their punishments are equal to their magnitude. The crimes falling within the pale of *Hadd* are:

1. *Zina* (whoredom or fornication)
2. *Sharab* (drinking wine)
3. *Sariqa* (theft)
4. *Qate Tariq* or *Harraba* (highway robbery)
5. *Qazf* (false accusation of adultery)
6. *Irtidad* (apostasy)
7. *Al Baghye*

The punishments of *Hadd* have been prescribed for these crimes because they impair human dignity, have far reaching effects in society and violate the public interests or the aim of Shariah in regard to man, namely protection of sanctity of family and progeny, protection of property, protection of honour and protection of religion.[378]

4.2. Enforcement of Islamic Criminal Law in Pakistan: *Hudūd* Ordinance

On 5th July, 1977, when the reins of power came into the hands of General Muhammad Zia-ul-Haq, he as Chief Martial Law Administrator gave top-priority to the enforcement of Shariah in the country. The President of Pakistan, on the recommendations of the Council of Islamic Ideology, also promulgated five Ordinances on the 12th of Rabi-ul-Awwal, 1399 A.H., 10th February, 1979 amending

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[377] Abdul Qadir Auda,*Islam ka Faujdari Qanoon*, (Lahore: Islamic Publications, 1979), 151.

[378] Abu Hamid Al Ghazzali, *Al-Mustasfa*, vol.1 (Cairo: Maktbah Mustafa Muhammad, 1937), 139-140.

the existing Pakistan Penal Code relating to certain offences affecting moveable property of the people and moral and social order of the society, so as to bring it in conformity with the Holy Qur'an and the Sunnah. By the promulgation of these Ordinances, the existing laws relating to the offences of theft, robbery, dacoity, adultery, false accusation of adultery and wine-drinking were replaced by the Islamic provisions of *Hudūd*; the almighty Allah's express Commandments par excellence, the fixed punishments prescribed by the Holy Qur'an proved and established by the Sunnah of the Prophet (PBUH) on which there is an Ijma (consensus) of the Holy Prophet's (PBUH) reverend Companions (Sahabah).[379]

With the passing of the 8th Amendment in the Constitution in 1985, the *Hudūd* Ordinance is now protected by the Constitution and changes in this law can only be made with a two third majority in the Parliament.

The case that highlighted national and international protest against the *Zina* Ordinance was the Safia Bibi case in 1983. Safia Bibi, a 13 year old blind girl allegedly raped by her employer and his son but was charged for adultery under the *Zina* Ordinance whilst the rapists were acquitted. Upon national and international pressure the Federal Shariat Court called for the record of the case and released Safia Bibi from prison.

In 1994, the Commission of Inquiry for Women was set up to review the laws and in 1997 under the chairperson Justice Nasir Aslam Zahid, the report recommended repeal of the *Hudūd* Laws.

Again in the year 2000, a permanent National Commission on the Status of Women (NCSW) was established to review all laws and policies affecting women. Under the chairperson Justice Majida Rizvi a 15 member special committee reviewed the *Hudūd* Ordinances and recommended repeal of these laws.[380]

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[379] Dr. S. M. Haider, *Shariah and Legal Profession*, 50.
[380] http://www.geo.tv/zsarch/history.asp (accessed March ... , 2010)

i. The Offences Against Property (Enforcement of *Hudūd*) Ordinance (VI of 1979)

In Case of theft, the punishment of imprisonment or fine, or both, as provided in the existing Pakistan Penal Code for such offence was substituted by the amputation of the right hand of the offender from the joint of the wrist by a surgeon, causing least pain, and with utmost care, thus to award of *Hadd* punishment, provided its requisite conditions relating to the quantum of the property stolen out of the safe and protected custody or place be proved by confession or the evidence in court of at least two truthful persons free from major sins, after full scrutiny and proper cross-examination and to the full satisfaction of the trial Court are fulfilled, on the complaint of the person whose property has been stolen. However, in cases where the property stolen falls within the exceptions, such as wild grass, fish, bird, dog, pig, intoxicants, musical instruments, perishable food-stuff (except that there is an arrangement for preserving the latter for a long period), or that the thief has a share in the stolen property, provided that the value of stolen property after the deduction of amount of his share is less than the fixed quantum (Nisab), making the theft liable to award of *Hadd.* Or where the requisite condition for theft relating to quantum of property stolen or the number of witnesses are not fulfilled, or that the property stolen is returned by the thief before the owner's filing his complaint, the Court will not award the *Hadd* punishment.[381]

The punishment of amputation of hand will not be imposed in some other cases when the thief is one of the progeny of the owner of the property, or is the husband or wife, or when the guest steals from the home of the host, when the servant or employee has committed a theft in his master's or employer's house where he is allowed free access, or when the creditor steals the debtor's property, provided that the value of stolen property after the

[381]Dr. S. M. Haider, *Shariah and Legal Profession,* 51.

deduction of the amount due to him is less than the fixed quantum (Nisab). The *Hadd* punishment of amputation of hand for theft will also not be awarded when the offender is entirely without the left hand or left thumb, or at least two fingers of the left hand or the right foot, or any of these is entirely unserviceable.[382]

In case of robbery, when a person (or a group of persons) is equipped with arms, or in any other manner makes a show of force, for the purpose of taking away openly (without his consent any such property in someone's possession, the theft of which may be liable to award of *Hadd*) attacks him, or causes wrongful restraint, or threatens him with murder or hurt, will be liable to *Hadd* punishment, namely, if the offender takes away property to the extent of the fixed quantum, his right hand from the wrist and left foot from the ankle shall be amputated by a surgeon. If he commits murder while committing robbery, he shall be sentenced to death which shall not be remitted even if the murderer is pardoned by the heirs of the murdered person.[383]

ii. The Offence of *Zina* (Enforcement of *Hadd*) Ordinance (VII of 1979)

Section 497 of the Pakistan Penal Code dealing with the offence of adultery provided certain exceptions to the offence inasmuch as if the adultery is with the consent or connivance of the husband, no offence of adultery was deemed to have been committed in the eye of law. The wife, under the prevailing law, was also not to be punished as abettor. Islamic law knows no such exception. It takes a very serious view of fornication and adultery because they damage the social norms and defeat the moral order of the human society which Islam wants to preserve for human dignity.[384]

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[382]Ibid.
[383]Ibid.
[384]Dr. S. M. Haider, *Shariah and Legal Profession,* 51.

Thus, in terms of the Holy Qur'an and the Sunnah, the provisions of law relating to adultery were replaced as that the woman and the man guilty of adultery will be flogged, each of them with hundred stripes, if unmarried. And if they are married they shall be stoned to death. The law, however, recognizes duress and coercion as an exception to punishment in case of fornication and adultery. Another aspect of the crime of *Zina* has been recognized as *Zina*-bil-jabar (Rape) in *Hudūd* laws, which differs from adultery or fornication in substance. A person is said to commit *Zina*-bil-jabar if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly and legally married. But for this offence certain different conditions have been laid down in order that the culprits may be punished. *Zina*-bil-jabar entails that the offence should be committed against the will and without the consent of the victim, or with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt or with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believers that the offender is another person to whom the victim is or believes herself or himself to be validly married. The punishment ordained for such offence amounts to the stoning to death at a public place or with whipping numbering one hundred stripes at a public place, if he or she is not a muhsan (married) and not muhsan (unmarried) respectively.[385]

iii. The Offence of *Qazf* (Enforcement of *Hadd*) Ordinance (VIII of 1979)

The offence of *Qazf* connotes false accusation of adultery and enjoins that whoever by words either spoken or intended to be read, or by signs or by visible representation, makes or publishes an imputation of *Zina* concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation or hurt the feelings of such person is said to commit the offence of *Qazf*. Certain necessary exceptions have also

[385]Ibid.

been laid down in order that innocent persons or persons doing the same in good faith may not fall under the same category as that of the actual perpetrator doing it with criminal and malignant intention.

It is not *Qazf* to impute *Zina* to any person if the imputation be true and made or published for the public good. Whether or not it is for the public good is a question of fact. Another exception enjoins that it is not *Qazf* to prefer in good faith an accusation of *Zina* against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation. The punishment for the offence of *Qazf* amounts to whipping the offender numbering eighty stripes and such punishment shall not be executed until it has been confirmed by the court to which an appeal from the court awarding the punishment lies.[386]

iv. The Prohibition (Enforcement of *Hadd*) Order (4 of 1979)

The said law mainly relates to modify the existing law relating to prohibition of intoxicants so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and the Sunnah. Hence, the same was promulgated by the President and Chief Martial Law Administrator, General Muhammad Zia-ul-Haq in the year 1979. In this law all kinds of intoxicants, in particular, wine have been prohibited even to the extent of imports, exports, transports and manufactures and sales.[387]

The punishment enjoined for the offence amounts to imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding three stripes and also liable to fine. Some exceptions in order to avoid the punishment of *Hadd* are also in line with the commission of the offence. For example, when drinking is proved only by confession of the convict but he retracts his confession or when drinking is proved by testimony, but before the execution of *Hadd*, any witness resiles from his

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[386] *Pakistan Penal Code, (Lahore: PLD publishers, 1968),* 480-487.
[387] Ibid., 490

testimony so as to reduce the number of witnesses to less than two, which a minimum requirement for the enforcement of *Hadd*.[388]

4.3. *Qisas* and *Diyat* Ordinance

The law of murder, called the law of *Qisas* (life for life) and *Diyat* (ransom as compensation of murder) in Muslim terminology has been one of the most controversial laws during the process of Islamizing the law in Pakistan.

Since the creation of Pakistan, the Pakistan Penal Code (PPC) and Criminal Procedure Code created by the British Raj in 1860 and 1898 have been applied to with the law of murder. The punishments for murder laid down in the PPC are death, imprisonment and a fine according to the circumstances of the case. During Islamization, efforts were made to replace the codes by the Islamic law of murder, which implies that murder should not be considered an offence against the state, but an offence against the individual and should be compoundable. The PPC does not recognize the option of blood money and clemency for the next of kin or heirs of deceased victims and is therefore considered not to be in accordance with the Islamic law of murder.[389]

The *Qisas* and *Diyat* Ordinance became law in 1990. The draft ordinance generated a lot of public discussion, in which there was pressure especially from women against its implementation. The draft ordinance relating to the law of *Qisas* and *Diyat* was prepared in June 1981 by the Council of Islamic Ideology. It was debated by the committees in the Majlis-i-Shura and the Ministry of Religious Affairs. The draft ordinance drew a massive public response when it was published in order to elicit public opinion about it.[390]

It should be noted here that, besides arising in the draft ordinance, the issue has also been raised in the courts. A case came up before the Shariat Bench in 1980, in which Gul Hassan, who had been convicted and sentenced to death for murder under

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[388]Ibid.,492- 493

[389] Rubya Mehdi, *The Islamization of the Law in Pakistan*, 151.

[390]For detail, Pakistan Times, 22 July 1984., & Dawn, 21 February 1984.

Section 302 of the PPC, moved a Shariat petition and sought a declaration that the above mentioned provision was repugnant to the injunctions of Islam. The court established that *Qisas*, *Diyat* and a pardon are the only three options available for dealing with a murder case in Islam. As the PPC contained no such provision, therefore, the court held that not only section 302, but all the law relating to murder needed amendment.[391]

The draft ordinance divided murder into four forms: *qatal-i-amad* (premeditated murder), *qatl-i-shibha* (suspected premeditated murder), qatl-i-khata (accidental murder), and qatl-bi-sabab (consequential murder). Injuries or bodily harm were divided into five forms. There were *itlaf-i-udu* (cutting off a limb or limbs), *itlaf-i-salahyat-i-udù* (permanently impairing the functioning of part of the body), *shajjah* (injury to head and face), *jurh* (injury other than to head or face, leaving a mark), and all kinds of other injuries. The ordinance made the abovementioned offences compoundable. The most important points about the draft ordinance were the following:

i. In case of qatal-i-amad the evidence of women was not entertained at all. For proof of qatal-i-amad at least two pious Muslim adult male witnesses were accepted.

ii. If the victim was a female, her *Diyat* shall be one half of that of a man.

This was resented by the women of Pakistan. They argue that both sexes enjoy equal status in Islam and this distinction in the rate of *Diyat* discriminates against women.[392]

The issue was also debated between Traditionalists and Modernists. About his distinction between the *Diyat* of a man and that of a woman, Rafiullah Shahab observed that as to punishment of *Qisas* no distinction was made between a man and a woman, while a distinction was made in the case of punishment of *Diyat* only. He argued:

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[391]Gul Hassan Khan vs. The Govt. of Pakistan, PLD 1980 Peshawar I.
[392]Rubya Mehdi, *The Islamization of the Law in Pakistan,* 152.

> If the same principle is applied, as in the case of *Diyat*, to the case of *Qisas* it will imply that it should also be reduced to one half of the actual punishment of *Qisas*. The idea of one half of *Qisas* will be impracticable as a half person cannot be killed. Its implementation would only be possible in the killing of two women by the same murderer. Killing of the half person is practically impossible, it will require killing of two women.

Rafiullah Shahab concluded that the draft ordinance had created a very awkward situation for women in Pakistan.[393]

Another contradiction was found concerning the *Arsh* of a finger of a man and a woman. The *Arsh* for damage to one finger was fixed at one tenth of the full *Diyat* of a man. According to this rate, the *Arsh* for damaging all ten fingers of a woman would be equal to the full *Diyat* of a man. This was contradictory to the rule that, when a woman loses her life, her *Diyat* was reduced to one half of that of a man.

The third important point about the draft ordinance was that it also provided a law concerning abortion. This was considered to be vague and contradictory. A distinction was made between *isqat-i-janin* (miscarriage caused where the limbs or organs were formed) and *isqat-i-hamal* (miscarriage caused where the limbs or organs were not formed). Punishments were provided in both cases. According to one Islamic viewpoint, abortion is allowed up to one hundred twenty days of pregnancy, but this ordinance did not seem to recognize that verdict, although it was accepted by almost all renowned Muslim jurists.[394]

This ordinance has not really brought any notable change in the law of theft. The same punishments which were alleged to unIslamic are implemented for practical purposes. Punishment by amputation was introduced in 1979, but no hand has been amputated so far although hundreds of thefts and robberies are committed in

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[393]Ibid., 153
[394]Ibid.

Pakistan. *Ta'zir* punishment is imposed in all cases. This shows that Islamizing the law of theft has not really affected the law already prevailing in the country. The trial of cases under *Hadd* has been nothing but an intellectual exercise, while the PPC still applies for practical purposes.

Asma Jehangir and Hina Jilani have criticized *Hadd* punishments for being ludicrous and out of proportion to the crimes committed. They say that, if a man is seen by male witnesses stealing an object worth Rs.2, 000/- from an enclosed place, he shall be punished by having his hand amputated. On the other hand millions of dollars can be stolen by an adult Muslim in the sight of several women and/or non-Muslims, yet the offender escapes *Hadd* and be given *Ta'zir* punishment. Similarly, a Rolls Royce can be stolen without fear of *Hadd*, since the robbers did not take it from an enclosed space.

If we look upon the crimes against property and robberies in Pakistan since 1979, there has been no notable change. The contention that the Islamic punishment of limb amputation would help to bring down the rate of theft does not seem to have had any effect, according to figures provided by the Bureau of Police Research and Development of the Ministry of the Interior.[395]

4.4. The Execution of Punishment of Whipping Ordinance 1979

Flogging as a method of inflicting judicial punishment has a long history. In Islamic history, during the time of the Prophet Muhammad and early Muslim rule, corporal punishment meant beating with hands, shoes and clothes. The practice later took the form of lashing. In India corporal punishment including whipping was widespread under Muslim rule and during the British period. The whipping Act, 1909, made by the British was still in force in Pakistan until the promulgation of the Execution of the Punishment of Whipping Ordinance, 1979. [396]

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[395]Rubya Mehdi, *The Islamization of the Law in Pakistan*, 154-155.
[396]Ibid., 142

The Execution of the Punishment of Whipping Ordinance, 1979 provides a specification of the whip, the conditions and modes under which punishment is to be carried out and finally how it is administered. According to the ordinance, the whip (excluding the grip) should consist of one single piece without any knob or joint in it. The length and thickness of the whip may not exceed 1.22 meters and 1.25 centimeters. A medical officer must examine the convict before the execution of the punishment to make sure that the convict is medically fit to undergo the punishment. If the convict is too old or too weak, the flogging should be carried out in such a manner and at such intervals that it does not cause the death of the convict.[397]

The ordinance also lays down that flogging should be carried out in moderate weather (neither too hot nor too cold). It requires the impartiality and mature understanding of the person executing the punishment; while applying the whip, the executioner should not raise his hand above his head allowing the whip to be applied with moderate force, so as not to lacerate the skin of the convict. He should not apply the whip to the head, face, stomach, chest, or other delicate parts of the body; on the other hand, lashes shall be spread over the body. The lashes shall be applied, in the case of a male, while he is standing and, in the case of a female, while she is sitting.[398]

Section 7 of the ordinance empowers the provincial government to make rules for the execution of whipping. Two of the rules made by the Punjab Government are worth noting. As is held by the Muslim jurists that flogging in Islam is for deterrent purposes, a widespread practice in Islamic countries is to flog in public. According to one of the rules, the place should be fixed by the court, and, in cases where it does not do so, places approved by the provincial government are to be used for such purpose. It would be right to mention here that stadiums, public parks and public places of similar type have been used for flogging. The other rule dealing with the persons carrying out the punishment is interesting because it gives the convict the right to object if he / she think that the person appointed to execute the punishment is

[397]Ibid., 143
[398]Ibid.

not impartial. If the authorities find the objection reasonable, another impartial person is to be appointed.[399]

Moreover, there is conflicting information and reports about the manner in which flogging is administered. There have been anomalies and contradictions regarding the question whether the Ordinance had been complied with. And there are strange and inequitable discrepancies in the number of lashes awarded in relation to the value of the offence. The punishment of flogging under the *Zina* Ordinance has been freely implemented on male convicts freely in public places. In the case of female convicts it has always been questionable whether it was acceptable to whip them in public places, because of the common feelings that the 'weaker sex' should not be treated so harshly. So in some of the cases women were flogged inside jail.[400]

The flogging of male convicts, on the other hand, takes place in public and also attracts large crowds. In some cases, a loudspeaker has been used so that people can hear the screams of the convict from a long distance. People are attracted to see a flogging for different reasons. One of the general effects of public flogging is to produce a state of terror among people. This state of terror has served the purpose of the authorities in Pakistan to pacify people politically, a purpose which is also considered to be one of the reasons for introducing cruel Islamic punishments.[401]

4.5. Women Protection Act, 2006

In 2006, the government managed to obtain parliamentary approval for the Protection of Women Act (PWA). Whereas, historically the most vocal critics of the *Hudūd* laws had been insisting on outright repeal, the promoters of the bill sought a reform of the *Zina* and *Qazf* Ordinances in accordance with the modernist Islamic critique. Thus, the bill proposed the abolition of the *Ta'zir* offences of *Zina* as well as *Qazf*. This is in accordance with the view that *Zina* is only a *Hadd* offence and the *Ta'zir* offence *Zina* is incompatible with the Qur'anic provisions on *Qazf*. The draft

[399]Ibid., 144
[400]Ibid.,145
[401]Ibid.,146

bill also proposed the abolition of *Zina bil-jabr* liable to *Hadd*, indicating the view that rape is distinct from *Zina* and is a *Ta'zir* offence only; *Qazf* does not apply to accusations of rape and neither does the requirement of a confession or four male witnesses in order to inflict the most serious punishment for rape. Abolition of the marital rape exemption introduced by the *Zina* Ordinance was also recommended in the bill. The criminalization of the publicization of the name of a woman with reference to *Zina* or rape case was also proposed. In addition to the fundamental restructuring of the *Hudūd* laws, a number of significant procedural safeguards were also proposed in the bill, and which have been included in the Act.

After heated parliamentary debates in which the established political alignments were reconfigured in the light of the historical ideological divides over the issue – the PPP and MQM supported the initiative while the pro-Musharraf PML-Q found itself leaning towards the MMA, the treasury sought a compromise based on the recommendations of a committee of ulama. The Act represents the compromise reached on the issue and represents most of the key demands of both sides. Thus, the modernist position was incorporated to the extent that the offence of *Zina* liable to *Ta'zir* was abolished and the *Zina* Ordinance now includes only the *Hadd* offence for *Zina*. However, an offence of 'fornication' has been included in the PPC, defined almost identically as the *Ta'zir* offence of *Zina* and punishable by imprisonment for up to 5 years and a fine of up to Rs.10, 000.[402]

Likewise, *Qazf* liable to *Ta'zir* has been expunged from the *Zina* Ordinance but has been replaced by the offence of 'false accusation of fornication' in the PPC.[403]

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[402] Section 7 of the PWA,2006 which inserted section 496-B in the Pakistan Penal Code:

(1). A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.

(2). Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.

Note that the penalty for *Zina* liable to *Tazir* could be imprisonment for up to 10 years.

[403] Section 7 of the PWA inserted section 496-C in the Pakistan Penal Code:

Both the *Zina* liable to *Hadd* and fornication offences have been made cognizable only by a court, meaning thereby that when a complaint is made of either offence the police may not arrest the accused unless directed to do so by the court.[404] When someone makes an accusation of *Zina* liable to *Hadd*, he is required to produce four eyewitnesses failing which a conviction for *Qazf* liable to *Hadd* is a serious possibility. More importantly from a practical standpoint, if someone brings a complaint of fornication, he is required to appear in court along with two eyewitnesses of fornication, failing which the court may convict him (and the witnesses) of the false accusation offence on the spot and sentence him to imprisonment for up to five years and fine of up to Rs. 10,000.[405]

The offence of *Zina-bil-jabr* liable to *Hadd* has been abolished.[406] The offence of rape has been repatriated to the PPC with two significant changes: firstly, the marital rape exemption has been abolished and, secondly, the minimum penalty for rape has

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Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees…

Note that the penalty for *Qazf* liable to *Tazir* could be imprisonment for up to 10 years

[404]Section 8 of the PWA inserted §203A and 203C in the Code of Criminal Procedure. §203A states that: (1). No court shall take cognizance of an offence under section 5 of the Offence of *Zina* (Enforcement of Hudūd) Ordinance, 1979 (VII of 1919), except on a complaint lodged in a Court of competent jurisdiction.

(2). The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine, on oath, the complainant and at least four Muslim, adult male eye-witnesses, about whom the Court is satisfied having regard to the requirement of tazkiyah-al-shahood, that, they are truthful persons and abstain from major sins (kabair), of the act of penetration necessary to the offence…

(4). If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.

A similar procedure is stipulated in §203C for the offence of fornication, except that the evidentiary requirements are reduced to the testimony of "complainant and at least two eyewitnesses to the act of fornication."

[405] See §496C of PPC, which states that the "Presiding Officer of a Court dismissing a complaint under section 203-C of the Code of Criminal Procedure, 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence."

[406]See section 13 of PWA.

been raised to ten years, the maximum still being twenty-five years of imprisonment.[407] The Act explicitly states that a case of rape shall not be converted into one of fornication or *Zina* liable to *Hadd*.[408] The proposed criminalization of the disclosure of a woman's name in a *Zina* or rape case has been dropped in the final form of the Act.

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[407]Section 5 of the PWA inserted the following sections in the Pakistan Penal Code:

375. Rape

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

(i) against her will;

(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

376. Punishment for rape

(1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten rears or more, than twenty-five years and shall also be liable to fine.

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.

[408] section 12A of the PWA inserted section 5A in the *Zina* Ordinance which states that:

No complaint of *Zina* under section 5 read with section 203A of the Code of Criminal Procedure, 1989 and no case where an allegation of rape is made shall at any stagy be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of fornication shall at any stage be converted into a complaint of *Zina* under section 5 of the Offence of *Zina* (Enforcement of Hudūd) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.

As such, the Act seeks to obviate most of the major criticisms of the *Hudūd* laws. The key issues identified with the *Hudūd* laws, namely the conversion of rape into *Zina*, the ease with which prosecutions for *Zina* could be initiated and the irrelevance of the *Qazf* provisions have all been remedied through the procedural provisions inserted in the PWA. While the discriminatory evidentiary provisions of the *Hadd* offences of *Zina* and *Qazf* still exist on the statute books, these are likely to be of no practical relevance as the history of the enforcement of the *Hudūd* laws indicates.

However, from a traditionalist perspective, in many areas the PWA simply overrules the provisions of traditional Islamic law and it is unlikely that the Islamic opposition will ever be reconciled to the Act remaining on the statute book in its present form. The PWA has made *Zina* a non cognizable offence that is liable to a five year prison sentence and a Rs.10,000 fine. Contrary to the provisions of Islamic law, the fine is to be paid to the state and not to the victim of rape. Rape, however, will be punishable by death or a 25 year prison sentence. As we saw above, in Islamic law punishment is determined primarily by the marital status of the accused. The Act thus stands in clear violation of the traditionalist stance. The PWA also introduced tremendous confusion and contradiction in the law: it is unclear in the Act just how many witnesses will be needed to prove the crime of *Zina*. Section 8 of the Act, states that a complainant and four others must testify to the occurrence of the crime. The phrasing is confusing but it could be interpreted as changing the Islamic law of evidence in such cases which treat the testimony of the complainant as one of the four needed to prove the crime. The Act also states that an allegation of *Zina* that is not proven will be converted into a *Qazf* offence. This makes a failed accusation of *Zina* a strict liability offence and deprives the accused of the opportunity to defend him as required by Islamic law. By taking the crime of rape into the PPC, the PWA implicitly allows the testimony of women to be considered in cases where *Hudūd* punishments could be applied. If this is the case, this will be another feature of the Act that may be unacceptable to the traditionalists.

One of the main problems being faced by those accused of *Zina* under the Ordinances, from the perspective of the traditionalists, was the fact that Sessions courts simply refused to follow the guidelines on interpretation and standards of evidence being set down by the higher courts. Some of the worst abuses of the rights of women under the Ordinances occurred where a party's complaint of rape would be treated as a confession and where an unexplained pregnancy was considered proof of *Zina*. The Federal Shariat Court had, within two years of the promulgation of the Ordinances, held that the approach being adopted by the session courts to determine the guilt of the accused were not correct.[409] In the famous Safia Bibi case the Federal Shariat Court again took it upon itself to review the judgment of the Sessions court. It stated that pregnancy on its own was not proof of guilt. It also stated explicitly that failing to prove a charge of rape would not automatically make someone liable to the punishment for *Qazf*.[410] However, because of the consistent inability of the Sessions courts to follow the precedents set by the FSC the Court found itself having to repeat itself eleven years later in the Rani case where Dr. Ghous Muhammad J. categorically stated that "mere pregnancy is not sufficient to convict a woman for *Zina* especially where she claims the pregnancy to have been caused due to her rape." He added that the burden of proving actual *Zina* fell on the prosecution and that "proof of pregnancy or some other form of medical testimony/report on its own could be of no consequence as the latter would at best only serve to be corroborative in nature."[411] Still, as late as 2002 the Sessions court convicted a rape victim of *Zina* based on her pregnancy. Once more the FSC had to reverse the decision and restate the principles it had set in earlier cases.[412] Considering that the inability of the Sessions courts to follow precedent was one of the main reasons for the victimization of women, the provisions of the PWA to give even more power to sessions courts in this area makes little sense. The Act contains no measures to ensure that future Session court judges do not ignore precedents and guidance from superior courts. Under Section 7 and Section 8 of the PWA empowers

[409]Muhammad Ashraf v. The State, PLD 1981 FSC 323 -326.
[410]Mst Jamila Bibi v. Muhammad Yasin and others, PLD 1983 FSC 523 at 526.
[411]Mst Rani v. The State, KLR 1996 Shariat Cases 150.
[412] Mst Zafran Bibi v. The State, PLD 2002 FSC 1.

the session court to hear the initial complaint of *Zina* and to send summons and carry out subsequent investigations. Far from restricting the power of these courts who failed to understand and implement the guidance of the FSC and the Supreme Court, the PWA gives these courts even more power and asks them to refer to the Ordinances, the PWA and the PPC, all of which now govern different parts of the law relating to sexual offences.

As per the traditionalist stance, the rights of women have been further jeopardized by the provisions of *li'an* (false accusation) in the PWA. Section 25 of the Act repeals Sections 14, 3 and 4 of the *Qazf* Ordinance. Whereas under the Ordinance a husband who accused his wife of *Zina* and refused to take oath to the occurrence of the crime would be imprisoned until he took the oath and gave his wife the opportunity of defending herself from this charge. Under the PWA however, a husband can initiate li'an against the wife and will not be imprisoned for not following upon his allegation. The Act states that the li'an procedure belongs in the Dissolution of Muslim Marriages Act 1939 as a "form of dissolution of marriage."[413] But this means that there is no legal protection for the woman who wants to free herself of the charge of adultery made by her husband.

In summation, the traditionalists, although they might have considered the Ordinances less perfect, are left unsatisfied by the new Act. From their perspective, the PWA certainly does not rectify the Islamic shortcomings in the Ordinances by making them adhere more closely to the Qur'an, the Sunnah and the practice of the earliest generations of Muslims, nor does it suspend the existing laws until such a time as the necessary conditions for the imposition of these punishments are deemed to have been achieved. In addition, many Islamists simply do not accept that the *Hudūd* laws are as demonic as the government made them out to be when it was trying to gain support for its reforms. Many people simply do not accept that the *Hudūd* laws are the worse example of the denial of rights to women in the country.

[413] See section 29 of Protection of Women Act 2006

Some recent independent studies also suggest that the negative impact of the *Hudūd* laws have been exaggerated.[414]

Hudūd laws of Pakistan have been at the heart of the debates concerning the proper place of religion in statecraft. As a result of the ideological significance of these laws, the practical and not so mundane issues, concerning their enforcement and the miscarriages stemming from the structure and language of the laws, the practice of the trial courts and law enforcement agencies remained obscured from the strict and depoliticized scrutiny that these merited. It is only in the mid 1990's that the fogs of controversy began thinning out and a greater appreciation of the human rights concerns became possible. In such an environment, proposals for intermediate reform, between outright repeal on the one hand and strict adherence to the *Hudūd* laws on the other, came to be explored and debated. The PWA represents a culmination of this point of view which places faith in the possibility of finding procedural and technical solutions to the human rights concerns with the enforcement of Islamic laws in a postcolonial legal system. The core divergences between the traditional perspective on Islamic laws on sexual offences and the modernist account have not been addressed though. And while the Act may represent an acceptable compromise on the means to avoid the most glaring miscarriages of justice, it does not in any way represent a final resolution of the foundational and doctrinal disagreements. Nor des it entail a firm answer as to the questions of the appropriate role of religion in law and politics in the Pakistani state and society.

Dr. Muhammad Munir,[415]says that the Protection of Women Act,2006 has neither completely pleased the women group nor the orthodox *'ulama.* The former wanted the Hudud Ordinances 1979 to be abolished while the latter wanted some of its provisions to be removed because they are un-Islamic. He further giving his final

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[414]Charles H. Kennedy, *Islamization in Pakistan: Implementation of the Hudūd Ordinances*, 28 ASIAN SURV. 62 (1988)

[415] He is a Chairman, Department of Law, Faculty of Shariah and Law, International Islamic University Islamabad and well renowned scholar, recognized nationally and internationally, an authority in Islamic law and Islamic International Law.

observations that the PWA has created more flaws regarding sextual offences against women. The good thing is that Hudud Ordinances are now more Islamized than they were before. The PWA has only partially achieved one of its stated objectives: Bringing the laws of zina and qadhf conformity with the injunctions of Islam because the flip side is that some of the new laws that are created have no basis in Islamic Law.[416]

5. Islamization and Law of Evidence

5.1. History of Law of Evidence in India

Before the introduction of Indian evidence Act, there was no complete or systemic enactment on the subject. Within the presidency towns of Calcutta, Bombay and Madras, the Courts established by Royal Charter followed the English Rule of Evidence. The Common and Statute laws of England before 1726 were introduced in the presidency towns by the Charter of that year. Outside the Presidency towns, there were no fixed rules of evidence. Entire English law on the subject was never declared to be applicable to India by any statute. The law was vague and indefinite. The mofassil courts used to be guided by occasional decisions and a few rules regarding evidence and procedure contained in old Regulations made between 1793-1834, with the customary law although it did not assume any definite form.

The first attempt towards reform was the Act 10 of 1835 which was applicable to all courts in British India and dealt with the proof of the Acts of the Governor General in council. Between 1835 and 1853, a series of Acts were passed by the Indian Legislature, introducing some reforms for improvement of the Law of Evidence viz. Acts 10 of 1835, 20 of 1837, 9 of 1840, 7 of 1844, 15 of 1852, 19 of 1853. These

[416]Muhammad Munir, "Is Zina bil Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection Act, 2006 in Pakistan", *Yearbook of Islamic and Middle Eastern Law,* vol. 14 (2008-2009), 114.

Acts embodies with some additions, many of the reforms which were advocated by Bentham and introduced in England by Lords Brougham and Denman[417].

The unsatisfactory state of the law was frequently commented on by the judges in their judgments. "The whole of Indian law of evidence" says Field, "might then have been divided into three portions, viz. one portion settled by the express enactment of the Legislature; a second portion settled by judicial decisions; and a third or unsettled portion- and this by far the largest of the three, which remained to be incorporated with either of the preceding portions".

Gradually, in the *mofussil* courts the belief gained ground that it was their duty to administer the English law of evidence and a tendency towards a capricious administration of that law prevailed[418].

Evidence Act of 1872 was the formal legislation on the subject passed into law in 1872, as Act 1 of 1872. The Act was based on English law of evidence with which the great mass of principles and rules of English law had been codified.[419]

5.2. Law of Evidence In Pakistan

Until 1987, the Evidence Act, 1872 remained applicable in Pakistan. Under the claim of bringing it into conformity with the injunctions of Islam, the Government enforced the Qanun-e-Shahadat (Law of Evidence) Order, 1984. A great many legal experts agreed that very few amendments were required to bring the Evidence Act of 1872 into conformity with Islam. But according to others, the whole evidence was out of tune and in several places opposition to the words and spirits of the Qur'an and the Sunnah.

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[417] Act 2 of 1855 contained valuable provisions, designed as supplementary to and corrective of the English Law, although all its provisions presuppose the existence of that a body of law upon which those reforms were engrafted yet it was authoritatively laid down that English law of Evidence was not the law in the mofussil.

[418] Because the English law was based on its social and legal institutions of England was not applicable here in entirety and a complete knowledge of English law could then be hardly expected from the judges.

[419] *Sarkar's Law of Evidence*, 1-4

The new Evidence Act is a lengthy document consisting of 166 sections. Very few changes have been made and they are generally of formal nature. The number and sequence of sections have however, been greatly changed. This has really distributed lawyers who were very much used to the old sequence (Akbar, 1986). One writer calls it the Pakistani edition of English law, on the ground that there are no substantial changes and the law is basically the same under the old Act of 1872.[420]

Some major changes are discernible in the Evidence Order, 1984 as follows:-

i. **Competence of Witnesses**

According to the Qanun-e-Shahadat Order, 1984 the court shall determine whether a person is competent witness in accordance with the qualifications prescribed by the Qur'an and the Sunnah and, where no such competent witnesses are forthcoming, the court may take the witness of any evidence available.

Now the Qur'an and the Sunnah are differently interpreted by Muslims.

Rashida Patel comments:

> "There is a serious danger to the rights of the witnesses by keeping the door wide open for the hundred of courts in Pakistan to determine the competence of witness. And, by allowing the several courts to decide what is or is not in accordance with the injunctions of Islam.

Justice (Rtd.) A.R. Changea remarked:

> "I would like to add that the qualifications as required by the third proviso of article 3, to determine the competence of witness, should have been prescribed and should not have left for discussion by each judicial officer. I am afraid it would open a Pandora's Box".

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[420]Rubya Mehdi, *The Islamization of the Law in Pakistan*, 147.

Under classical Islamic law, the evidence of a male is considered equal to that of two females. Section 3 does not specifically discuss this point. But since it gives the court the power to determine the competence of a witness in accordance with the Qur'an and Sunnah, it depends on judge whether he wants to consider two female witnesses equal to one male witness. Thus the new law of evidence not only reduces the women to the position of legal destitute but also opens the floodgates to unending controversies about the interpretation of Qur'an ic injunctions because of its vagueness and ambiguity.[421]

ii. Legitimacy

Presumption of legitimacy is another aspect in which the Qanune-e-Shahadat Order, 1984, has made important changes. Section 112 of the Evidence Act of 1872 has been replaced by the section 128. According to the section 112 of the Evidence Act, there was no minimum period of gestation and the maximum period was 280 days. Under the Evidence Act, 1984, the minimum period is 6 months and the maximum period is two years. Muslim classical law is controversial concerning the maximum period of gestation. The 1984 Act has adopted the view of Hanafi School of thought. Firstly, this is in conflict with modern science and secondly, it could start endless controversies among different Muslim sects in Pakistan.[422]

iii. Evidence of Women

Section 17 of the 1984 Act provides;

The competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah. Unless otherwise provided in any law relating to the enforcement of *Hudūd* or any other special law.

a. In matters pertaining to the financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or

[421]Ibid., 147, 148
[422]Ibid.

one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

b. In all other matters that court may accept, or act on the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant.

Since a single woman is not considered a reliable witness on financial matters, her capacity as a principal party in financial transactions has been put in doubt by the section. This may make it increasingly impossible for women to enter into such contracts independently. This section is claimed to be based on a Qur'anic verse (verse 282:2) which may be interpreted different ways.

Rashida Patel points out that the section "has belittled the status of several women working as administrators, bankers, lawyers and judges, for they often have to request their male clerks and peons to attest documents drawn up by them.[423]

All the jurists agree that in *Zina* and *Qazf* four witnesses are must but in rights, dealings, transactions and other criminal matters two men or one man and two women. Shafi'iyyah make another difference in civil matters especially which, is not a financial transaction e.g. *Nikah*, two men are must. Zahiris allow women in all categories including *Hudūd* but two women are equal to one man. There are some other evidences from those we can say that one women or one man is enough to prove a right or offence. Imam Ibn-e-Qayyim says that the intent of Lawgiver is to protect the rights with any kind of evidence and the testimony of one man, if he is just can not be rejected but the fact is when it is clear that a witness is just then decide a case on his testimony as The Holy Prophet (PBUH) accepted the testimony of Abu Qatadah and made admissible the testimony of Khuzaima alone.[424]Besides this there are evidences which indicate that only on circumstantial evidences we can decide the case.[425] The jurists are unanimous on the issue that the evidence of

[423]Ibid.,149
[424]Ibn-e-Qayyim, *I 'lamul Muwaqqe'in,* vol.1, 100-104.
[425] Ibid., vol.1, 130

women is sufficient in all matters relating to themselves or in matters not relevant to men such as the evidence of new born showing signs of life at birth.[426]

5.3. The Woman and the Law of Evidence

One step towards Islamization of civil law that created considerable reaction among educated women was the Draft Law of Evidence passed by the Shoora (Parliament) in February 1983. The main controversy surrounding this draft concerned the number of witnesses necessary to establish evidence in a court of law. As reported in the newspapers, the draft law stipulated that the number and particulars of the witnesses would be in accordance with the Holy Qur'an and Sunnah the details of which are as under:

> In *Hudūd* cases, according to the *Hudūd* Ordinance. In *Qisas* (Retaliation) cases according to the capital punishment and *Diyat* (blood money) Ordinance. In other matters, two men or one man and two women. If the said witnesses are not available, the court shall decide on the evidence of one woman or such other evidence as circumstances may be available.[427]

In other words, women would have been completely barred from giving evidence in *Hadd* cases, i.e., cases of murder, theft, *Zina*, and drinking. Otherwise their testimony would be worth half a man's testimony.[428] President Zia sent the bill to the Law Division for "final approval" so it would be ready for implementation in the Qazi courts, which were supposed to start functioning on an experimental basis in March 1984. Without the enactment of the Law of Evidence, Qazi courts would not be able to function properly. The Law Division was said to have made certain

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[426]Ibn-e-Hazm, *Al Muhalla*, vol. 9, 399.

[427]The Law of Evidence was signed by President Zia on October 26, 1984, *"to the thunderous applause of the Shoora."* (Pakistan Times Overseas Weekly, August 5, 1984) See also *"Qanoon-i-Shahadat, "Salient Features,"* Dawn, March 5, 1983, p. 3, also, Ashraf Hashmi, *"Shoora Prorogued: Evidence Law with Substituted Clause Passed,"* The Muslim, March 4, 1983.

[428]Yameema Mitha, *"WAF Meeting: Women Reject Draft Law of Evidence,"* The Muslim, February 10, 1983.

amendments as recommendations submitted to the President by the Chief Justice of the Shariah Court.[429]

The symbolic power of making the legal evidence of one woman equal to half the evidence of one man led to many protests both before and after the draft Law of Evidence passed by the Majlis-i-Shoora (Parliament). Several women's groups made public statements against legal discrimination on the basis of gender. On February 12, 1983, a small group of women lawyers and other interested women met in front of the High Court building on the Lahore Mall to protest the draft Law of Evidence.[430] Reaction to the protest and the police measures took two forms. The APWA (All Pakistan Women Association) and other women's groups, as well as a few male-dominated groups such as the Lahore High Court Bar Association, condemned the police action. On the other hand, a great many articles in both Urdu and English dailies branded the demonstration "sacrilegious."According to the Pakistan Times, about 100 "renowned ulama described women's protest against the Law of Evidence as a proclamation of war against God's commands."[431]

The major strategy used by all parties to support positions for and against the draft law was to cite the Qur'an. Several attempts were made to claim that women lawyers were not competent to interpret the Qur'an. One article declared, "It is surprising that a small group of westernized women who cannot even read Arabic consider themselves qualified to interpret the Holy Qur'an."[432] Dr. Israr Ahmad, well-known

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[429]In January 1984, the government announced that women would be appointed as qazis (judges) to newly established women's courts, where women litigants could choose women lawyers to serve them.

[430]In early February 1984, the Lahore WAF group announced a march on the Lahore High Court on February 12 to commemorate the episode of the previous year. A group of women protesting the Draft Law of Evidence did march on the High Court, but no untoward incident occurred. The police merely stood by and watched. It was a peaceful demonstration, but the interesting point was the treatment by the press. The Muslim, published in Islamabad, reported the affair with about four inches of space on an inside page under the caption "Women's Rally in Lahore"; Dawn, published in Karachi, gave it about eight inches of space, plus a photograph of about 5 x 8 inches showing a group of young women carrying placards, with the caption "Lahore Women Demonstrate" while the Pakistan Times, published in Lahore, the scene of the demonstration, totally ignored the whole affair.

[431] Pakistan Times, February 18, 1983.

[432] N. A. Khwaja, "Women's Rally: The Slogan and the Motive," *The Pakistan Times*, 18 February , 1983.

for his controversial remarks, commented that "the Qur'anic provisions with regard to women's posture vis-a-vis their evidence is clear and that two of them are equal to one man. This is a bitter pill which a modem and educated woman will have to swallow in an Islamic society."[433] Not ready to start swallowing yet, the Islamabad branch of the WAF planned to start weekly classes in Arabic and Qur'anic studies, for "women must be prepared to fight their own battles."[434]

The Law of Evidence (Qanun-e-Shahadat) promulgated by a Presidential order in October 1984 gave women equal voice in giving legal evidence except for financial transactions. This significant change in the draft law passed by the Shoora more than a year earlier came from a President's Commission on the Law of Evidence. Predictably, those women's organizations fighting for equal civil rights for both genders criticized the new law, calling it "vaguely and incompletely drafted." Lack of clarification in the law as to the meaning of the phrase "matters pertaining to financial obligations" was seen as a particular handicap for women engaged in business. The WAF (Democratic), a splinter group, joined the Punjab Women Lawyers Association and the *Anjuman Behbood-i-Khawateen* in calling for a boycott of all government functions, but this effort failed.[435]

A number of arguments were put forward showing that the proposed Law of Evidence in fact was not the only acceptable evidence law in Islam. Members of the Women's Action Forum and the Pakistan Women Lawyers Association contested that there is only one instance in the Qur'an, verse 282 (Surah Al-Baqra), in which two women are called to testify in the place of one man. This is in a specific financial arrangement, and the role of the second women is to remind the first on points she may have forgotten. In numerous other verses, men and women are referred to as being equal in matters of witness.[436] Critics also note that the

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[433]Dr. Israr Ahmed, an official of Pakistan Television publicly stated that all employed women should be pensioned off and return to their homes and live in purdah.

[434] Fauzia Rafiq, "Evidence Act a Forced Compromise," *The Muslim*, 10 March, 1983, 3.

[435]*Pakistan Times Overseas Weekly*, 4 November, 1984, 5.

[436]See, for example, Sura Al-Noor, verses 6 -9.

testimony of Hazrat Khadija, the Prophet's (PBUH) first wife, which asserted that Mohammad was the Prophet (PBUH) of God, made her the Prophet's (PBUH) first disciple. On the single testimony of Hazrat Aisha (another of the Prophet's (PBUH) wives), hundreds of *Ahadith* (sayings, actions, and states of the Prophet (PBUH)) have been verified. In addition, they point out that a rigid interpretation of the Qur'an such as would support the Law of Evidence (i.e., meaning "male" whenever the generic word "man" was used) would exclude women from being members of the religion. As to the exclusion of women's evidence as inadmissible in *Hudūd* cases it has been charged that the sole evidence of Hazrat Naila, the wife of Usman (the third Caliph), was accepted by the Prophet's (PBUH) companions regarding the guilt of Usman's murderer. Opponents also argue that criteria for witnesses, as stated in the Qur'an is possession of sight, memory, and the capability to communicate. As long as witnesses have these, be they men or women, their testimony should be equally weighed. The interpretation that was finally decreed on October 27, 1984, as the Law of Evidence restricts the testimony of two women being equal to that of one man only to financial cases; otherwise, it is left up to the discretion of the judge.

5.4. The Law of Evidence and Testimony of Women in Muslim Countries

An international Conference on the subject of "Islamic Laws and Women in the Modern World" was held in Islamabad on 22-23 December, 1996. The main theme of the Conference was how Islamic laws have dealt with the problems of the Muslim women in the modern world. The changing social, economic and legal conditions in Muslim societies, particularly after they developed into modern independent nation-states having power to legislate on their own, posed a challenge of reform in the status and role of women in these societies. Muslim jurists faced these challenges and dealt with these problems with diverse approaches. The participants from various countries of the Muslim world also highlighted and discussed the issues relating to the status of testimony of women in Islam and enforcement of laws in their respective countries on the subject. Position of legislation on law of evidence

with particular emphasis on the testimony of women in different Muslim countries is as follows:-

Bangladesh: Evidence based on English common law for two hundred years.

Egypt:
a. Two women/one man, only impersonal status law.
b. In all courts in Egypt, equal evidence of men and women.

Iran:
a. No witnesses are needed for marriage; however, the marriage should be registered.
b. Qualification rather than the number of those given evidence has precedence
c. In divorce only two male witnesses are needed
d. Judges have enough power to take judgments on their own
e. Evidence of men alone in penal code is at the discretion of judges.

Malaysia:
a. If the women appear in court to give Bayyinah (evidence) then the formula does not apply.
b. If a woman appears to give shahadat, then formula is followed. All the Muslims can give Shahadah or Banniyah if they have certain qualities.
c. Testimony of a non-Muslim is accepted in the court.
d. Dispute between spouses is admissible as Banniyah.

Pakistan:
a. Competency of a witness is determined by the court in accordance with the injunctions of Islam. There in no reported case of any female being excluded from giving evidence on the basis of competency.
b. For financial or future obligations, if reduced to writing, the instruments are to be attested by two men or one man and two women.
c. For awarding the punishment of *Hadd*, the evidence of women is not admissible.

Tunisia &

Turkey: Emphasized the equality of all citizens before the law. Men women are equal; both can be witnesses and judges.[437]

Summary of Deliberations on Evidence in the Conference

1. Interpretation of Islamic injunctions regarding the evidence of two women vis-à-vis one man is seen as discriminatory, especially for the women in financial institutions.

2. Legislators should realize that the times have changed, and the whole position of women has changed. Thus modification is needed.

3. A response to this concern is that one should put contracts in writing, according to the Qur'an. The two women-one man formula applies to oral contracts only.

4. One may add that the issue here is not the formula only, but what is beyond the formula. As it has been used in some circles to stigmatize women with inferiority.

5. Another argument is that the Prophet (PBUH) judged on the basis of one evidence: *"Al-Banniyah ala al-Mudda'I wal-Yamin ala-man ankara"*. There should be two witnesses, but not necessarily one man and two women.

6. Tunisia and turkey emphasized the equality.

7. Only nine verses in Qur'an deal with this issue, of these, eight references treat both sexes equally.[438]

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[437] *International conference on Islamic Laws and Women in the Modern World,* (Islamabad: Giant Forum, 1996), 127, 128

[438] Ibid.,145-146

Conclusion

Evidence *or Bayyinah* means clear expression or irrefutable and clear proof which cannot be denied and means anything that manifests the facts disputed in a court. The word *Bayyinah* in the language of the Qur'an, of the Prophet (PBUH) and of his Companions (RA) is everything by which the truth becomes evident. *Bayyinah* includes all kinds of evidences, testimonies, whether oral, documentary or circumstantial evidences. The definition covers the evidence of witnesses and documentary evidence, evidence can be both oral and documentary and also electronic record can be produced as evidence. Testimony is one among these evidences.

The classical Jurists agree as a rule that in *Hadd*-e-*Zina* and *Qazf* four male muslim witnesses alone are must and women testimony is not admissible for had punishments Zahiris (Imam Ibn-e-Qayyim, Imam Ibn-e-Taymiyya and Ibn–e-Hazam) allow admissibility of women's testimony in all categories including *Hudūd* but two women are equal to one man. There are some indications which signify that one woman or one man's testimony was considered sufficient to prove a right or offence. Imam Ibn-e-Qayyim says that the intention of S*hari'* is 'to protect the rights with any type of evidence available and the testimony of one man, if he is just cannot be rejected', when it is clear that a witness is just then a case should be decided on his testimony alone. The Holy Prophet (PBUH) accepted the testimony of Abu Qatadah and decided the case on the testimony of Khuzaima alone. Besides this there are other incidents where cases were decided on circumstantial evidences as well.

The general tone and tenor of the Holy Qur'an and *Sunnah* is the use of masculine plural words which includes both men and women. Masculine plural words used in the Qur'an do not specifically address to men alone but also connotes the same status for women. Therefore, the argument that since Qur'an used masculine expression for the testimony of the offence of *Zina* and other *Hudūd* cases is not sound. In fact, this masculine feminine word (arb'ata) has been used for the plural general expression of

the Qur'an. The verse of Qazf and Zina was revealed in the same general expression. If we accept this argument then it may render a large number of injunctions, contained in the Qur'an and the *Sunnah,* inapplicable to the women. There are several verses of the Qur'an and traditions of the Prophet (PBUH) which use only the masculine expressions which is understood as including both male and female. Another strong argument may be found in the word *Arb'ata Shuhada* (four witnesses) which has been used in two verses in the context of Zina and Qazf. It is evident that testimony of women in *Hudūd* cases should be made acceptable / admissible.

The opinion regarding inadmissibility of testimony of women in cases of *Hudūd* and *Qisas* is mainly based on the narration of Imam Muhammad Bin Muslim Bin Shahab Al-Zuhri which is generally quoted by the Jurists in their writings. This narration has been quoted in books in different words and sentences, and is considered controversial in authenticity. No explicit and absolute rule or text been found in the Qur'an and the *Sunnah* regarding the inadmissibility of evidence of women in *Hudūd* cases. Even the weakest *Hadith* of the Prophet (PBUH) either by words or by practice does not contain any sign of inadmissibility of the testimony of women in *Hudūd* cases. The basis for exclusion of women testimony is the statement given by Imam Zuhri. This statement being weak and frail no tradition of the Holy Prophet (PBUH) may be attributed to it.

Many *Muhadditheen* like Allama Shaukani had traditionally criticized the Zuhri's statement. He says that the narrator i.e. Hajjaj Bin Artat is weak; secondly this *Hadith* is *Mursal* and on its basis a general text of the Qur'an cannot be reduced or restricted in its scope. Also, Imam Shaukani never admitted the arguments made on the basis of masculine-words.

Imam Zuhri being youthful successors of the Companions, *sighar tab'een*, his tradition is regarded as *Munqati'* rather than *Mursal*. The experts of *Hadith* opine about the *Muqati' Hadith* that it is unacceptable and cannot be relied upon as an authentic proof.

If the tradition of Imam Zuhri is treated as *Mursal* even then the *Mursal Hadith* is also not acceptable to some of the *Muhadditheen* e.g. Saeed Bin Al-Musayyib, Imam Malik, Imam Zuhri himself, Imam Auzai, Abdullah Bin Mubarak and many other *Muhadditheen*. Imam Abu Hanifa and some other jurists regard *Mursal Hadith* as admissible but majority of the jurists do not recognize it as admissible.

The books of *Jarh and Ta'deel* are replete with such traditions of Imam Zuhri in which he attributed a work, on the basis of his observation, to the *Sunnah* of the Holy Prophet (PBUH) but later has not been found as *Sunnah* or no consensus was ever developed on it. It shows the weak criteria followed by Imam Zuhri for attributing an incident as the *Sunnah* of the Holy Prophet (PBUH) . Imam Zuhri himself claims that the evidence of women is admissible in *Qisas*. But the *Muhadditheen* regard it a weak narration which is opposed by the narrator himself.

The research study has brought us to the conclusion that the Qur'an has not ordained any explicit and absolute text or rule on the admissibility or inadmissibility of the testimony of women in *Hudūd* cases. The Qur'an does not render the women ineligible to adduce evidence in case of need under any circumstances. It has also not specified or restricted the areas and issues for the women to adduce evidence or give testimony. But on the other hand, the testimony of a man is preferential over that of a woman. The underlying rationale leads to the opinion that a woman is more prone to forgetfulness and misunderstanding of the matter in issue, which may probably lead to a wrong conclusion on the matter. In the light of this discussion, we may build our argument to the admissibility of the testimony of women in *Hudūd* cases particularly and generally in all other cases.

Similarly, the study of various traditions of the Holy Prophet (PBUH) narrated by the Companions and their Successors followed by authentic books on Ahadith do not bring the research to a logical conclusion on the issue of admissibility or inadmissibility of the testimony of women in *Hudūd* cases. Many traditions have been quoted by different companions and their successors which evidently use the

testimony of women even in *Hudūd* cases during the period of the Holy Prophet (PBUH). The same traditions were acted upon and followed by the companions and their successors. Since, no consensus was ever developed and reached by the jurists on the issue; therefore, no explicit and absolute rule could be derived by them. It looks the admissibility of testimony of women in *Hudūd* cases is not barred by the original as well as the secondary sources of the Islamic law, hence the same may be given due consideration while deciding the matters in issue.

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