

**Non-Muslims competence in giving testimony;
A study between Islamic jurisprudence and
the Saudi Civil procedural Law.**

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**أهلية غير المسلمين في تأدية الشهادة:
دراسة بين الفقه الإسلامي وقانون المرافعات السعودي**

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ABSTRACT:

The world became a connected society because of the influence of recent communication technologies. The idea is that you can communicate without affecting other people, yet you cannot affect without communicating. In these interconnected cultures, commercial transactions flow beardless regardless of the traders' identity, whether they are Muslim or not. In this respect, it is essential to have an adequate legal system to secure those transactions.¹

Well-enacted evidence law in any country is vital to ensure an adequate legal system to secure those transactions. In Islam, evidence law includes several forms of admissible proof to confirm or disapprove of disputes, such as circumstantial, empirical, and psychological evidence. In the Arabic language, the word evidence is a synonym to the word al-Bayyinah," which translated as any form of proof that could show the right.² Evidence in Islamic law contains, but is not limited to, testimony, confession, oath, written record, presumption, preview, and knowledge of the judge.

¹ Shams , H. A. In H. M. Siddique (Ed.), *Testimony and its Importance in Islamic Law* (p. 22). essay. at <https://ziaetahqeeq.gcu.edu.pk/ZTQ/2012-Vol-2,%20Issue-1/Testimony-and-its-importance-in-Islamic-Law.%20Dr.%20Humayun%20Abbas,%20Hafiz%20Muhammad%20Siddique.pdf>

² al-Jawziyyah, I. Q. In *Turuq al Hikmiya fi al-Siyasa al Sharia* (pp. 14–24). al-Jawziyyah, I. Q. In *I'laam ul Muwaqqi'een 'an Rabb il 'Aalameen*, (pp. 96–97).

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Testimony considers as essential and dominant in Islam and Islamic courts, as well as the primary form of proof in Islamic jurisprudence, to preserve harmony and provide justice in Islamic communities. Islamic jurisprudence has some mandatory criteria and standards to allow individual testimony against others. The prerequisite for a person to be a just Muslim is one of those criteria that discloses a factual debate on the competency of a Non-Muslim to provide testimony before the Sharia court against a Muslim.

The general theory is that most Muslims are qualified to testify before others, whether they are Muslims or Non-Muslims, and this theory has an extensive consensus among Islamic jurists. Most Muslim' scholars agreed that it is an obligatory duty upon a judge to accept the testimony of a just person and rule on dispute based on this testimony.¹ Even in the Mecelle, a civil code of the Ottoman Empire, article 1828 obligated all judges in Islamic courts to accept a just person's testimony.² However, the competence of Non-Muslims to testify against others in Islamic courts, particularly their credibility in giving testimony against Muslims due to disparities in faith, is a disputable issue not only under Islamic jurisprudence but also in the Saudi Civil procedural law and its judicial application. A solution to this issue can be attracted through understanding the difference in Islamic jurisprudence opinions and employ them in the Saudi legal system.

¹ Murdāwī D. A.-H. A. S. A. (2013). In *al-Inṣāf fī ma'rifat al-rājiḥ min al-khilāf 'lā madhhab al-Imām Aḥmad ibn Ḥanbal* (Vol. 12, p. 3)., Markaz al-Turāth,, & Al Manhal FZLLC. Sarakhsī Muḥammad Aḥmad. In *Kitāb al-Mabsūṭ* (Vol. 16, p. 112). Essay; Ibn 'Ābidīn Muḥammad Amīn 'Umar. In , *Radd al-muḥtār 'alā al-Durr al-mukhtār, al-ma'rūf bi-Ḥāshīyat Ibn 'Ābidīn* (Vol. 5, p. 463).

² Haydar, A. In *Durar Al-Ḥukkām, Ṣarḥ Mağallat Al-Aḥkām* (Vol. 4, p. 663. Art.1828).

Keywords: Testimony, Competence, Competence to Bear Testimony, Competence to Deliver testimony, Conditions Of Bearing Testimony, Conditions Of Giving Testimony, Muslims, Non-Muslims, Civil Procedures Of Saudi Arabia, Islamic Jurisprudence, Hanbali Jurisprudence, Maliki Jurisprudence, Shafi Jurisprudence, Hanafi Jurisprudence, State Of Necessity, Bequest.

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المخلص :

إن العالم أصبح مجتمع مترابط كنتيجة للتأثير الواقع بسبب الوسائل التكنولوجية الحديثة -وكما هو متعارف عليه فانه يمكنك التواصل بدون التأثير على الغير ولكن لا يمكنك التأثير على الغير بدون التواصل معهم، لذلك وفي ظل هذا المجتمع الثقافي المترابط نجد أن الصفقات التجارية تنساب عابرة بين الحدود دون وضع قيود او اعتبارات للهوية الدينية للتجار- وفي ظل ذلك فانه من المهم وجود نظام قانوني قوي يضمن حماية تلك الصفقات.

يعد سن قانون للإثبات في أي بلد أمر جيد وحيوي لضمان وجود نظام قانوني مناسب لتأمين تلك المعاملات. وفي الإسلام فان مبادئ نظام الإثبات بمعناه يتضمن أشكالاً متعددة من الأدلة المقبولة في حل النزاعات فعلى سبيل المثال هناك الأدلة الظرفية والتجريبية والنفسية وغيرها. كما أن كلمه الدليل في اللغة العربية تأتي كمرادف لكلمة البيئة والتي تفيد بالإشارة الى أي شكل من أشكال الإثبات يمكن أن يساهم في إظهار الحق ومن ضمن تلك البيئات وهي على سبيل المثال لا الحصر الشهادة، الاعتراف، القسم، السجل الكتابي، القرائن، والمعايينة، ومعرفة القاضي-

تعتبر الشهادة من الأدلة المهمة والأساسية في الإسلام وفي المحاكم الإسلامية وتشكل الشكل الأساسي للإثبات في الفقه الإسلامي وذلك للحفاظ على الانسجام وتحقيق العدالة في المجتمعات الإسلامية كما يحتوي الفقه الإسلامي على بعض المعايير الإلزامية للسماح بالشهادة ضد الآخرين ويعتبر من أهمها الشرط بأن يكون الشاهد مسلماً عدلاً وهذا الشرط يكشف عن نقاش حقيقي حول أهلية غير المسلم للإدلاء بشهادته ضد مسلم أمام المحاكم الشرعية.

إن النظرية العامة في الاثبات تبين أن معظم المسلمين ممن تنطبق عليهم الشروط ذوي أهلية للشهادة في مواجهه الآخرين سواء أكانوا مسلمين ام غير مسلمين، وهذه النظرية تحظى بإجماع واسع بين فقهاء المسلمين لذلك فقد اتفق معظم علماء المسلمين على وجوب قبول القاضي شهادة المسلم العدل والحكم في النزاع بموجب هذه الشهادة في حال صحتها، بل انه حتى في مجله الأحكام العدلية نجد أن المادة ١٨٢٨ تلزم القضاة في جميع المحاكم الإسلامية على قبول شهادة المسلم العدل -

ومع ذلك، فإن أهلية غير المسلمين لأداء الشهادة ضد الآخرين في المحاكم الإسلامية وخصوصا ضد المسلمين أمر غير مقبول بسبب اختلاف الدين وقبول شهادتهم هو أمر محل نزاع ليس فقط في الفقه الإسلامي بل أيضا نزاع مفترض في قانون المرافعات السعودي وأحكام محاكمه. وعليه يمكن استقطاب حل لهذه القضية من خلال فهم الاختلاف في الآراء الفقيه الإسلامية وتوظيفها في النظام القانوني السعودي-

الكلمات المفتاحية: الشهادة ، أهلية ، أهلية تحمل ، أهلية أداء ، شروط التحمل ، شروط الأداء، مسلمين ، غير المسلمين ، قانون المرافعات السعودي ، فقه إسلامي ، الفقه الحنبلي، الفقه المالكي، الفقه الشافعي ، الفقه الحنفي ، حالة الضرورة ، وصية .

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INTRODUCTION

Human beings are social beings, which they live in a connected world as a result of the effect of technological instruments over them. The new live style of people makes it merely impossible for them to spend their lives alone, which may result to the possibility for the existence of disagreements and disputes that need to be fairly settled.¹

When the plaintiff commences his lawsuit and starts to present his claims and showing his evidence in court, defendant most likely going to refute the plaintiff allegations. So far, when the plaintiff is unable to prove with evidence his allegations then defendant is obligated to take an oath in order for the judge to be able to give a verdict. This mechanism for dispute settlement is accepted in most Islamic courts as “Ibn 'Abbas narrated that the Messenger of Allah (ﷺ) judged that the oath is due from the one the claim is made against.”² Accordingly, it is the norm in Islamic courts that the plaintiff's responsibility is to provide the evidence, including but not limited to testimony, and the person who denies it has to swear on oath.

The means of proof are of considerable value to litigants when they defend their public rights. According to Islamic law, testimony [The term used for evidence through testimony in classical Islamic jurisprudence is shahada in Arabic] is the prime source of proof in the use of witnesses [singular Shahida in Arabic].³ Witness testimony was not only a primary form of evidence in the

¹ Siddique, H. M. (2019). Testimony as a Method of Proof in Islamic Law & Legal System in Pakistan, 3(1), 34. <https://doi.org/AFKAR>

² Al-Tirmadhi, A. I. M. I. Jami' at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah (Vol. 3, Ser. 1342).

³ John A. Makdisi, The Islamic Origins of the Common Law, 77 N.C. L. Rev. 1635 (1999). Available at: <http://scholarship.law.unc.edu/nclr/vol77/iss5/2>

use of witnesses in Islamic courts however was also a prevalent method of proof claims among litigants, particularly in the early years of Islam due to lack of writing and the spread of illiteracy.¹ To be assured that the term used for evidence through testimony in classical Islamic jurisprudence is Shahada.²

Today, written documents instead of "Shahada" testimony turn out to be the preferred forms of evidence in the various Islamic legal systems due to the complexity of the court's methods of proof.³ However, testimony has never lost its value as a critical way of demonstrating individual rights in the courts.

The quorum of the necessary witnesses varies according to the existing order for testimony, although there is no standard number for all testimony forms.⁴ Respectfully, some conflicts can involve one witness, two witnesses, or four witnesses to acknowledge their testimony. For example, the testimony is that no fewer than four men, no women among them, must be admitted to adultery. While in certain offenses like Hudud and Qisas offenses, such as stealing, burglary, and alcoholic liquor, only two witnesses without a woman may be admitted.⁵

¹ Zuḥaylī Muḥammad M. (1994). In Wasā'il Al-Ithbāt Fī Al-Sharī'ah Al-Islāmīyah: Fī Al-Mu'āmalāt Al-Madanīyah Wa-Al-Aḥwāl Al-Shakhṣīyah. "Means of Evidence in Shar'a Law in Civil and personal Transactions" (1st ed., Vol. 1, p. 134). Al-Riyād, Maktabat al-Mu'ayyad.

² Lawan, M., Sada, I. N., & Ali, S. S. (2011). (tech.). (S. Mansoor, Ed.)An Introduction to Islamic Criminal Justice A Teaching and Learning Manual (pp. 3–103). UKCLE. Available at: https://s3.eu-west-2.amazonaws.com/assets.creode.advancehe-document-manager/documents/hea/private/introduction_to_islamic_criminal_justice_156803679_1.pdf

³ Sanhūrī, 'Abd al-Razzāq Aḥmad. (1956). Al-Wasīṭ fī sharḥ al-qānūn al-madanī [The Interpretation of Civil Law], (Vol. 2, p. 319).

⁴ Ministry of Awqaf and Islamic Affairs. (2012). Encyclopedia of Islamic Jurisprudence (1st ed., Vol. 27, p. 230).

⁵ Alrjoub, Salim Ali., The Philosophy of Islamic Sharia in the Testimony of Women A Comparative Study in Jurisprudence and Law., (2019)., (University of Sharjah (UoS) Journal of Sharia and Islamic Studies (JSIS). (Vol. 16, issue. 1, p. 64.) available at: <https://www.sharjah.ac.ae/en/Research/spu/Journalsharia/Documents/V16/Issue%201/3.pdf>

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In some cases, Islamic jurists allow testimony from two men or a man with two women, particularly in monetary disputes such as selling, dismissal, relocation, security, and so on.¹ In some cases, only women, such as when foreign men cannot see concealed flaws, such as in cases involving birth and lactation disputes, tolerate testimony.² Thus, not only did Islam emphasize the number of witnesses, but it also stressed the consistency of the witnesses so that the judges could be pleased with the competence of the witness.³

Generally speaking, the purpose of using evidence in court is the objective of the disputer to prove the accusation after it has been made or to protect himself against the arguments of other contestants by having the advantage of bearing testimony. One of the main benefits of taking the testimony being that whether the complainant or the defendant presented the evidence, the court was obliged to use it as a means by which the parties could argue their case. Nevertheless, testimony as a form of proof has a clear concept and purpose and a variety of criteria that must be satisfied before agreeing on its applicability.

Indeed, the judges of Islamic courts regard themselves as deputies of the King to ensure justice and bring an end to conflicts by implementing the rules of Sharia law. Jabir in his narrated Hadith said: I heard Allah's Messenger saying, "How could an Ummah (people) be purified (of its sins) where the right of its weak is not taken from its strong."⁴ Judges in Islamic courts, like Saudi Arabia,

¹ Id, p. 75.

² Id. pp. 80-88

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⁴ Ibn Hajar al-‘Asqalānī, Aḥmad ibn ‘Alī, & Muḥammad ibn Ismā‘īl Ṣan‘ānī. (2002). *Bulūgh al-marām min adillat al-aḥkām*, Attainment of the objective according to evidence of the ordinances. (Vol. 2, p. 447). Al-Riyād, Al-Mamlakah al-‘Arabīyah al-Sa‘ūdīyah, Dār al-Salām.

also have the legal authority to determine the creditworthiness of evidence, including testimony, to render their decisions. They are not restricted to any means of proof unless a limitation is part of the legal system's requirement.¹

This legal competence of the judges to decide about the correct methods of evidence is due to its existence since it is not a holy process of which the judge's conscience has no right to modify it.² However, judges have their free will to settle on the relevant facts that can give rise to rights.³ Without prejudice to the Islamic law principles, judges shall maintain their independence and impartiality vis-à-vis the litigants during the review and analysis of legal facts to reveal the truth and deliver the correct decision.

It is one of the fundamental rules of Islamic law of evidence that the litigants must be handled equally and must have the same right to present their cases in a just manner.⁴ Without such independence, impartiality, and equality, litigants can question the judges' ability to hear disputes in compliance with applicable law.⁵

Nonetheless, Muslims and Non-Muslims do not have equal rights, depending on Islamic doctrines' views, to appear in Islamic courts for testimony on the grounds of disparities in faith. The competence of non-Muslims for carrying testimony, in particular against Muslims, is to some degree an argumentative topic in the last century, as equality is a fundamental legal right and a concept accepted in several international treaties. A violation of the equality principle on the grounds of differences of faith may lead to an infringement of human rights principles based on discrimination.

The views of these Islamic doctrines on testimony in Islamic courts influence the Saudi legal system because the Saudi

¹ Saudi Ministry of Justice Legal Order of High Court No. (38/M), dated in 18/01/1441; Supreme Council of Magistracy, Order No 1205/T, (27/04/1440).

² Ash-Shawkani, Muhammad. *Nayl al-Awtar* (Vol. 2, p. 300).

³ Az- Zuhailī, Muḥammad. "Methods of proof in Islamic Shari'a (p. 615).

⁴ Awad, Hesham , *A'soul almrafa'at alshra'iah.*(2018) (Vol. 3., pp. 35-36.)

⁵ 00000

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constitution concludes that all law and regulation in the Saudi state extracted from the Quran and Sunnah, which are the primary source of Sharia law.¹ On this point, the possible reason for excluding the testimony of non-Muslims is the state interpretation of the concept of public policy, which may justify such practices.

In certain countries around the world, the essence of public policy is known as an elusive term. It is considered an unruly horse in some publications depending on the complicated existence of determining the true meaning and implementation of that concept.² Nevertheless, in Saudi Arabia, the term of public policy has been described in law enforcement as the principles of Islamic Sharia law.³ In interpreting the meaning of public policy in Saudi Arabia, the Bureau of Experts at the Council of Ministers issued an order number (497), which stated that “Public policy is the preemptory evidence in the primary sources of Sharia; Quran and Sunnah”⁴

In the next sections of this paper, the essential purpose would be to shed full light on the sense of testimony linguistically and in the Islamic schools of doctrines to describe testimony accurately. Secondly, it is part of this study to comprehend, the legal authorities that legalize the use of testimony in Islamic courts. Thirdly, it is within the framework of this article to shed light on the criteria for bearing and giving testimony in Islamic jurisprudence to infer the presumptions of Islamic doctrines' views on the competence of non-Muslims to bearing and providing testimony in

¹ The regime derives its power from the Holy Qur'an and the Prophet's Sunnah, which rule over this and all other State Laws. Saudi Arabia's Constitution of 1992 with Amendments through 2005, art 7. Available at: https://www.constituteproject.org/constitution/Saudi_Arabia_2005.pdf

² Richardson v Mellish (1824), 2 Bing 229 at 252, 130 ER 294 (CP) Burrough J, observing that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”

³ Enforcement law, Royal Decree No. M/53, Dated 13/8/1443H, art:11/3

⁴ Bureau of Experts at the Council of Ministers, order No. (497), Dated 16/9/1433H.

general and against Muslims in particular. Fourthly, this article needs to shed light on applying the Saudi Courts to this issue before providing our conclusions and recommendations.

I.THE MEANING OF TESTIMONY UNDER ISLAMIC JURISPRUDENCE

a.Linguistic Definition of testimony

Testimony or “Shahada” in the Arabic language comes in a different meaning. For example, it can be understood as a conclusive report, mainly when an individual knowingly provides information about what he sees.¹ The Quran says, “Return to your father and say, "O our father, indeed your son has stolen, and we did not testify except to what we knew. And we were not witnesses of the unseen.”²

Another meaning of testimony is the presence and that when someone presents and sees of happening event, he prescribes what he knows based on his presence.³ This meaning of testimony is manifested in the Quran as Almighty Allah imposed an obligation over Muslims for fasting Ramadan, “So, whoever of you is present (Literally: witnesses the month) at the month, then he should fast it.”⁴

Finally, testimony may bear the meaning of confession or an oath as the Almighty Allah says, “It is not for the polytheists to maintain the mosques of Allah [while] witnessing against

¹ Ibn Manzor, Lisan al-Arab, (Hyder, Amir. A. Ed), (Vol. 3, p. 294). Rāzī, Muḥammad bin Abī Bakr. Mu‘jam mukhtār al-ṣaḥāḥ. (pp. 267-268). al-Zabidi, Murtada. Taj al-Arus Min Jawahir al-Qamus.(1988), (Vol. 7, p. 224).

² Yusuf, verse:81; This verse in Quran talks about the story of Prophet Yusuf who is the son of Jacob.

³ Siddique, H. M. (2019). Testimony as a Method of Proof in Islamic Law & Legal System in Pakistan, (Vol. 3, Issue. 1, p. 35). Available at: <https://doi.org/AFKAR>

⁴ Al-Baqara, verse 185. The word sight in the verse is a translation from the Arabic word testifying. Shawkani, Muhammad. A, Fath al-Qadir,(Vol. 1, p. 182).

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themselves with disbelief.”¹ The word “witnessing” in this context refers to the confession.² Also, Allah says, “And those who accuse their wives [of adultery] and have no witnesses except themselves - then the witness of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful.”³ The meaning of testimony in this context is evident, which refers to taking an oath while presenting a testimony to support or prove an allegation.⁴

b. Definition of testimony in Islamic law

It is a matter that testimony is an essential means of proof in Islamic societies, yet the meaning of testimony varies between Islamic schools of doctrine.⁵ Some Islamic jurists identified the reason behind the extending of the testimony term definition for two reasons; first, some scholars' expansion in the description of testimony through introducing more restrictions and precautions regarding some conditions that affect the term itself. Second is the diversity of scholars and their variations in the degree to which they need the testimony's wording to be delivered. Some of them specified a particular terminology such as “I testify”, and some of them did not account for it.⁶

• Testimony in the Hanafi jurists:

Ibn Al-Njīm, a Hanafi jurist, defines testimony [Shahada] as it is “Informing others of the right of another with certainty, without

¹ Al-tawba, verse 17.

² Sa’dī, ‘Abd al-Rahmān, Nāṣir. Taysīr al-Laṭīf al-Mannān fī khulāṣat tafsīr al-Qur’ān, (Vol. 3, p. 641). Māwardī, ‘Alī.M. Tafsīr al-Māwardī (Vol. 2, p. 347).

³ Al-Noor, verse 6.

⁴ Ibn al-Humam, Muhammad, ‘Abd al-Wahid. Faḥ al-Qadīr. (Vol. 4, p. 279).

⁵ The four main Sunni schools, which Muslims call it “madhhab”, are the Hanafi, Shafi’i, Maliki, and Hanbali. Those schools are schools of thought within Fiqh or what is known as Islamic jurisprudence.

⁶ Abdulrazaq, O. A. (2006). Refusing the testimony of a just Muslim and its application in the Islamic Courts in Gaza district.) (p. 4) (thesis).

uncertainty and conjecture.”¹ It is a case when a witness sees or examines the act during his presence, such as killing, adultery, or for something they have heard such as contracts and statements, etc.²

Ibn Al-Humam, another Hanafi jurist, stated that testimony is "telling the truth to proof right by pronouncing the term I testify in the Judicial Council."³ In other words, the Hanafis require truthful reporting to take out any false news, and they restrict the performance of this testimony by pronouncing the phrase "I testify" during its implementation. This testimony is not valid from a legal perspective unless the witness provides it in a judicial council.⁴

Likewise, the Mecelle, a civil code of the Ottoman Empire in the late 19th and early 20th century, defines testimony and its condition as the Hanafī jurists did. It is within the expectation that the Hanafis jurists' definition of testimony may exclude its validity if conducted outside of a judicial council.⁵

Any definition that requires testimony delivery in front of a judicial council may raise its validity question if delivered in front of an arbitration committee. Some scholars assumed the testimony conducted outside of a judicial panel might not be accepted unless the arbitration committee asks for a judicial council's help or if the arbitration law itself permitted. Nevertheless, the restriction upon an individual to conduct a testimony in front of a judicial council assumed not to apply to the process of delivering testimony in front

¹ Ibn, Nujaym Z.-D. Al-baḥr Al-Rā'iq Sharḥ Kanz Al-Daqā'iq. (1418) (Ed. 2. Vol. 7, p. 60). Dar-alkutub.

² AL-Musali, Abdullah, M. Al-Ektiar letalil Al-Mukhtar. (1419H). (Abu-Alkhear, Ali. Ed & Suliman, Mohammed. Ed) (Ed.1, Vol. 2, p. 413)

³ Al-Suwāsī Ibn al-Humām, Kamāl al-Dīn, M. Sharḥ Faṭḥ al-qadīr. (1998). (Ed. 2, Vol.7, p. 364).

⁴ Shinqiti, Mohammed, A. (1992). Contradiction of Evidences in Islamic Jurisprudence: A Comparative Study in Islamic Schools. (Ed. 1, p. 89) Prince Naif Academy.

⁵ Mustafa, Mohammed, M. Testimony of Non-Muslims In Islamic Jurisprudence. (1434 H). (Al-Adl Journal, Issue. 46, p. 214). Available at: <https://adlm.moj.gov.sa/attach/927.pdf>

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of an arbitration committee because being in a specific place in managing the arbitration procedures is not a requirement in arbitration.¹

•Testimony in the Maliki jurists:

The Maliki jurists describe testimony as a statement requiring the judge to decide on the condition that more than one reliable person has submitted such testimony.²

•Testimony in the Shaffie jurists:

Testimony has mentioned in many places in the Shaffi doctrine. Some may describe it as “someone is telling about something by pronouncing a special word.”³ The particular word required here is “I testify.”⁴ This definition of testimony may be considered defective because there is no indication either for the required place of testimony or for the qualification of the one who performed the testimony.⁵

•Testimony in the Hanbali jurists:

The Hanbali jurists define the term testimony as the information the witness provides using particular words, such as ‘I bear witness’ and ‘I testify.’⁶ This definition is also expected not to

¹ Al-Daour, Ahmed, Evidence Provisions, Al-Ghandour Printing Press – Beirut (1385 AH / 1965 CE) (P. 7.).

² Abu-Shauesh, Maher. Sahada Alkhetabi ALmuktalif fe Qubulaha (Islamic University Journal, Vol. 4, p. 324).

³ Shirbīnī, Muḥammad, Aḥmad. Mughnī al-muḥtāj ilá ma‘rifat ma‘ānī alfāz al-Minhāj.(Vol. 2, p. 260.)

⁴ Al-Azahiri, Suliman, Hashea Al-Jamal a Sharih Al-Menhaj (vol. 5, p. 277).

⁵ Supra note 41, p. 326)

⁶ Al-Bahootee, Mansoor. (1993), Sharh Muntahaa al-Iraadaat, (Ed. 1, Vol. 3, p. 575). Alam al-Kutub publishers, Beirut

be comprehensive because it may include the term confession or a lawsuit.¹

c. Definition of testimony In some Arab legal systems:

Countries are differing in defining testimony. Many Arab countries may not include a specific definition for testimony in their law of evidence or law of procedures, such as Saudi Arabia, Unites Arab Emirates, Bahrain, Oman, Qatar, Kuwait, Egypt, and Jordan. Nevertheless, some Arab countries such as Sudan and Yemen clearly defined the term testimony in their laws and regulations.

According to article 23 of the Sudanese law of evidence, testimony is “the verbal evidence of a person having direct awareness of an incident that proves to others the responsibility claimed against another before the court.”² Likewise, article 26 of the law of evidence in Yemen defines testimony as “The testimony is informing of something in the Judicial Council by pronouncing the term "I testify" to prove the right of others over others.”³

Whether there is or not a clear definition of testimony in the Arab countries, they still share the same understanding of the meaning regarding this tool of evidence.⁴ According to some legal scholars, testimony represents the meaning of expressing the content of the witness's perceptions concerning what he has been seen or heard before the judicial council after performing an oath.⁵ Another

¹ Shamoot, Hassan, A. Infidel's Witness on Muslim, (Jordan Journal of Applied Science: Humanities Sciences Series, 18, 2, p. 3.)

² Sudan Law of Evidence of 1994, art. 23. (Translated by the researcher from the Arabic version of the law). Available at: <https://www.moj.gov.sd/sudanlaws/#/loading>

³ Yemen Law of Evidence No. 21 of 1992, art. 26. (Translated by the researcher from the Arabic version of the law). Available at: http://hrlibrary.umn.edu/arabic/Yemeni_Laws/Yemeni_Laws5.pdf

⁴ Al-rashedi, Mohammed A. Wetness as a mean approving means: A comparative study between Islamic principles and Law, (L.L.M thesis , Middle East University , Law School, 2011)(p.20).

⁵ Murqus, Sulaymān, Esoul alithbat wijra'aath alala'dlah almkidah wma ijouz ethbath bha wma ijb ethbath balktabah., (1998), (vol. 3, p.1).

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Another law expert, Jamil El-Sharkawy, defines testimony as “A statement presented by a person in front of a judicial council after performing an oath.”¹

d. Similarities and differences in defining testimony between Islamic law and secular law.

Both Islamic and secular law agreed that testimony should verbally be giving, yet judges may accept written testimony if the applicable law permitted. In addition, it is a requirement for a witness to carry their testimony in front of a judicial council. Nevertheless, both Islamic and secular law may differ in that; it is not a general requirement for a witness to perform an oath before carrying his testimony under Islamic law. In contrast, a witness's need to execute an oath before taking his testimony is part of many Arab statutes and regulations concerning testimony.²

II. LEGAL AUTHORITIES FOR TESTIMONY

a. Introduction

Islamic law has a particular character as a divine law in its origin, and it exemplifies God's will, which all people have to obey. No one reference includes the Islamic Law; instead, it extracted throughout several sources {Daleel}. Daleel means a guide to something.³ It could also refer to proof or a particular piece of evidence.⁴

¹ El-Sharkawy, Jamil, Evidence in civil matters., (1976), (p.101)

² Supra note 50, 21

³ Khallaf, A. Ilmu usulil fiqh, (2003).(p.26) Dar elhadith, Cairo, Egypt.

⁴<https://www.almaany.com/en/dict/ar-en/%D8%AF%D9%84%D9%8A%D9%84/?c=Islamic>

Accurately, any practical rule of Islamic law originates from a daleel, which represents an example of the source. The rule so obtained may be conclusive or inconclusive depending on several indicators such as the nature of the subject's clarity of the text and the value it seeks to establish.¹ The sources from which a practical rule of Islamic law is derived can be primary sources like Quran and Sunnah. In contrast, secondary sources include but are not limited to Ijma and Qiyas.²

The assumption is that the Quran and Sunnah contain only general rules of Islamic law of Evidence.³ This assumption is valid even to consider the legality of testimony under the general theory recognized in Islamic societies. Yet, it is not entirely correct to assume that most of the rules of Islamic civil procedures, including testimony, are derived for its legality from secondary sources apart from the meaning derived from the primary sources of Islamic law.

b.In Quran

Quran is a great miracle of Allah Muhammad's Messenger, which in most Islamic communities is known as the words of Allah ALMIGHTY that revealed to prophets and messengers through the angel Gabriel.

It is a matter of fact that providing testimony before a court of law is a collective duty of those who know the truth related to an incident. In the Quran, God says; “The witnesses should not refuse

¹ Badran, A.B., Usul elfiqh al-islamy, Mu'assasah shabab al'jami'ah, (p.46). Alexandria, Egypt,

² Quran is a book of Allah; Sunnah is the practices of the Holy Prophet Muhammad (Peace be upon him); Ijma, the approval and agreed opinion of the Muslim jurists; and; Qiyas, the analogy from the Quran, Sunnah, and Ijma.

³ KONA, Muhammad Sani Ismail, AN ANALYSIS OF THE USE OF TESTIMONY AS A MEANS OF PROOF IN NIGERIA, (2015), (L.L.M Thesis , AHMADU BELLO UNIVERSITY, ZARIA).,(p.19).

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when they are called on (for evidence,)"¹ He also says; "Conceal not evidence; for whoever conceals it his heart is tainted with sin"² Ibn-e-Qudama stated in Al- Mughni

"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"³

Many verses in Quran refer to the legality of testimony. God says; "And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah."⁴ "And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon."⁵ Even if there is a contract, whether it is a commercial or not, it is an excellent solution to preserve people's rights when providing testimony. God says: "And take witnesses when you conclude a contract."⁶

¹ Al Baqara: 282

² Id., 283

³ Ibin Qudama, Abdullah, A., Al Mughni,(1984), (Vol. 10, pp. 154-155). Beirut: Dar ul Fikr

⁴ At-Talaaq: 2

⁵ Supra note 52, 282

⁶ Id., 282

c. In Sunnah

Sunnah is an Arabic word that represents the meaning of a “habitual practice.”¹ In Islamic societies, it refers to the traditions and practices of the Islamic prophet Muhammad recorded through Hadith, which is a recording of his sayings and practices. In this context, Sunnah and Quran constitute Shari’a’s primary source or Islamic law.

Many indications have been mentioned for the legality of testimony in Sunnah. For example, Zaid bin Khalid Al-Juhani narrated that the Messenger of Allah said: "Shall I not inform you of the best of witnesses? The one who comes with his testimony before being asked for it."² It is a practical and lawful tool for someone to provide testimony before a court of law to present knowledge or information related to an incident. Prophet Muhammad, when there was a dispute between a man and another about something and the case was filed before he said: "Produce your two witnesses or else the defendant is to take an oath."³

Yet, those seeking to prove information about a fact or an incident through testimony must be honest and should abstain from giving false testimony because that will consider under Islamic law as one of the biggest sins.

Narrated Abu Bakra: “The Prophet considered (giving false testimony) among the most serious of major sins.”⁴ It is part of Islamic law that performing a false testimony results in the anger of God. In this context, Prophet Muhammad says: “Whoever takes a false oath in order to grab (other's) property, then Allah will be

¹ Afsaruddin, Asma, Sunnah Encyclopædia Britannica, (2018), available at: <https://www.britannica.com/topic/Sunnah>, accessed date December 12, 2020.

² Al-Tirmadhi, A. I. M. I. Jami` at-Tirmidhi , The Chapters On Testimony (Vol. 4, Ser. 2295).

³ Sahih al-Bukhari, (Vol.3, book 48, hadith 836)

⁴ Bulugh al-Maram, (Vol.3, book 48, hadith 839)

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angry with him when he will meet Him.”¹ All recorded of the prophet Muhammad's sayings and practices indicated the legitimacy of testimony in proofing people's rights and its importance of bearing and giving testimony honestly.

In consensus

Consensus represents an Islamic concept that Muslim legal scholars agree on a legal issue. In respect to testimony, Muslim jurists have unanimously approved the legitimacy of testimony for the Holy Quran's definitive indications and the Sunnah on that. Therefore, it is considered a credible tool for proof before any Islamic courts.² Ibn Qudama, an Islamic scholar, indicated that testimony is a verifiable tool for evidence-based on the Holy Quran's definitive indications, the Sunnah, and Muslim jurists' consensus.³

IV.CONDITIONS OF BEARING AND GIVING TESTIMONY IN ISLAMIC JURISPRUDENCE

a.Condition of bearing testimony in Islamic jurisprudence.

In Islamic jurisprudence, there are two kinds of conditions for testimony; the first is a condition for bearing testimony, and the second is conditions for giving the testimony itself.

While the conditions of giving testimony are varying, there are some conditions required when bearing testimony. It is a requirement for an individual to reach the age of discretion and be insightful unless there is an exception for carrying testimony for

¹ Supra note 60 , hadith 839

² Supra note 54, (Vol. 12, p. 3).

³ Supra note 54, (Vol. 10, p. 128).

those who are not insightful. Likewise, a witness shall know the fact of the case in which he will bear his testimony about it.

A man or woman who is summoned to bear and give testimony must reach the age of discretion because, with it, a person is aware of what he has seen and memorizes what he sees, so he or she will acquire the power of perception. Thus, an insane person cannot bear testimony because they cannot provide a disciplined testimony.¹

It is a requirement in the Hanafi Islamic school that man or woman must be insightful when bearing a testimony. Yet, the Maliki, Hanbali, and Shafi Islamic schools are not entirely agreeing on this condition because, in some cases, it is a fit right for those who are not insightful for bearing testimony if they definitively can identify the voice of those against whom are going to take testimony.²

Ibn Farhon, an Islamic scholar, defined the discretion required for bearing testimony as “the knowledge about the fact of a case when there is a summon of someone to give a testimony.”³ Accordingly, it is forbidden for someone to bear testimony when he or she does not know the fact of the incident because God says: “And do not pursue that of which you have no knowledge. Indeed, the hearing, the sight, and the heart - about all those [one] will be questioned.”⁴ The Quranic verse indicated a prohibition for bearing a testimony when witnesses do not know a given case.

Yet, when a court summons an individual to bear a testimony, they shall perform their testimony based on their knowledge of the fact of the case. God says: “And let not the witnesses refuse when they are called upon.”⁵ Al-Hasaan Al-Basri, an Islamic scholar,

¹ Al-Kasani, Ala' al-Din. Bada'i' al-Sana'i' fi Tartib al-Shara'i' (Vol. 6, p. 266).

² Supra note 54, (Vol. 14, p. 83).

³ Ibn Farhūn, Ibrāhīm ibn 'Alī., Kitāb tabṣirat al-ḥukkām fī uṣūl al-aqdiyyah, wa-manāhij al-aḥkām, (Vol. 1, p. 164.)

⁴ Al-Israa, 36

⁵ Supra note 52, 282

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clarifies that this verse in Quran encourages people not to refuse to bear testimony when they called for it.¹ Thus, it is not a rightful thing in Islamic law to conceal a testimony or to refuse to bear it when whiteness has the knowledge and when the court is asking for its performance. In the next section, the researcher will show the required conditions for giving testimony in a courtroom.

b.Conditions of giving testimony in Islamic jurisprudence.

Conditions of giving testimony in Islamic jurisprudence are divided into conditions attached to the witnesses, conditions related to the testimony itself, conditions associated with the object of testimony, and conditions related to the prescribed minimum for witnesses in some crimes.

In this article, it is essential to clarify the required conditions attached to the witnesses. First of all, there are eight conditions connected to the witnesses, which are the following: Islam, maturity, mentality, memorize and discipline, the ability of speech, ability to sight, a just person, and not punished for slander.

1-Islam:

The majority of Muslim scholars agreed that Islam is a necessary condition in giving testimony. Therefore, a just Muslim provides a valid testimony, and consequently, Non-Muslim testimony is not accepted. Many Hanbali scholars disagree regarding this opinion, particularly when a Muslim is traveling through the land and death is approaching; in this case, testimony should be taken and accepted even from Non-Muslims.²

¹ Qurṭubī, Muḥammad., Aḥmad, Tafsīr al-Qurṭubī : al-Jāmi‘ li-aḥkām al-Qur’ān., (Vol. 3, p. 298.).

² Supra note 54, (Vol. 14, pp. 70-71).

2-Maturity:

Most Muslim jurists required a witness to reach the age of maturity to accept their testimony.¹ Those jurists' opinions are based on the Quran verse, "And bring to witness two witnesses from among your men."² The Islamic jurists interpreted the term "men" as those who reached the age of maturity. Accordingly, those who have not reached this age are not competent to give a testimony. Some Maliki scholars disagreed with this finding and accepted the testimony of those boys who did not reach maturity when cases occurred between them because of the possibility of necessity.³

3-Mentality:

Most Muslim jurists in Islamic jurisprudence accept the testimony of people with a reliable mentality and exclude insane people and those who have chronic conditions that affect their mental capability. People with illness who affect their cognitive abilities cannot realize the importance of the testimony and its performance in delivering a just judgment.⁴

4-Preservation and discipline:

The witness must be vigilant, preserve and control what he testifies, and therefore the testimony of a fool who is unable to preserve and discipline is not accepted. Most scholars believe that they accept a witness's testimony if his mistake or omission is rare because no one is safe from it. If this testimony is prevented, then it will not be easy to provide testimony.⁵

¹ Buhūtī, Maṣṣūr ibn Yūnus, *Kashshāf al-qinā' 'an matn al-iqnā'*. (Vol. 6, p. 416)

² *Supra* note 52, 282

³ *Supra* note 54, (Vol. 14, pp. 38-42).

⁴ Buhūtī, Maṣṣūr ibn Yūnus, *al-Rawḍ al-murbi' sharḥ Zād al-mustaqni' fī ikhtiṣār al-Muqni'* (Vol. 7, p. 590).

⁵ Sarakhsī, Muḥammad, A., *Kitāb al-Mabsut* (Vol. 16, p. 113.)

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5-The ability of speech:

The majority of scholars believe that the mute's testimony is not accepted; inferring that the term "I testify" is a condition for its correct performance. The Malikis and Ibn al-Mundhir of the Shafi'i disagreed and said that the mute's testimony would be accepted if given with an understandable sign because the discernible movement takes the place of the pronouncement in the decisions of the mute from marriage, divorce, and others.¹ Hanbali school may accept a mute's testimony if they can write down the testimony regardless of whether they are willing to give their testimony with an understandable sign.²

6-Ability to sight:

Imam Abu Hanifa and another Islamic scholar, Mohammad, did not fully accept the testimony of those who were blind because they may not know whom they were going to testify to unless they become blinded after performing their testimony.

Nevertheless, the Maliki, Shafi, Hanbali jurists accept the testimony of blinded for their testimony over a heard speech, not for committed actions based on the Quranic verse: "And bring to witness two witnesses from among your men."³ Accordingly, nothing in the Quranic verse bans a blinded individual from providing their testimony in a court, indicating the general acceptance and competency in providing their testimony.

¹ Id, (Vol. 8, p. 130.)

² Supra note 54, (Vol. 14, p. 86).

³ Supra note 52, 282

7-A just person:

It is a matter of the fact that the court will summons for testimony and accept the testimony of a just individual or what they call in Arabic as "Adil." A just or "Adil" refers to a person that is an earnest and highly regarded figure and is not accountable to uncertainty. In many events, Islamic scholars define a just individual in this context as their dedication to restrain themselves from dedicating major-grave transgressions and not to insist on devoting minor wrong firmly.¹

This stipulation for testimony is based upon the instructed Quranic verse: “And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah.”²

8-Not punished for slander:

Aspersions is prohibited in Islam and takes into consideration as one of the significant wrongs. Slander is an accusation of others of committing infidelity, homosexuality, or fornication. Most Islamic scholars agreed to reject the slanderer's testimony unless they show their repentance after getting legal punishment. Islamic scholars' opinions vary on accepting this kind of testimony if the offenses doers have been punished and shown their repentance. The majority of Maliki, Shafi, and Hanbali Schools believe that the testimony is accepted after shown repentance.³ Nevertheless, the Hanafi scholars settled on not considering the testimony of those that engage in aspersion, perhaps even after their repentance.⁴

¹ Shirbīnī, Muḥammad, Aḥmad. Mughnī al-muḥtāj ilā ma‘rifat ma‘ānī alfāz al-Minhāj. (Vol. 4, p. 427.); Aljasali, Mohammed, M., Al-Wajez. (Vol. 2, p. 248.).

² AL-Talaaq: 2

³ Supra note 54, (Vol. 14, p. 99).

⁴ Supra note 76, (Vol. 16, p. 113.)

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This condition for testimony is based upon the instructed Quranic verse: " And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient".¹

V.CAN NON-MUSLIM GIVING A TESTIMONY IN ISLAMIC JURISPRUDENCE

a.Introduction

Many Islamic scholars required witnesses to be fair Muslims to validate their testimonies, whether it is a testimony for or against a Muslim or a non-Muslim. Yet, within the general accepted Islamic scholars' view, Non-Muslim is not competent to give a testimony in Islamic courts against a Muslim except for their testimony over a Muslim bequest during traveling based on the state of necessity. Likewise, it was a disputed issue whether Non-Muslims are competent to provide testimony against Muslims or other Non-Muslims regardless of their religion. Accordingly, the legality of non- Muslims' testimonies, in general, is divided into four views.²

b.First view:

Imam Ishāq ibn Rāhwayh, an Islamic scholar, affirmed the acceptance of Non-Muslims testimonies when they testify for other Non-Muslims with whom they share the same religion. Imam Ishaq points out a Quranic verse to support his point. God says: "And We have cast among them animosity and hatred until the Day of

¹ An-Noor:4

² Supra note 65, (p. 280.)

Resurrection.”¹ According to this verse, differences in religion may lead people to degrade justice by providing unstable testimony based on the level of animosity and hatred derived from their faith differences.

Ishāq says: “the testimony of Non-Muslims is accepted between themselves as long as they share the same faith. It is not accepted when they are not sharing the same religion because the level of animosity and hatred between them is greater than that between Muslims”.²

According to Abubakar, Adamu “the wisdom in all this is to ensure the prevalence of the justice as the evidence of one religion against the other religion could be unsafe and liable to suspicion or bias and partiality.”³

c.Second view:

Hanafi Scholars and few other scholars accept Non-Muslims testimonies against similar Non-Muslims regardless wither they are or are not sharing the same faith.⁴ This opinion is relying on some indications in Islamic sources of law such as the Quran and Sunnah.

For example, in the Quran, God says; "And those who disbelieved are allies of one another."⁵ In interpreting this Quranic verse, Prophet Mohammad said that disbelievers are allies, and testimony is part of the alliance's meaning. Accordingly, Ibn Al-Najim, an Islamic scholar from the Hanafi School, agreed that the testimony of Non-Muslims is accepted between themselves.⁶ This view concludes the possibility for Non-Muslim to bear and give a

¹ Al-Maaida:64

² Kawsaj, Ishāq ibn Mansūr, Masā'il al-Imām Aḥmad ibn Ḥanbal wa-Ishāq ibn Rāhwayh, (Vol. 8, pp. 4096-4097.)

³ Abubakar, Adamu, Islamic Law Practice and Procedure in Nigerian Courts, (p. 109).

⁴ Supra note 65, (p. 280.)

⁵ Al-Anfaal: 73

⁶ Supra note 36, (Vol. 3, p. 124.).

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testimony against other Non-Muslim whether they are from the same religion or not.

Another example came from the Prophet Sunnah as following:

Jabir b. ‘Abd Allah said: “The Jews brought a man and a woman of them who had committed fornication. He said: Bring me two learned men or yours. So they brought the two sons of Suriya. He adjured them and said: How do you think about the matter if these two persons bear witness to the effect that they have seen his sexual organ in her female organ (penetrated) like a collyrium stick when enclosed in its case, they will be stoned to death. He asked: What is there which prevents you from stoning them: They replied: Our rule has gone, so we disapproved of killing. The Messenger of Allah (ﷺ) then called four witnesses. They brought four witnesses. Who testified that they had seen his sexual organ (penetrated) in her female organ like a collyrium stick when enclosed in its case. The Prophet (ﷺ) then gave orders for stoning them.¹

The above Sunnah means that Prophet Mohammad accepted the testimony of Non-Muslims between themselves and, for example, their testimony over the punishment of adultery crime. Some scholars disagreed with this interpretation and concluded that confession is the reason for the sentence rather than testimony acceptance.²

Some scholars refer to the acceptance of Non-Muslims testimonies between themselves based on a logical interpretation.

¹ Abi Dawud, Sunan Abi Dawud.,(Book, 40. Hadith 102).

² Aẓīmābādī, Muḥammad Shams al-Ḥaqq. Awn al-ma‘būd : sharḥ Sunan Abī Dāwūd. (Vol. 12, p. 93.)

They indicate that not all Muslims are decent individuals, and Non-Muslims may be trustworthy people in their religion who are known for their honesty. Therefore, nothing may prevent the acceptance of their testimony against similar Non-Muslims.¹

d.Third view:

The majority of Muslim scholars are not for approving Non-Muslims testimony, whether their testament is for or against Muslims or Non-Muslims, and whether they are or otherwise from the same religious beliefs. In sustaining their view, some scholars point out the verse in the Quran, which states, "And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah."² The scholars analyze this verse as God request a witness to be a just person to accept the given testimony; nevertheless, they argue that Non-Muslims are not trustworthy individuals in their eyes. Furthermore, the verse states that "two just men from among you," which demands the witnesses to be from among us as Muslims; nonetheless, Non-Muslims are not part of us as Muslims.³

Another example is the Hadith in Sunna, in which the prophet Mohammad says: "The people of the Book used to read the Torah in Hebrew and expound it in Arabic to the Muslims, so God's messenger said, "Neither believe nor disbelieve the people of the Book, but say, 'We believe in God and what has been sent down to us.'" ⁴ This hadith's significance is that most neither believe nor disbelieve the people of the Book even for their testimonies.

¹ Al-Asali, Mohammed, T, Provisions for making testimony by modern means, (2011)., (LLM thesis, Islamic University., p.19). available in Arabic Language at: http://www.riyadhaelem.com/researches/9/54_ahkam_shahdat.pdf

² At-Talaaq: 2

³ Shirbīnī, Muḥammad, Aḥmad. Mughnī al-muḥtāj ilā ma‘rifat ma‘ānī alfāz al-Minhāj.(Vol. 4, p. 427.)

⁴ Bukhari,(Book 1, Hadith 148).

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Likewise, Islamic scholars use logical analysis to ban the testimony of Non-Muslims, especially against a Muslim, as a judge in Islamic court is not allowed to accept the testimony of a Muslim's debaucher because he or she is not a just person. Accordingly, if a Muslim's debaucher's testimony is not accepted, it is more realistic and essential to reject the statement of Non-Muslims.¹

e.Fourth View:

The fourth view represents when a Muslim is traveling through the land, and the disaster of death should strike him, and there is only a Non-Muslim. A judge can accept the testimony of Non-Muslims over a Muslim bequest in this circumstance. The Hanbali scholars agreed for this view's legality based on a clear Quranic verse and based on the existence of the state of necessity.²

God says: "O you who have believed, testimony [should be taken] among you when death approaches one of you at the time of bequest - [that of] two just men from among you or two others from outside if you are traveling through the land and the disaster of death should strike you."³

Ibn ' Abbas narrates another example from Sunnah: "A man from Banu Sahm went out with Tamim Ad-Dari and 'Adi bin Badda. The Sahmi man died in a land in which there were no Muslims. When they arrived with what he left behind, they searched for a bowl made of silver which was inlaid with gold. The Messenger of Allah (ﷺ) had the two of them take an oath. Then they found the bowl in Makkah, and the person said: 'We purchased it from Tamim and 'Adi.' So two men among the relatives of the Sahmi man stood to take an oath by Allah that they

¹ bn Abd al-Barr, Yusuf ibn Abdallah ibn Mohammed, Al-Kâfi fî Madhhab Mâlik ("The Sufficiency in Mâlik's School of Jurisprudence")(Vol. 2, p. 917.)

² As-Sa'di, Abdur-Rahmân, Nâsir. Tafseer As-Sa'di (2018) (ed. 1, p. 246.)

³ Al-Maaida:106

(his family) had more right to it than them." He said: "So it was about them that the following was revealed: O you who believe! (When death approaches any of you then) take the testimony."¹

The significant point of this hadith is that Prophet Mohammed has accepted Tamim Ad-Dari's testimony and 'Adi bin Badda who were Non-Muslims, based on an explicit verse in the Quran, the existence of the state of necessity.

The state of necessity is also the reason behind accepting Non-Muslims' testimonies regardless of the place or time in the Hanbali school. Accordingly, the testimony of Non-Muslims, nevertheless it is in favor of Muslims or not, is accepted during the state of necessity. The state of necessity means in this place as o the situation where there is no Muslims to provide testimony over an incident that occurred regardless of whether it was or has not happened during traveling.²

¹ Jami` at-Tirmidhi (Book., 47. Hadith 3337).

² al-Jawziyya, Ibn Qayyim. At-Ṭuruq al-Ḥukmiyyah fī as-Siyāsati ash-Shar'iyyah (p. 160.).

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VI. THE COMPETENCE OF ON NON-MUSLIM TO GIVE A TESTIMONY UNDER THE SAUDI CIVIL PROCEDURAL LAW AND ITS JUDICIAL APPLICATIONS

a. The legal system of testimony in the Saudi law of civil procedures

Islamic Sharia is the source of all laws and regulations in Saudi Arabia. Islamic Sharia in this place is an indication of the primary source, which is the Quran and Sunnah. Article (7) of the Basic Law of Governance stated, "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State."¹

Whether they are citizens or residents, all people in the Kingdom have an equal right to file suit on Saudi's courts. According to Article (47): "All people, either citizens or residents in the Kingdom, are entitled to file suit on an equal basis. The Law shall specify procedures for this purpose."² Furthermore, every court within the territories of the Kingdom applies the rules of Islamic Sharia. According to Article (48) of the Basic Law of Governance; "The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunnah, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunnah."³

The Saudi government, to shape the Saudi judicial system so that it can meet a higher judicial standard, enacted a new Law of Procedure based on Royal Decree No. M/1 of 25 November 2013.

¹ Basic Law of Governance, issued a Royal Decree No: A/90, Dated 27th Sha'ban 1412 H (1 March 1992), art (7).

² Id, Art;47

³ Id, Art;48

Besides, the Minister of Justice, through order No. 39933 of 20 March 2014, enacting the Implementing Regulations of the Law of Procedure before Sharia' Courts.

The new law of Procedure incorporated two hundred and twenty-four articles, and it includes many different kinds of legal proof mechanisms. Testimony as a means of proof is part of this law through articles 121 to 127.

According to article 121, a litigant who, throughout the process, demands proof by the testament of witnesses shall mention in writing or orally during the hearing the facts he seeks to verify. Suppose the court determines that such facts are permissible under the arrangements of article 101 of this Legislation. In that case, it shall decide to listen to the witnesses, routine a hearing for such functionality, and ask the litigant to bring said witnesses.¹

If a witness has a justification for not showing up to testify, the judge will proceed to his place to hear his testament, or the court may assign one of its courts for such an objective. It will delegate the court of his area of residence to hear his testament if the witness resides outside the court's territory. ²

The statement of each witness shall be heard individually in the litigants' presence yet not in the existence of various other witnesses whose testimony had not been listened to. Failing of the litigant indicated versus to participate in a statement shall not preclude hearing it, as well as the very same shall read to him when he engages in. Upon confirmation of his identification, a witness shall specify his full name, age, profession, place of residence, and his partnership to the litigant, whether by kinship, employment, or any other kind of connection, if relevant.³

¹ Law of Procedure before Shari'ah Courts, Royal Decree No. M/1, art. 121, (22/1/1435 H, Nov. 25, 2013), O.G. Umm al-Qura, (3/2/1435H, Dec. 6, 2013).

² Id, Art:122

³ Id, Art:123

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Testimony shall be offered orally. Adopting written notes throughout the statement is allowed just with the court's approval supplied it is validated by the nature of the case. A litigant versus whom the testimony is made may show to the court matters that might bias the witness or his statement.¹ At his own movement or at a litigant activity, the judge may direct the witness inquiries he considers for disclosing the fact. The court shall accede to the demand of the litigant hereof unless the inquiry is immaterial.²

In case the counterparty cannot bring his witnesses, who are absent from the hearing, the judge may grant him a time necessary upon his requests. Suppose he fails to get them to the scheduled hearing or brought a person whose statement was not conducive. In that case, he shall be permitted another period and advised that he would certainly be considered not able if he fails to present his witnesses. If he stops working to offer them in the third hearing or provides some of the witnesses whose testament is not conducive, the court might determine the conflict. If he does present his witnesses due to their absence or lack of knowledge of their place, he shall deserve to file a case when they are readily available.³

The testimony of a witness and his response to questions routed at him will be entered into the record and mentioned in the initial individual without modification. It shall after that be read to him, and he might go into any change to it. The change will be entered after the testimony text and signed by the judge and the witness.⁴

¹ Id, Art:124

² Id,Art:125

³ Id,Art:126

⁴ Id, Art:127

As we can see, no article in the procedural law prevents Non-Muslims from providing testimony in the Saudi Courts, whether between them and other Non-Muslim or between them and other Muslims. Nevertheless, the Islamic roots regarding the interpretation of Islam as a condition required by the primary sources of law in concluding witnesses' competency may lead to this unpleasant conclusion, specifically, when the law is ambiguous itself in deciding this issue. Accordingly, judges in the case of such ambiguity will act within their legal authority to determine the competency of Non-Muslims' witness to perform their testimony, specifically, when Muslim is part of the conflict. Mostly, they will not accept their testimony because most Islamic scholars require the witness to be a just Muslim to validate the testimony.

In conclusion, the only way that may accept the Non-Muslims' testimonies is the case where the witness is testifying over a Muslim's bequest during traveling when death is approaching, and there are no other Muslims nearby. To verify the Non-Muslims' testimony corresponding to Muslims in the Saudi courts, the state of necessity might not also be approved unless there will undoubtedly be a specific and legitimate write-up in the step-by-step law to equal rights in treatment.

b. The judicial applications of the competence of Non-Muslims witnesses to give a testimony against Muslims under Saudi Civil Procedure.

As indicated above, the Saudi law of procedure did not prevent Non-Muslims from providing testimony in the Saudi Courts, whether between them and other Non-Muslims or between them and other Muslims. Contrary to different legal systems, the Saudi legal system adheres to Sharia's primary sources' provisions and articles, prevailing its application over laws and regulations on the Saudi sovereignty land. Therefore, judges in Saudi's courts might discount the testimony of non- Muslims or individuals who do not comply

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with Islam's primary interpretation and neglect the testimony of a non-Muslim in favor of a Muslim's testimony.

The practice of judge discounting the testimony of Non-Muslims in favor of a Muslim's testimony can be understood, as the condition required for providing testimony is part of the state public policy. According to the article (11/3) of the Saudi enforcement law, "public policy is the provisions of Sharia law."¹ In interpreting the meaning of public policy in Saudi Arabia, the Bureau of Experts at the Council of Ministers issued an order number (497), which stated, "Public policy is the peremptory evidence in the primary sources of Sharia; Quran and Sunnah"²

Concerning the connection between the conditions of giving testimony in Islam and the state public policy, most Islamic schools thought in favor of nullifying the judgment that accepts the testimony of Non-Muslims over Muslims. For example, Ibn Qudama, an Islamic scholar, stated: "there is no doubt among Islamic scholars that any judgment that issued based on the testimony of Non-Muslims over a Muslim is null and unenforceable."³

In the Saudi courts, judges have a significant discretion to settle the conflict based on provided evidence unless their choice is conflicting with the peremptory evidence in Sharia's primary sources.⁴ Accordingly, to override the Islamic scholar consensus regarding the non-competence of Non-Muslims in giving testimony

¹ Enforcement law, Royal Decree No. M/53, Dated 13/8/1443H, art:11/3

² Bureau of Experts at the Council of Ministers, order No. (497), Dated 16/9/1433H.

³ Supra note 54, (Vol. 9, p. 258).

⁴ The principles and decisions issued by the Supreme Judicial Authority and the permanent and general committee of the Supreme Judicial Council and the Supreme Court from 1391 AH to 1437 AH; Rule 1927, P.487 (350/5)(1420H).

to validate court judgment based on such testimony against a Muslim needs legitimate proof.¹

Hence, it within the expectation that the only possible way for the testimony of Non-Muslims to be accepted in the Saudi courts is the case where the witness is testifying over a Muslim's bequest during traveling when death is approaching, and there are no other Muslims nearby. Opponents of this ideological approach, which are a few numbers of scholars, argue that expanding the acceptance of non-Muslims' testimony on Muslims should be accepted as a necessity in the absence of a Muslim witness, regardless of location. To verify the Non-Muslims' testimony corresponding to Muslims in the Saudi courts, the state of necessity might not also be approved unless there will undoubtedly be a specific and legitimate write-up in the step-by-step law equal rights in treatment.

In a one published commercial case, the plaintiff had confined his lawsuit to a request to prove the sale of the defendant to the plaintiff of the contract of a company (...) (Saudi Major Markets Limited) in exchange for 6% for the defendant and 94% for the plaintiff, from the total revenues and not from the profits from the year 1995 AD. Accordingly, an obligation has required the defendant, at an amount of (23,191,148) riyals, the value of the remaining amount of the signed contract with the institution registered in the defendant's name.

On the contrary, the defendant denied the sale, contracted altogether, and stated that the plaintiff was a worker for him and was in charge of the institution, and the guarantee was transferred. He argued that the Board of Grievances did not have jurisdiction in this case. The Labor Dispute Settlement Commission's jurisdiction and the plaintiff submitted a declaration on 12/31/2010 AD and an agreement On September 25, 2012.

To support his claims, the plaintiff asked the judge to be summoned and to hear two of his witnesses, one of them was Non-

¹ Id., (478/6) (1420H).

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Muslim. Yet, the defendant argued that, as for the second witness (...), the witness and his testimony must not be admitted since he is not a Muslim. The scholars have decided that the testimony of a non-Muslim is not accepted for a Muslim.

During the hearing session and before reasoning its judgment later, the judicial circuit upholds that the Non-Muslim witness's testimony is not accepted according to what the scholars have decided in this regard.¹ The Second Commercial circuit of the Court of Appeal in Riyadh Region held its session, and it uphold the decision.²

From the conclusion of the judicial circuit's judgment, we can assume that it is the general norm in the Saudi courts not to accept the testimony of Non-Muslims witnesses except for the existence of the state of necessity and in a narrow limit.

VII.SUMMARY AND RECOMMENATIONS

In summary, the globe is extra connected than ever. The flow of trade transaction end up being borderless and also the demand for a solid and also fair lawful system to safeguard the end of any potential disagreement between people is essential. A solid and fair legal system calls for the implication of legal standards that dissuade any discriminatory treatment based upon sex, race, or religion.

Part of people's civil rights to protect their legal rights is the opportunity to have accessibility to the national legal system and its courts' system with no obstacles. Both Islamic legislation and the Saudi Regulation system protect the opportunity for any private to submit a legal action within the kingdom's territory with an equal right.

¹ Commercial Court, Riyadh, Case No., 1/15904/k, dated 25/12/1437H;

² The Second Commercial circuit of the Court of Appeal, Riyadh, decision No.,1657/k dated 1348H.

Judges within the Saudi territory apply the principles of Islamic law and regulation derived from Sharia's primary sources. There are several forms of admissible proof to confirm or disapprove of controversies and disputes under Islamic law, such as circumstantial, empirical, and psychological evidence. Testimony is a legal form of proof, and it is a part of Islamic law of evidence in which individuals can assert their arguments in court. Accordingly, the testimony considers as essential and dominant in Islam and Islamic courts and the primary form of proof in Islamic jurisprudence to preserve harmony and provide justice in Islamic communities. It has its authority based on Islamic verses in the Quran, the Sunnah, and the Agreement of the Companions, which are the primary source of Sharia law.

However, Islamic jurisprudence has some criteria that must be met to enable an individual's testimony in front of others. The requirement for an individual to be a just Muslim is among those standards that reveals a valid dispute on the ability of a Non-Muslim to be a witness before the Sharia court, in particular, whether she or he can birth or give a statement versus a Muslim.

In this regard, except for those who deem themselves incompetent, the general theory in Islamic jurisprudence is that most Muslims are qualified to testify before others, whether they are Muslims or Non-Muslims. Amongst doctrine and method, Islamic concepts make it possible for Muslims to testify before other Muslims and Non-Muslims in Islamic courts. This basic concept of the proficiency of Muslims to testify has a considerable agreement among Islamic jurists.

Most Muslim scholars concurred that a court must approve a just individual's testimony on conflict based upon this statement. However, in Islamic law, there are many disputes over the competence of Non-Muslims to testify versus others in Islamic courts, especially their credibility in providing testimony against Muslims because of differences in faith.

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In this regard, several Islamic scholars called for witnesses to be fair Muslims to confirm their testimonies, whether it is a testament for or versus a Muslim or a non-Muslim. Nevertheless, within the essential accepted Islamic scholars' sight, Non-Muslim is not competent to testify in Islamic courts versus Muslim except for their testimony over a Muslim bequest while taking a trip based upon the state of necessity. In addition, it was a challenging concern whether Non-Muslims are qualified to supply testimony versus Muslims or various other Non-Muslims based on differences in their religion. Appropriately, the legality of non- Muslims' testimony, generally, is separated right into four sights.

The initial sight attested to the approval of Non-Muslims testimony when they affirmed for various other Non-Muslims with whom they share the same religious beliefs. The second sight approves Non-Muslims' testimonies versus comparable Non-Muslims no matter whether they are or are not sharing the same faith. The third view represents most Muslim scholars who are not for approving Non-Muslims testimony whether their testimony is for or against Muslims or Non-Muslims and whether they are or otherwise from the very same faiths. The fourth sight stands when a Muslim is traveling by land and the disaster of fatality ought to strike him, as well as there is only a Non-Muslim. A judge can accept the testimony of Non-Muslims over a Muslim commandment in this condition based on the state of necessity. The state of necessity is additionally the reason behind approving Non-Muslims' testaments no matter the location or time in the Hanbali school.

Islamic Sharia is the source of all laws and regulations in Saudi Arabia. Whether they are citizens or residents, all Kingdom people have an equal right to file suit on Saudi's courts. The Saudi government, to shape the Saudi judicial system so that it can meet a higher judicial standard, enacted a new Law of Procedure based on Royal Decree No. M/1 of 25 November 2013. The new law of Procedure incorporated two hundred and twenty-four articles, and it

includes many different kinds of legal proof mechanisms. Testimony as a means of proof is part of this law through articles 121 to 127.

No article in the procedural law prevents Non-Muslims from providing testimony in the Saudi Judiciaries, whether in between them and other Non-Muslim or between them and other Muslims. However, the Islamic roots of Islam's analysis as a problem needed by the primary resources of law in ending witnesses' proficiency might bring about this unpleasant conclusion, mainly when the legislation is ambiguous itself in deciding this concern.

Appropriately, courts when it comes to such obscurity will undoubtedly act within their legal authority to determine the competency of Non-Muslims' witness to do their testimony, particularly, when Muslim belongs to the dispute. Mainly, they will decline their testimony since most Islamic scholars call for the witness to be a just Muslim to confirm the testimony.

The only way that may accept the Non-Muslims' testimonies is the case where the witness is testifying over a Muslim's bequest during traveling when death is approaching, and there are no other Muslims nearby. To verify the Non-Muslims' testimony corresponding to Muslims in the Saudi courts, the state of necessity might not also be approved unless there will undoubtedly be a specific and legitimate write-up in the procedural law to equal rights in treatment.

Likewise, the judicial application within Saudi courts upholds that the Non-Muslim witness's testimony is not accepted according to what the scholars have decided in this regard. Accordingly, there may be an unpleasant difference in applying evidence tools within the Saudi Courts based on the difference in understanding of the condition of Islam as a requirement of bearing and delivering a testimony.

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It might be an excellent remedy for the Kingdom to pass separate legislation of evidence to guarantee the different proof approaches approved in the Sharia regulation consistent within the international legal standards. To pass an evidence law that can provide equal rights and treatments between Muslims and Non-Muslims since there is a possibility to do that according to the Hanbali School of thought, such law enacting may increase justice and legal fairness.

*****END*****