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EXAMINATION OF THE ADMISSIBILITY OF
CIRCUMSTANTIAL EVIDENCE UNDER ISLAMIC LAW
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1.1 Introduction

Situation may arise where neither the proof by Shahadah nor by Iqra may be available, but there could be circumstance which may be accepted as forming the needed evidence.

Before examining the Qarinah as a means of proof, it is better to define *al -Baiyinah* (the evidence).

Accordingly, *Al-baiyinah in its literal meaning* covers a wider scope and includes all types of proofs.¹

The Ulama defined it from the technical sense to mean “a form of notice” (which is authentic), to prove a right or interest through the use of some specific words in the course of judicial proceeding.²

According to Ahmad Fathi al-Bahnasy, *al-Baiyinah* means about a proof of right or interest, for the benefit of another, against another person’s interest, with regards to right which belongs to Allah or a right which belongs to private individuals.³ The information given must be based on certainty not on mere suspicion or conjecture. This was the criterion laid down by the Prophet (S.A.W) himself in a *hadith* where he says “if one of you sees the event as clear as he sees the sun then he can testify.”⁴

1.2 The Aim And Objectives Of The Paper

The aim and objectives of this paper are to critically examine the essentiality of the determination of rights and duties of the litigants in a judicial proceedings, particularly by means of circumstantial evidence.

For example how can the application of Islamic rules of evidence be better entrenched. To what extent the circumstantial evidence be relied upon? Can circumstantial evidence alone be sufficient to grant conviction on criminal

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¹ Bahnasy A.F(1976)*Nazariyatul Ithbat*, Sharikatul Arabia, Egypt. P.13

² Ibn Human (1317AH) *Fath al-Qadir*, Matba

ah’-al Kubrah, p.2

³ Bahnasy, A.F. op. cit. p.14.

⁴ Ibid

matters?

In determining the admissibility of such evidence it is better to use the acceptable techniques or methods of *ijtihad* under Islamic Law, in accordance with the juristic interpretation of the four sunni Schools of Islamic jurisprudence.

1.3 Definition of al-Qarinah:

Al-Qarinah (circumstantial evidence), literally means connection, conjunction, association, linkage and indication.⁵

In the technical term, *qarinah* means the logical inference to be drawn from something done or from circumstances by virtue of which the matter becomes certain.⁶

According to Abdulkareem Zaidan, the definition of *al-Qarinah* covers everything which may be used as proof or evidence in order to establish the existence or non existence of a thing.⁷

A presumption may sometimes be weak or strong, sometime it may be considered as conclusive, while on the other hand it may be only probative, when it is strong it is acceptable as evidence for the relevant fact or fact in issue.

1.4 The authority of *Qarinah* from the Holy Quran:

In Suratu Yusuf the Holy Quran says:

So they both raced each other to the door and she tore his shirt from the back, they both found her Lord near the door. She said what is the (fitting) punishment for one who frames an evil desire against thy wife but a prison or grievous chastisement. He said, it was she who sought to seduce me from my (true) self. And one of her household saw (this) and bore witness, thus, if it be that his shirt is torn from front then it is her tale true and he is the liar. But if it be that his shirt is torn from the back, then she is the liar and he is telling the truth.

⁵ Lane, Edward William. *Madd al-Qarni*. (Arabic-English Dictionary lexicon Book I, 1610, Lahore. 1978). See also Coron, J. (nd) The Dictionary of modern written Arabic. Darul Fikr. 760.

⁶ Anwarullah (n.d.) *Islamic Law of Evidence*, Shariah Academy Islamabad, p.63.

⁷ Ibid.

*So when he saw his shirt that was torn from the back he, (the husband) said, behold, is a snare of you women truly might is your snare.*⁸

In the same *surah* i.e. Surat Yusuf, another verse referring to circumstantial evidence says in respect of Yusuf and his brothers.

*“They stained his shirt with false blood. He said “Nay” our minds have made up a tale (that may pass with your self) patience is most fitting against that which ye assert. It is Allah whose help can be sought.”*⁹

According to al-Qurtubi, in his commentary on the verse, he says:

*The jurists have employed this verse (ayah), as a justification for using signs, which points to the existence of something in solving fiqh related problems. That is, by using circumstantial evidence of qarinah and others. In this context, the ulama are unanimous in their view that, Prophet Yaqub (Jacob), has treated the blood stained shirt of his son, Yusuf as evidence that Yusuf was still alive, as the shirt though being stained, has not been torn, as it should be if Yusuf was really attacked by wolf, as has been claimed by the brothers.*¹⁰

In another narration, it was said that, Prophet Yaqub (a.s) has asked when he was told that his son Yusuf was mauled by wolf, he said when did wolf become so clever that it could eat Yusuf without tearing off his shirt?

Based on the narration above, it is clearly shown that Prophet Yaqub (A.s.) had resorted to the use of *qarinah* (circumstantial evidence) as a means of proving that the allegation by the brothers of Yusuf were false. It is usually the case that a person who is mauled by wolf, would have his shirt

⁸ Quran 12:25-30.

⁹ Quran 12:18

¹⁰ Zaidan, A.KJ. (184) *Nizamul Qada Fi Shariat Islamiyah*, Maktaba al-Ani, p.220.

torn into pieces, but which was not the case in the Yusuf's case and this fact clearly raised doubt on the allegation coming from Yusuf's brothers.

In the same vein, it was also reported that Prophet Sulaiman (a.s) once gave a decision based on *Qarinah*. The story was that he was approached by two women on the claim over a child, both of them claimed that, that child belong to her. Then Prophet Sulaiman summoned them in order to examine their claim. He asked them to bring the child they were claiming. He offered them a suggestion that, since he himself could not be able to identify the real and biological mother to the baby, then the best solution to this problem is to divide the baby into two, so that each will have her own share of the boy. Then Prophet Sulaiman ordered for a knife to be brought to him so that he would cut the child. The older woman who was not the real mother of the child agreed with his suggestion, while the younger woman who was the biological mother exclaimed, "May Allah give you mercy! Please do not do such a thing as the baby is mine! Upon hearing this, Prophet Sulaiman decided the case in favour of the young woman, based on *qarinatul hal* (Circumstantial evidence), that she is the real mother.¹¹

Ibn Qayyim was, while explaining the above *hadith*, he says: We can never find any better example for the case of *qarinah* than the one above, which is clear evidence based on *qarinah*. The fact that the older woman was ready to sacrifice the child, so that in the end neither of them will get the child. And also the fact that the younger woman was ready to give up her claim to the baby so as to save his life, shows that she is the real mother of the baby boy. This is because of the special bond of maternal love between the mother and the child. This *Qarinah* becomes clearer and stronger when the younger woman said 'it is my child.'¹²

1.5 From the Sunnah

The *ulama* (Islamic Scholars) have also argued that in several *sunnah* of the Prophet (SAW,) we can find ample evidence which shows that *qarinah* may be used as one of the means of proof under *Shari'ah* (Islamic. The Noble Prophet (SAW) also had admitted the presumption as a source of proof in many cases:

It has been related that, in the battle of Badr, that the two sons of Afrah claimed that they have killed Abu Jahal. They went to the Prophet (SAW) and narrated this story to the him, the Prophet asked them, do you have any

¹¹ Ibid.

¹² Ibn Qayyim A. (1977) *al-Turuq al-Hukumiyyah*. Matha al Muani, Egypt, p.6.

exhibit? They said yes, the Prophet said could you show me your swords. When they showed it to him the Prophet (SAW) saw the blood stained swords, then he said "You have really killed the man!"¹³

It has been also related on the authority of Nu'man, who related from his father that some people brought a dispute concerning a hut to the Noble Prophet (SAW). The Prophet (SAW) sent Hudhaifah to decide the case. Then Hudhaifah decided the case in favour of those to whose the bamboo of the hut had come out. When he returned and told the Prophet his decision, the Holy Prophet (SAW) said "Your decision is correct."¹⁴

In another *hadith*, the Prophet (SAW) at one time decided the paternity of some one based on *qiyafah* (procedure or rule for establishing paternity of someone). This means that such judgment of the Prophet (SAW) which was based on *qiyafah*, was also based on *Qarinah*, as *qiyafah* is based on *qarinah* (circumstantial evidence) to establish the paternity of some one. The rightly guided caliphs also followed the footsteps of the Prophet (SAW) by applying *qiyafah* as a means of proof of nasab. Imam Malik, Ahmad Ibn Hambal, al-Shafi'i and many others, all accepted that applying *qiyafah* amounts to applying *qarinah* (circumstantial evidence).¹⁵

The Prophet of Allah (SAW) had also once given an order that a lost but found property should be given to the party who claims it, if he can be able to describe the property which he had lost. It is therefore clear that returning the lost property to its rightful owners on the basis of description of the lost item, is also a method based on *qarinah*.¹⁶

On the other occasion, the Prophet (SAW) had also given judgment in a *qasamah* case, based on *lauth* which is also a type of *qarinah* (circumstantial evidence). It is also to be born in mind that, the majority of the *ulama* have accepted *qasamah* as a means of proof in murder cases, where the murderer is identified. It is therefore clear that *lauth* is also a type of *qarinah*, which plays an important role in the *qasamah* procedure.¹⁷

The companions of the Prophet (*Sahabah*) had also on many occasions given their judgment on the basis of *qarinah*.¹⁸ For example, Umar Ibn khattab (RA) had at one time imposed *hadd* punishment on *zina* case, on a woman who conceived pregnancy without having a husband. He

¹³ Onm Ja,na;. A)nd _ al;-Musnad Daral Fikr Vol.III, p.217.

¹⁴ Reported by Ibn Majah and in Sunan Abu Daud vol.ii, p.171.

¹⁵ Awang, S.M. (1996) *Introduction to Islamic Law of Evidence*, Open Press, Kula Lumpur, p.123.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid, p.220. Zaidan, A.K. (1984)

relied on the *qarinah* in passing his judgment. This is also the opinion of Imam Malik and one opinion of Imam Ahmad.¹⁹

Umar (RA) and Abdullahi Ibn Masud had at onetime imposed the *hadd* of *shurbul khamr* (wine drinking) on the basis of the smell of the liquor, on the breath of the accused person, on the account of the suspect's vomit, in which the liquor was found. This is also the opinion of Maliki School.²⁰

According to Ibn Qayyim, the Imams including the Caliphs had also imposed *hadd* punishment on people who have been caught with stolen property in their possession. In some circumstances, the fact that the stolen property were found in the possession of someone is also a good *qarinah*, which is stronger than *shahadah* (testimony) or even *al-Iqrar*, which may be real or fabricated. The discovery of stolen property in the possession of the accused person is a proof which usually cannot be easily denied.²¹

In ordinary circumstances, a person would surely be suspicious if he sees a dead body of another man lying in a pool of blood, while besides him, there is another person holding a blood-stained knife. The ordinary conjecture would be that, it is the knife holder who killed the deceased. The suspicion would be stronger still if it is found that, the deceased and the man found besides him were enemies to each other.

In the *fiqh* books (books of Islamic jurisprudence). These books contain many examples of circumstantial evidence, but they did not write specific chapters on the subject matter, it was found scattered throughout. Some of them show that the pregnancy of a woman without having a husband is a conclusive presumption that she has committed *zina* (adultery), particularly in Maliki *Mazhabah*. They also maintain that, if someone smells wine or vomits it, is a conclusive presumption that he has taken alcohol, and also if someone is found with the possession of stolen property, it is a conclusive presumption that he has committed theft (*sariqah*) or if one accepts a congratulatory message from other people, on the occasion of the delivery of his wife, it is a conclusive presumption that he acknowledges the paternity of that baby as his legitimate child.²² They also brought another example that, if someone is living in a house and is seen from time to time, demolishing and rebuilding the house, for the period of at least ten years, the presumption is that he is the original owner of that house, until the contrary is

¹⁹ Muhammad, A. (nd) *Nizamul Qada fi Shariat Islamyya*. Al Am, p 221.

²⁰ Ibid

²¹ Ibid.

²² Ibn Qayyim (nd) *Mugni*, Darul Arabiah Vol 4, p.471.

proved otherwise.²³

Similarly, giving judgment based on the accused refusal to take an oath is no more than giving judgment based on apparent *qarinah*. This is because an innocent person would surely take an oath affirming his innocence. If such a man refuses to take the oath, his refusal would be a *qarinah* indicating that the truth of the allegations of the plaintiff. In this kind of situation, the *qarinah* is preferred on the person who originally was not liable for anything.²⁴

The argument of those scholars who rejected *qarinah*:

The opponents of *qarinah* as a means of proof contend that, *qarinah* or circumstantial evidence is not a reliable form of evidence and if subjected to stringent tests, then its weakness would surely be exposed.²⁵

According to Ahmad Abdul Munim al-Bahai the people who are against *qarinah* as a form of evidence, have given the *hadith* of the Prophet (SAW) as reported by Ibn Majah, as proof of their arguments as follows:

“Ibn Abbas has said that, the Prophet (SAW) said to the effect, ‘If I had wanted to stone someone without any proof, I would have stoned the woman who had raised suspicion as to her chastity due to her speech, the circumstances surrounding her own people who had approached her.’²⁶

The above scholars, while commenting on the above *hadith*, maintains that, the group who go against *qarinah* as a means of proof, have used the above *hadith* to show that, *qarinah* should not be applied in evidence simply because, if the Prophet had wanted to use *qarinah*, then surely he would have imposed the *hadd* of *zina* on the woman, because of the suspicious circumstances surrounding her. In the above *hadith* the Prophet (SAW) had refrained from punishing the woman.²⁷

In an answer to the above argument, the majority of the ulama have accepted *qarinah* but did not say all *qarinah* whether weak or strong or doubtful, should be accepted as *qarinah*. They maintain that the only acceptable *qarinah* is the strong *qarinah*, therefore, there is no question of admitting a weak *qarinah* as evidence.²⁸

They further maintain that, the above *hadith* reported by Ibn Abbas shows that *qarinah* cannot be used to proof *zina*, this however does not mean

²³ Ibid, p.371.

²⁴ Ibn Qayyim, op. cit. p.9,. see also Ibn Juzai (nd) *Qawaninul ahkamul Fiqhiyyah*, Dar al Ilm, p.277-278.

²⁵ Ibid.

²⁶ Al-Bahai, A.A. (1965) *Min Turuq al-Ithbat Fi Shari'ah*, Darul Fikr al-Arabia, p.80.

²⁷ Ibid, p.80.

²⁸ Ibid.

that *qarinah* cannot be used in other matters other than in *zina* cases. Because in hudud cases, facts which are doubtful are to be avoided, based on another hadith which says "Avoid hadd punishment in cases of doubt."²⁹

1.6 Qarinah in Hudud Cases:

(a) In Zina Cases:

The *ulama* (jurists) are unanimous in that, *zina* cases can be proved through *iqrar* or through *shahadah*. Nevertheless, they are not unanimous on whether or not *zina* can be established by *qarinah*. Some *ulama* like Imam Malik are on the opinion that, the *hadd* of *zina* could be inflicted on a woman who conceives pregnancy without having a husband, unless there is sign that she was forced against her will. For example when she is heard crying or screaming and seeking for help.

In the Hanafi school, they are of the opinion that, the *hadd* punishment for *zina* should not be applied in such cases. Al-Shafi'i agreed with Hanafis.³⁰

But in the Hambali school, they say *hadd* punishment should not be imposed merely because an unmarried woman was found to be pregnant. This is because her pregnancy may be due to a rape or she may appear to be pregnant whereas she was not. According to al-Mughni, a woman may nevertheless become pregnant without intercourse, if a man's sperm or seminal fluid gets into her womb, either through her own device or through some one's device. In such a case, it is possible for a virgin girl to become pregnant.³¹

There are also other *ulama* who opposed the above argument saying that, if we are to accept such a thing then thieves could use this argument as a defense and therefore, the hadd punishment cannot be imposed at all.³²

According to Ibn Qayyim, the Imam or Caliph can pronounce the *hadd* punishment on an accused who has been found in possession of stolen property. This is because, such a fact is stronger than al *Bayyinah* or al *iqrar* due to the fact that *iqrar* and al-*bayyinah* are just statements of fact which may be true or false. Whereas, the fact that the stolen articles were found with the accused person is a stronger and clear evidence.³³

²⁹ Ibid.

³⁰ Ibid.

³¹ Al-Bahnasy, op. cit. p.127

³² Ibid.

³³ Ibid.

(b) *al-khamr* (wine drinking)

In cases involving *al-khamr* (wine drinking), the *ulama* are in agreement that offence should be proved by confession or by *al-bayyinah* (testimony). The issue is whether it can be established by *qarinah* or not such as smell or vomit. The Shafi'is and Hanafis held that, the *hadd* punishment should not be inflicted, if the only available evidence is smell of the liquor on the accused mouth or in his vomit. Their argument is that, the odour was only an indication that the person could have taken liquor, it does not point to certainty or that even if the accused did drink liquor, then he could have done so under the influence of duress, compulsion, mistake or under ignorance.³⁴

Other group of scholars are of the view that, the *hadd* punishment shall be imposed on the above category of persons because of the fact that their breath smell liquor is a strong *qarinah*. The holders of the above view are the four rightly guided caliphs, Imam Malik and Imam Ahmad.³⁵

(c) In *qazaf* cases:

Ahmad Abdul Munim came to the conclusion that, *qarinah* may be used to prove *hudud* cases, by saying that, the *Ulama* on this legal opinion are divided into three as follows: The Shafi'is and Hambalis and Hanafis opined that *qarinah* can not be used as a means of proof in *hudud* cases, because in *hudud* the only available means of proof are either through *shahadah* or through *al-igrar* not otherwise.³⁶

Ibn al-Qayyim on the other hand, is of the opinion that *qarinah* may be used to establish liability in all cases, including *hudud* cases.³⁷

The Malikis on their own maintain that, *qarinah* may be used and accepted as a means of proving certain *hudud* cases e.g. in pregnancy cases by woman, who have no husbands and who cannot defend themselves.³⁸

(d) In Qisas and diyyah:

The general rule is that, the crimes of murder can be proved through *shahadah* or *igrar*, could also be used as one of the means of proving murder. However, some of the *ulama* are of the opinion that, a murder case can be established by way of *qarinah*, but the *qarinah* must be of *lauth* (strong

³⁴ Ibid.

³⁵ Ibid, p.173.

³⁶ Ibid, p.176.

³⁷ Ibid.

³⁸ Ibid, p.176.

presumption), which will entitle the family of the deceased to demand for *qisas*. Ibn Qayyim has explained that an ordinary person would surely be suspicious if he sees some one killed and covered with blood, while another person is standing next to the body holding a knife. Surely, such a person would be the prime suspect.³⁹ The circumstances would further be aggravated if it could be proved that there was existing enmity between the deceased and the suspected killer. Based on this argument, the majority of the jurists have held that, the family of the deceased should take an oath fifty times accusing the suspect as the killer. Imam Malik and Ahmad held that, the suspect could then be put to death. Imam al-Shafi'i said that the *diyyah* should be paid in lieu of killing.⁴⁰

Some *Ulama*, like Ibn Qayyim and Ibn Gharas felt that *qarinah* or circumstantial evidence is one of the means of proof in murder cases just like in the case of *hudud* cases and other offences.⁴¹

Although all cases of *hudud* and *qisas* may be proved through *iqrar* and *shahadah*, such evidence can as well be established through *qarinatulhal* (circumstantial evidence). This would be beneficial and important to a judge in ascertaining that the decision he is giving would be just decision.⁴²

The role of *qarinah* in Islamic law of evidence is therefore wide and important. Nevertheless, *qarinah* should not be accepted without careful consideration as its acceptance depends an individual case, according to its weakness and strength. A strong *qarinah* should be accepted, while a weak *qarinah* should be rejected and a vague *qarinah* should be clarified further.⁴³

There are also other *ulama* who believe that *qarinah* can be accepted in all cases, without any restriction including *hudud* and *qisas*. While some believe that, it cannot be used in *hudud* cases as *hudud* involves the sole rights of Allah. Some of the *ulama* on the other hand totally rejected *qarinah*. in all circumstances. However, *qarinah* is important because it could be used to strengthen other forms of evidence such as *shahadah* and *iqrar*. *Qarinah* could also be used to test the validity of testimonies, including *shahadah yamin* and *iqrar*.⁴⁴

In today's modern society, *qarinah* has an important role to play involving crimes, such as *qisas mu'amulat* (contracts) and *hudud*. As such,

³⁹ Ibid.

⁴⁰ Bahnasy, A.F.A Ibid, p 175-176.

⁴¹ Ibid, p.97-98.

⁴² Al-Bahai, op. cit. p.98.

⁴³ Ibid.

⁴⁴ Ibid.

Ibn Qayim's opinion with regards to *qarinah* should be strongly taken into account, as it would assist us in expanding the Islamic law of evidence to meet the ever increasing rate of crimes

The Muslim jurists have thoroughly discussed on circumstantial evidence in both criminal and in civil matters. For example. the post mortem examination, dying declaration, recovery of blood stained clothe, razor, spear, injury on the body of the suspect or accused person, recovery of a gun or other weapon, all can be considered in a murder cases as circumstantial evidence which can be linked and corroborated in the evidence. Others are, the motives of the accused, his threat, his opportunities, his preparations, his attempt, his silence, his fabrication or destruction of evidence, his flight, his possession of stolen property.⁴²

1.7 Observations

We observe that in *zina cases*, the rushing of punishment for a pregnant woman, who is accused of zina, who is unmarried, or in the case of an accused whose mouth smells the odour of wine or his vomiting it, all these are considered as circumstantial evidence which can be admissible or otherwise in Islamic law relating to evidence. Therefore, giving *hadd* punishment on such offences based on circumstance, will not solve the matter. Therefore, it is better to punish the accused person by *al-ta'azir* (the discretionary punishment).

1.8 Recommendations:

We strongly recommend that, *qarinah* should be taken very important in solving our problems, because it has an important role to play in solving crimes, such as *qisas*, and *hudud* as well as *diyyah*. As such, Ibn Qayyim's opinion with regards to *qarinah* should strongly be taken into account as it would assist us in expanding the Islamic law of evidence to meet the ever increasing crime problems.

Finally, I strongly support the views maintained by the majority, who accepted *Qarinah* as a means of proof as it will solve a lot of problems in our modern times.