CIRCUMSTANTIAL EVIDENCE AND ITS RATIOCINATION IN JUDICIAL DECISION IN ISLAMIC LAW

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1. Introduction:

In the Name of Allah, the Beneficent, the Merciful. *Bayyinah* (evidence) is the means through which a plaintiff attains his right or protects his interest. If the plaintiff is able to prove that the defendant is impeding him from his enjoying right or is violating his right, the judge shall issue an injunction prohibiting the defendant from such interference or direct him to surrender the plaintiff his right. Muslim jurists have agreed that admission (*iqrãr*), testimony, oath and the decline to take it as well as *qasãmah* are *Sharĩ'ah* evidence upon which a judge should rely in his judgements.[1]

There has always been disagreement between jurists on whether means of proving claims are confined and limited to the above mentioned means or whether such means are unlimited; but anything that makes the truth manifest can be relied upon in ending dispute between people. The reason of their disagreement rests on the interpretation of term *bayyinah*. The majority of the scholars are of the view that the term bayyinah in the Qur'an and the traditions of the Prophet is limited to two witnesses while other scholars like Ibn Taimiyyah, Ibn al-Qayyim, Ibn Farhun and Ibn Hajar hold that it is much more than that.[2]

The word *bayyinah* (evidence) has been described by Ibn Al-Qayyim as anything that makes the truth revealed.[3] Or, to put it more succinctly, it is that which makes the truth evident. Ibn Farhũn of the Maliki School has also taken the same opinion.[4] In fact Ibn Al-Qayyim has said that the term bayyina in the utterances of the Prophet and his companions is referring to anything that reveals the truth. It has wider scope than the usage of *fuqahã* when they limited it to two witnesses or a witness and oath."[5] He cited the following verses that contained the word bayyina and meaning that which makes the truth apparent.

> *"We sent aforetime our apostles with Clear Signs* ***(bayyinah)*** " Qur'an 57:25

He also said elsewhere:

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[1] Ibn Rushd, M.A., *Bidãyat Al-Mujtahid wa Nihãyat Al-Muqtaṣid,* vol. 2, (Mustafa Al-Bãbĩ 1395H/1975), p. 501; Ibn Ãbidĩn MA, *Hãshiyat Radd Al-Muhtãr 'alã Al-Durr Al-Mukhtãr*, vol. 4, (Bũlãq n.d.), p. 462, 653; Al-Asnawĩ JAA, *Nihãyat Al-Sũl Sharh Minhãj Al-Uṣũl,* vol. 8, (Egypt, Matba'at Muhammad Ali Subaih 1389H/1969), p. 314.

[2] Al-Zahrãnĩ, S.D., *Tarã'iq al-Hukm al-Muttafaq alaihã wa al-Mukhtalaf fĩhã fĩ al-Sharĩ'ah al-Islãmiyyah*, 3rd edn, (Mecca, Maṭãbi' al-Saff, 2002), p. 17.

[3] Ibn al-Qayyim, MA.J., *I'lãm Al-Muwaqqi'ĩn 'an Rabb Al-'Ãlamĩn*, vol. 1, (Beirut, Dãr Al-Jĩl 1973), p. 71; Ibn al-Qayyim, M. A.J., *Al-Turuq Al-Hukmiyyah fĩ Al-Siyãsah Al-Shar'iyyah,* (Matba'at Al-Madanĩ, Cairo), p. 24.

[4] Ibn Farhũn, B.I.A.M., *Tabṣirat Al-Hukkãm*, vol. 2, (Al-Halabĩ n.d), p. 80.

[5] Ibn Al-Qayyim, *I'lãm al-Muwaqqi'ĩn,* Op. Cit., p. 71.

> *"And before thee also the apostles We sent were but men, to whom We granted inspiration: if ye realise this not, ask of those who possess the Message. (We sent them) with* ***(bayyinah)*** *Clear Signs"* Qur'an 16:43-44.

He also said:

> *"Nor did the People of the Book make schisms, until after there came to them Clear Evidence (****al-bayyinah****)."* Qur'an 98:4

He has also said:

> *"Say: "For me, I (work) on a clear sign* ***(bayyinah)*** *from my Lord"* Qur'an 6:57.

Another verse has also provided:

> *"Can they be (like) those who accept a Clear (Sign) from their Lord"* Qur'an 11:17

He saying:

> *"Or have We given them a Book from which they (can derive) clear (evidence)?- Nay, the wrong-doers promise each other nothing but delusions."* Qur'an 35:40

And His Saying:

> *"Has not a Clear Sign come to them of all that was in the former Books of revelation?"* Qur'an 20:133

In no verse has the word *bayyina* meant to refer to two witnesses; and in fact, there is no place in which the term *bayyina* is meant to indicate that. Having known that, the saying of the Prophet, peace be upon him: "Do you have *bayyinah* (proof or evidence)"[6] means does he have anything that will prove the truth either in form of witnesses or any other sign? The Lawgiver's purpose in all these instances is to reveal the truth with that which it can be made manifest through its signs and indicators. The law does not reject a truth (right) that has been made manifest through such indicators so that rights of Allah and His servants are not wasted.[7]

This paper attempts to study the authoritativeness of circumstantial evidence as well as the scope of its application in judicial decisions.

2. Concept of *Qarĩnah* (Circumstantial Evidence)

Literally, the Arabic word *qarĩnah* is translated as link, connection, tie or bond.[8] In addition, the word *qarã'in* is the plural of *qarĩnah* in Arabic. Technically, it is defined by Al-Jurjãnĩ as that which directs towards the intended.[9] According to Al-Zarqã, *Qarĩnah* is any manifest sign that compares with something hidden and implies it.[10] In other words, *qarĩnah* is anything that implies the existence of another thing although this later thing is not ascertained. *Qarĩnah* also refers to indications and inferences used to deduce existence or non-existence of facts. To explain it further, a *qarĩnah* is any evident indicator that directs towards an unknown thing through

[6] This is part of a Hadith narrated by Tirmidhi in his Sunan, in the Chapter on "Evidence is Upon Plaintiff and oath is upon him a claimed is made against", Hadith No. 1340,
[7] Ibn Al-Qayyim, *I'lãm Al-Muwaqqi'ĩn,* Op. Cit, p. 71.
[8] Baalabaki, R., *Al-Mawrid*, (7th ed, Beirut, Dar el-Ilm lilmalayin 1995), p. 809
[9] Al-Jurjãnĩ, A. M. A., *Al-Ta'rĩfãt*, (Dãr al-Kitãb al-Arabi 1985), p. 174.
[10] Al-Zarqa, A. M., *Al-Madkhal Al-Fiqhi Al-Ãmm*, vol. 1, (Damascus, Dãr Al-Qalam, 1998/1418), p. 252.

inference and deduction from the accompanying signs and comparing it to that which is hidden. Without it, it would have been impossible to reach towards the unknown.[11] Some writers refer to *al-qarã'in* as circumstantial evidence while translators of the *mejelle*[12] call it conclusive presumption.[13]

The Mejelle has included *qarã'in* as one of the means of judgement.[14] It defined it as a sign that has reached the level of certainty.[15]

Bayyina (evidence) is anything that reveals the truth. Limiting evidence to witnesses is a specific custom (*urf khãṣṣ*) as it is a name of anything that makes the reality evident. The party whose side is stronger

The other form of the evident fact: *zãhir* which literally means the evident or manifest that can be known through custom (*urf*), habituation (*i'tiyãd*) or the status quo. Example is where a soldier and a judge dispute over ownership of a gun, the presumption is that it belongs to the soldier. The evident proof, such as when a suit over an ownership of a property possessed by B for many years is launched by A claiming to own it, the statement of the possessor will have greater legal force over A's claim who is the plaintiff.[16]

The manifest (*ẓãhir*) can be known through one of two things: ***al-'urf (customs)*** and ***signs (qarĩnah)*** that suggest greater probability.

The first one which is *al-'urf* (Custom) which is often referred to as *al-ma'hũd* (the accustomed), *al-ghãlib* (the prevalent or usual) and *al-'ãdah* (custom and habituation) and status quo. The jurists relied on the saying of Allah, the Most High:

> *"Hold to forgiveness; command the urf; But turn away from the ignorant*." Qur'an: 7:199.

The general rule is that Custom (*urf*) has preference over Presumption of law (*asl*) and every *asl* negated by custom, the later takes precedence. There is however an exception to this rule. Where a pious and trustworthy man claims that a very unrighteous person owes him some money, the presumption of non-liability takes priority and the onus of proof shall be upon the noble person. This is despite the fact that such anoble man does not normally make false claim.[17]

The second aspect through which the manifest are known is through *qarã'in* indicators, circumstance as well as the evident state of affair and high probability. Where ownership of a property possessed by A who is accustomed to disposing it is

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[11] Hasan, U.M., *Al-Ilm bi al-Qarĩnah wa Atharuhu alã al-Ahkãm al-Qaḍã'iyyah*, in *Al-Qaḍã'iyyah (1435H)*, p. 314.

[12] The Mejelle is the first ever codification of Islamic law enacted during the Othoman Empire in *Majallatul Ahkãm Al-Adliyya* (a.k.a. the *Mejelle).* It came into force in 1293H (1876G). It consists of 1851 Articles starting with definition and classification of *fiqh* in article (1) followed by ninety-nine maxims from Article (2) to (99) based on preferred opinions of the Hanafi school of thought. It was applied in the territories under the Turkish Empire where it was also taught in high Institutions. Even though the *Mejelle* has seized to exist as a binding law, it has continued to attract a significant attention from modern researchers of Islamic law. This may be due to the fact that it has not been adulterated by desires of secular leaders yielding to pressures of western powers as is the case in many contemporary codifications. [See: Al-Zuhailĩ, M. *Al-Qawã'id al-Fiqhiyyah wa Taṭbĩqãt fĩ Al-Madhãhib Al-Arba'ah,* (Dãr al-Fikr, Damascus: 1427H/2006), p. 5-6.; Al-Zarqã, A. M., *Sharh Al-Qawã'id Al-Fiqhiyyah*, (Dãr Al-Qalam: 1409H/1989) p. 41.]

[13] Ibn al-Qayyim, *Al-Turuq Al-Hukmiyyah,* Op. Cit., p. 13.

[14] the Mejelle, Article 1740.

[15] The Mejelle, Article 1741.

[16] Ibn Juzai, M. A. K., *Al-Qawãnĩn Al-Fiqhiyyah alã Talkhĩṣ Madhhab Al-Mãlikiyyah wa Al-Tanbĩhu alã Al-Madhdhab Al-Shafi'ĩyya wa Al-Hanafiyya wa Al-Hanbaliyyah*, (Dãr al-Ilm li al-Malãyĩn, n.d.), p. 288.

[17] Ibn Juzai, Op. Cit., p. 288.

claimed by B: In this instance the statement of A will be presumed making him the defendant and B is the plaintiff as his statement is in contradiction with the manifest or evident fact.[18] The rule is that whatever is possessed by a man belongs to him unless evidence indicates the contrary.[19]

However, to safeguard public interest or due to necessity at times, the above rule has several exceptions according to Malikis. Example of safeguarding public interest is admitting the claim of a trustee (*amĩn*) on the damage of consignment. This is despite the presumption of absence of damage as it is incidental attribute (*ãriḍ*). The claim is admitted so that honest people will not desist from keeping properties in trust which will be against public interest.[20] Example of exception due to necessity is admitting the statement of usurper who claims that the usurped property is damaged with his oath. He will be regarded as the defendant else he will be in danger of long imprisonment.[21]

For a matter to qualify to be a *qarĩnah*, two essential elements are required:

i. It must be manifest, known and certain to be a basis for the inference or deduction.
ii. There must be a connection between the manifest element and the inferred or deduced *qarĩnah*. This will happen by careful forethought and intelligent deep insight by the person making the deduction.[22]

The famous example cited by our jurists is where a man holding a blood stained knife comes out of a house in panic; upon inspecting the house, a man was found with his throat slit. Under such circumstance, one will conclude that it was the doing of the man who just left the house despite the fact that no one witnessed him doing so.

The strength of *qarĩnah* can qualify it to stand as a witness; or it can be strengthened by the judge with an oath to backup the party whose side it supports. These type of *qarã'in* are referred to as customary witness (*al-shãhid al-urfĩ*) by the Malikis.

3. Jurists' Positions on Qarĩnah

Quoting Imam Ibn Al-Arabĩ, Ibn Farhũn writes, "a judge should take notice of signs and indicators if evidence presented before him are contradictory. He should give preference to the strongest indicator (Circumstantial Evidence). Such preference strengthens the argument of the party it supports."[23]

Reading through works of the four schools of thought reveals that the four schools of jurisprudence, Hanafi, Maliki, Shafi'I and Hanbali generally accept *qarĩnah* as a means of proof. On the other hand, scholars like al-Khair al-Ramly of the Shafi'ĩ School and Ibn Nujaim of Hanafi school have argued that qarĩnah cannot serve as an evidence.[24] Maliki and Hanbali Schools have given greater recognition to *qarã'in* without much restriction. On their parts, Hanafis and Shafi'ĩs have only used *qarã'in*

[18] ibid.
[19] Al-Ghazãlĩ, M.M.H., *Ihyã' Ulũm Al-Dĩn*, vol. 2, (Dar al-Fikr, n.d.), p. 100.
[20] Al-Maliki, M.A.H., *Tahdhĩb Al-Furũq wa al-Qawã'id al-Saniyyah*, vol. 4, (Isã Al-Halabĩ, Egypt, 1346H), p. 122.
[21] Ibn Farhũn, Op. Cit., p. 126.
[22] Al-Zuhailĩ, M., *Wasã'il al-Ithbãt fĩ al-Sharĩ'ah al-Islãmiyyah fĩ al-Mu'ãmalãt al-Madaniyyah wa al-Ahwãl al-Shakhṣiyyah*, (Damascus, Dãr al-Bayãn, 1402H/1982), p. 490; Qurã'ah, A., *Al-Uṣũl Al-Qaḍã'iyyah fĩ al-Murãfa'ãt al-Shar'iyyah,* (Cairo, Matba'at al-Raghã'ib: 1339H/1921), p. 275.
[23] Ibn Farhun, Op. Cit., p. 97-98.
[24] Al-Zahrãnĩ, Op. Cit., p. 329.

in limited and specific cases.[25] According to them, *qarã'in* are merely suppositions and thus not conclusive. However, reading their works reveal that they use *qarã'in* for proof of people's rights only but not in *hudũd* and *qisãs* offences.[26]

But if one looks carefully at the verses of Qur'an and the traditions of the Prophet, one will be satisfied that application of qarĩnah is accepted according to the principles of Sharĩ'ah. These principles shall be outlined in the next section.

4. Legal Basis of *Qarã'in*:

The Islamic law has recognised this sort of evidence and does not dismiss it. This recognition could be found in the Qur'an, Sunnah as well as the actions of the righteous predecessors. Some of these authorities can be seen in the following:

> *"They stained his shirt with false blood. He said: "Nay, but your minds have made up a tale (that may pass) with you, (for me) patience is most fitting: Against that which ye assert, it is Allah (alone) whose help can be sought". Qur'an 12:18.*

According to Imam Qurtubĩ, jurists have used this verse in recognising use of circumstantial evidence to arrive at results in cases like *qasãmah*. They have also stated that Sayyidunã Ya'qũb, may peace of Allah be upon him, has concluded that his children were lying when he saw that the cloth that was worn by Sayyidunã Yusuf ﷺ has not been torn apart. He even said: "there is mercy in this wolf as it ate Yusuf without tearing his clothes."[27]

Jurists have also reasoned with the saying of Allah, the Most High:

> *"And one of her household saw (this) and bore witness, (thus):- "If it be that his shirt is rent from the front, then is her tale true, and he is a liar!"*

It is permissible to prove a cause based on signs or indicators or to use the technical term, circumstantial evidence. This is because the sign of Prophet Yusuf's dress being torn from back was used as an indication of the lie she attributed to Sayyidunã Yusuf, peace be upon him.[28]

Another authority is the ruling of Prophet Sulaiman, peace be upon him when two women disputed over a child. The Prophet said: bring me a knife so I can cut him into two. The eldest woman accepted the ruling and took solace over the young one's lost of her son (as she did). But the young woman could not withstand the torment of that decision as she was overwhelmed by mother's love of her child. She begged Sayyiduna Sulaiman not to follow on the decision, and gave up her claim of the child saying: "its her child" taking solace from the fact that the child is alive even if he is taken by another woman. The side of the younger woman acquired strengthen based on those exchanges and her reaction of pure love towards her child, her choice for the child's survival over the older one's choice of his death is a sign (*qarĩnah*) of the truthfulness of her initial claim despite the subsequent admission. Despite the known strength of admission over circumstantial evidence, Prophet Sulaiman overruled the admission and judged in her favour. In fact this is the truth and right decision as if a

[25] *Ibn Farhũn,* ibid, vol. 2, p. 95; Ibn al-Qayyim, *Al-Turuq Al-Hukmiyyah*, Op. Cit., p. 194.
[26] Kuwaiti Ministry of Endowment and Religious Affairs, *Al-Mausũ'ah Al-Fiqhiyyah*, vol. 33, (Dãr Al-Safwa 1417H/1996), p. 158-159.
[27] Al-Qurṭubĩ, A.M.A., *Al-Jãmi' li Ahkãm al-Qur'an Tafsĩr*, vol. 9, (Dar al-Kãtib al-Arabĩ 1387H/1967), p. 149
[28] Ibn Al-Arabĩ, A.M.A., *Ahkãm Al-Qur'ãn,* vol. 1, (Beirut, Dãr Al-Fikr n.d.), vol. 1, p. 440.

judge becomes aware of defective admission he shall not admit it.[29] According to Imam al-Nawawĩ, the intention of Prophet Sulaiman was not to cut the child into two, rather he wanted to test how merciful the two women are towards the child; and when this was found, he knew who the mother between them was.[30]

Another example of use of *qarĩnah* is the saying of the Prophet, peace be upon him, "A widow is better qualified to decide for herself than her guardian; while the virgin's permission should be sought and her permission is her silence".[31]

The Prophet recognised a virgin's silence as indication (*qarĩnah*) of her consent. A testimony to this effect can therefore be given that she has consented to the marriage. This is one of the strongest authorities showing legal validity of proof by *qarĩnah*.

In another Hadith, the incident of the Mu'ãdh bin Amru bin al-Jamũh and Mu'ãdh bin 'Afrã' that occurred during the battle of Badr when the claimed to have killed Abu Jahal. The Prophet, peace be upon him asked them: Have you cleaned your swords?" They said: No. He said: Show me your swords. When he looked at them he said: Both of you have killed him; and ruled that Abu Jahal's *salab* (possession) goes to one of them.[32] Here the Prophet relied on the signs on the swords.[33]

Judgement based on *qarĩnah* has also been reported from the four rightly guided caliphs and other companions in several cases. This include judgements by Sayyidunã Umar bin al-Khattãb, Abudullahi bin Mas'ũd, Uthmãn bin 'Affãn, may Allah be pleased with them on the implementation of prescribed *(hadd*) punishment upon a person from whom the smell of alcohol emanates. Such judgements were based on the evident indicators (circumstantial evidence). No dissenting voice has been reported from any companion on this which confirms consensus (*ijmã'*) of the *sahãba* (Prophet's companions) on the matter. It was also based on *qarĩnah* that Umar ruled on stoning an unmarried woman who became pregnant. This was also the position taken by Imams Malik and Ahmad bin Hanbal.[34]

5. Classification of Circumstantial Evidence:

i. Conclusive Qarã'in:

Some *qarã'in* are absolute and definite conclusive evidence for proof of certain matters while others are weak and thus inconclusive evidence.[35] Jurists usually use as an example the situation where a man is seen exiting an unoccupied house in fear and shock holding a bloodstained knife; upon inspection of the house, a man with his throat slit was found in a pool of blood. Based on all these conclusive *qarã'in*, one can safely infer that the man who earlier exited the house is indeed the killer.

ii. Inconclusive Qarã'in:

Inconclusive *Qarã'in* on the other hand indicates higher probability and preference (*tarjĩh*) during interrogations and proceedings. Along with other evidence, they can give strength to a claim of a party. These *qarã'in* are testified by customs (or

[29] Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah*, Op. Cit., p. 10-11.
[30] Al-Nawawi, Y.S., *Al-Minhãj 'alã Sharhi Muslim*, vol. 12, (Dar Ihyã' Al-Turãth Al-Arabi: 1392H), p. 18.
[31] Al-Naisãbũriy, M. M. A. Q, *Sahĩhu Muslim*, (Beirut, Dãr Ihyã Al-Turãth Al-Arabĩ, n.d.), Hadith No. 3542.
[32] Al-Bukhãri, M. I. I. M., *Sahĩh Al-Bukhari,* vol. 4, (Riyadh, Darussalam 1997), Hadith No. 3141; Al-Naisãbũri, Muslim, Op. Cit., Hadith No. 4668;
[33] Al-Dughaithir, A.S., Al-Qaḍã'u bi al-Qarã'in wa al-Amãrãt fĩ al-Fiqh al-Islãmĩ in *Al-'Adl (No. 28 of Shawwal 1426)* p. 145.
[34] Ibn Farhũn, Op. Cit., vol. 2, p. 97
[35] Ibn al-Qayyim*, Al-Turuq Al-Hukmiyyah*, Op. cit., p. 194

habituations) or those that are deduced from facts of a claim and behaviours of litigants. Example is where spouses argue over ownership of a domestic item. The bottom line is that Sharĩ'ah does not dismiss rights that are testified for by strong and valid signs and indicators, circumstantial evidence.[36]

iii. Weak or Imaginary *Qarĩnah*:

This type of circumstantial evidence does not bring about knowledge nor creates probable supposition. It has no effect on the judgement and it should be rejected as a means of proof. An example is where a person claims ownership of a property in his possession; but it has been proved with credible testimony that he does not own it. His possession is a weak qarĩna in the existence of testimony. Another example of this weak qarĩnah is when the brothers of Prophet Yusuf, peace be upon him:

> *"They stained his shirt with false blood"* Qur'an 12:18

But Prophet Ya'qũb, peace be upon him rejected their argument due to the more obvious *qarĩnah* that the clothes were not torn apart.

6. Conditions for the Validity of Circumstantial Evidence:

Circumstantial evidence that can be relied upon for proof among jurists must satisfy the following conditions:

i. There must be an obvious thing, whose presence is known and confirmed for it to be relied upon in the process of inference. This is based on attributes and signs that such a thing shows.

ii. There must be a connection between the thing that is taken as the basis of the inference with the unknown thing whose proof is sought. In other words, the relationship between the indicator (*qarĩna*) and the indicated most be clear, strong and based on straight and healthy logic. It should not be based on illusion or imagination.[37]

iii. The inference of circumstantial evidence must be effective. In other words, the judge must move from the known indicator to the unknown fact being investigated through his discretion in a logically sound manner.

7. Relationship between *Qarĩnah* and Other Means of Proof:

Testimony, admission and oath which are the orthodox means of proof are often affected by *qarĩnah* in determining their truth. There is for instance the probability that testimony can either be true or false. The *qarĩnah* that the witness is not seeking to attract some benefits to himself will give weight to the probability that it is the truth.[38] Likewise, certain *qarĩnah* that may accompany a testimony will taint such probability and render the likelihood of falsehood preferable. Some of these instances can be seen in the following examples:

1. **Absence of Suspicion (*Al-Tuhmah*) in Admission:** For an admission to be regarded as absolutely true there should not be suspicion against the acknowledger. In other words, the admission should not be construed as indirectly benefiting the acknowledger. According to Maliki School, this condition is particularly applicable to a person in death sickness and a bankrupt (*muflis*) whose dispositions are restricted to

[36] *Al-Mausũ'a Al-Fiqhiyyah*, vol. 33, Op. Cit., p.158.
[37] Al-Mubarak, M.A., *Al-Qarã'in inda Al-Uṣũliyyĩn,* (Riyadh, Muhammad bin Su'ũd Islamic University 1426H), p. 89-90.
[38] Barakãt, M.M.Nã., *Al-Sulṭah al-Taqdĩriyyah lil-Qãḍĩ fĩ al-Fiqh al-Islãmĩ*, (Jordan, Dãr al-Nafã'is 1427/2007), p. 293

protect his creditors.[39] Generally, any argument tainted by definitive possibility of accusation or biasness (i.e. *qarĩnah*) will not be entertained. According to Al-Qãdi Ad-Dabbũs Al-Hanafi, a conduct will be judged invalid whenever it is overshadowed by suspicion.[40] By overshadowed, we mean there is a clear evidence to be suspicious of the conduct and not just illusion.

A testator's admission of being indebted to one of his heirs during death sickness will be ineffective unless confirmed by the other heirs. The *Sharĩ'ah* presumes that the acknowledger (or legator) intends to deprive the other heirs. This position is held by Hanafis and Hanbalis. But in Maliki School if there is ground for accusing the testator or he is a credible and pious person, his acknowledgement (or bequest) shall be executed; else it is an invalid bequest. Shafi'is on the other hand regard such as valid bequest and must be executed without recourse to investigating his intent.[41] We can see from the above example that despite the strength of *iqrãr* as the strongest means of proof, any sign or indicator that points towards the possibility of the person lying renders it void. These signs are in fact *qarã'in* or circumstantial evidence that weaken the strength of the admission.

2. A testimony should not benefit the witness either directly or indirectly; or protect himself from a detriment. Example of witness benefiting from his testimony is where creditors of a bankrupt testify on existence of credit owed to their debtor by a third party; and the testimony of a Guarantor (*al-kafĩl*) that the person he is standing for has paid all his liabilities. In such instance, the testimony will not be admitted because its effect benefits the witness.[42] Imam Malik was reported to have listed testimony of a friend in favour of his friend among inadmissible testimonies due to suspicion (*tuhmah*) of acquiring benefit. But Ibn Qudãmah Al-Hanbali has narrated majority of scholars admit the testimony of a friend in favour of his friend is admissible.[43] Hanafis and Imam Al-Auzã'ĩ are also of the opinion that testimony of *Ajĩr* (hired labourer) in favour of his master is not admissible even if he is credible (*ãdil*) base on the doctrine of *istihsãn* (juristic preference). But Imam Al-Thaurĩ is of the opinion that it is admissible unless the labourer (*ajĩr*) benefits from the testimony while Malikis admit it.[44] However, all these should be subject to the Judge's discretion. If he is of the opinion that a relationship dents credibility of a witness he should reject the testimony else it should be admitted.[45]

3. On the effect of circumstantial evidence on oath, Malikis have opined that there must be proof of frequent transaction (*khulṭah*) between the litigants so that mischievous people will not drag honourable and noble people to courts and request judgement against them based on decline to take oath. *Khulta* can be proved with testimony of two witnesses that there have been two or three transactions between the

[39] Al-Dusũqĩ, M.A.A., *Al-Hãshiyah Alã Al-Sharh Al-Kabĩr,* vol. 3, (Dãr Al-Fikr: n.d.) p. 397; Al-Sharh Al-Saghĩr, Al-Dardĩr, A.M.A., *Al-Sharh Al-Saghĩr*, vol. 3, (Mustafa Al-Bãbi Al-Halabi 1352H□1952) p. 527; Al-Mawwãq, Muhammad bin Abil Qãsim, *Al-Tãj wa Al-Iklĩl bihãmish Mawãhib Al-Jalĩl*, vol. 5, (Libya 1399), p. 216; Al-Buhũtiyy, M.Y.I., *Kashshãful Qinã' 'an Matn Al-Iqnã',* vol. 6, (Maktabat Al-Nasr Al-Hadĩtha, Riyadh: n.d.), p. 55.

[40] Al-Nadawi, A.A., *Al-Qawã'idul Fiqhiyyah*, (Damascus, Dãr Al-Qalam n.d.), p. 377.

[41] Al-Sadlãn, Saleh bin Ghãnim, *Al-Qawã'id al-Fiqhiyyah al-Kubrã wa mã tafarra'a 'anhã, (*Riyãdh, Dar Bilansiyyah 1417H), p. 210

[42] Zaidãn, A., *Niẓãm al-Qaḍã' fĩ al-Sharĩ'a al-Islamiyyah*, (Mu'assasat al-Risãlah 1409H/1989), p. 182.

[43] Ibn Qudãmah, Muwaffaq al-Dĩn Al-Hanbali, *Al-Mughnĩ,* vol. 9, (Cairo, Dãr Hajar 1410H), p. 194.

[44] Al-Mũṣilĩ, Abdullah bin Mahmud bin Maudũd Al-Hanafĩ, *Al-Ikhtiyãr li Ta'lĩl Al-Muhtãr*, vol. 2, (Beirut, Dãr Al-Kutub Al-Ilmiyyah 1426H/2005), p. 147, Al-Fattũhĩ, T. A., *Sharh Muntahã al-Irãdãt,* vol. 3, (Dãr Al-Fikr: n.d.), p. 553; Alĩsh, M., *Minah Al-Jalĩl Sharh Mukhtaṣar al-Khalĩl*, vol. 4, (Al-Matba'a Al-Kubrã, Egypt: n.d.), p. 222; Al-Dusũqĩ, *ibid*, vol. 4, p. 169;

[45] For more on this issue see: *Al-Mausũ'at Al-Fiqhiyyah*, vol. 17, p. 183;

two. These are mostly claims that are inconsistent with customs or in total contradiction with the defendant's social status according to Ibn Al-Qayyim. This has been narrated from Ali bin Abi Tãlib, Umar bin AbdulAzĩz as well as the Seven Medinan Jurists.[46] They reasoned that accepting to take oath is a grievous act especially to pious religious and noble persons; while mischievous persons seize such chance to humiliate others and Ibn Al-Qayyim was himself a victim of such mischief.[47] From the above example, it is clear that resort is made to circumstantial evidence in considering whether or not there is a reason to believe in the existence of any relationship that may warrant giving the defendant an oath to defend himself. In these instances, the *qarĩnah* of previous relationship is recognized as justification that there may be a case to answer.

7. Scope of Admissibility of *Qarã'in* Among Jurists:

Despite the strength and authoritativeness of circumstantial evidence, most jurists that have accepted it as admissible confined its admissibility to pecuniary rights, personal laws as well as discretionary punishments; and have differed on its admissibility as proof of prescribed (*hadd*) and *qiṣãṣ* (retribution) offences.[48] On admissibility of *hadd* offence, the jurists have diverged into two groups:

The first opinion held by Malikis and a statement among the Hanbalis is that proof of *hadd* offences is permissible through circumstantial evidence.[49] Thus, whenever the strength of circumstantial evidence has reached the level of certainty such as appearance of pregnancy in unmarried woman as proof of adultery or smelling alcohol in one's breathings as proof of consumption of alcohol; or discovery of stolen property in the possession of a suspect whose character is questionable.

The Malikis relied on the following authorities:

1. Ibn Abbãs, may Allah be pleased with them has narrated from Umar bin al-Khattãb, may Allah be pleased with him saying: "And there is certainly in the Book of Allah, stoning upon he who has committed adultery after previously marrying among men and women, if it is proved or pregnancy or admission."[50]

2. The *sahãbas* have also accepted proof of *hadd* punishment where a person who smells of alcohol or vomits it by relying on qarĩna; as both the smell and vomit are *qarĩna* of drinking. Uthman bin Affan was also reported to have said: "He did not vomit until he drinks it".[51] In support of his opinion over permissibility of implementing *hadd* punishment proved by circumstantial evidence, Ibn Qayyim has said: "the companions of the Prophet, peace upon him have implemented *hadd* of adultery based on emergence of pregnancy and on alcohol with smell and vomiting; and this is the right decision. The evidence of vomiting, smell and pregnancy

[46] The seven jurists refer to seven successors (*tãbi'ũn*) who lived in Medina in the same generation. They are: Sa'ĩd bin Al-Musayyib, Urwah bin Al-Zubair, Al-Qãsim bin Muhammad bin Abĩ Bakr Al-Siddĩq, Abdullahi bin Utbah bin Mas'ũd, Khãrijah bin Zaid bin thãbit and Sulaimãn bin Yasãr. They do however differed on the seventh jurist between Abu Salamah bin Abdurrahman bin Auwf which is the opinion of majority, Sãlim bin Abdullah bin Umar bin Al-Khattãb and Bakr bin Abdurrahman bin Al-Hãrith bin Hishãm Al-Makhzũmi. (Al-Zarkalĩ, Al-Zarkalĩ, K.M.D., *Al-A'lãm*, vol. 2, (Dãr al-Ilm li al-Malãyĩn 1980), p. 40; Maklũf, S.M. *Shajarat Al-Nũr Al-Zakiyyah fĩ Tabaqãt Al-Mãlikiyyah, (*Dãr Al-Fikr n.d.), p. 19).

[47] Ibn Al-Qayyim, *Al-Turuq Al-Hukmiyyah*, vol.1, Op. Cit., p. 241.

[48] Hasan, Op. Cit., p. 329.

[49] Ibn Rushd, M. A., *Bidãyat Al-Mujtahid wa Nihãyat Al-Muqtasid,* vol. 4, (Mustafa Al-Bãbĩ 1395H/1975), p. 282; Ibn Farhũn, Op. Cit., vol. 2, p. 120; Ibn Qudãmah, *Al-Mughnĩ, vol. 9, p. 163;* Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah,* ibid, p. 21.

[50] Bukhari, Op. Cit., Hadith No. 6441.

[51] Al-Naisãbũri, Muslim, Op. Cit., Hadith No. 1707.

confirms drinking alcohol and adultery is even more obvious than certain testimony; how then will the Sharĩ'ah this sort of evidence."[52] It is worth noting that Malikis have only recognize effectiveness of circumstantial evidence concerning *hadd* offences on matters decided by the Prophet's companions. These matters are only where an unmarried woman becomes pregnant and where a man is found to be smelling alcohol in his breathing.[53]

The second opinion was taken by Hanafis, Shafi'is and another statement among the Hanbalis. They opined that proof of *hadd* with circumstantial evidence is not permissible.[54] There most be admission or witnesses. They relied on the following authorities:

1. *Hadd* are dropped when there is *shubha* (suspicion regarding commission). This is in line with the principles of *Sharĩ'ah*. The Prophet was reported to have said: "Drop *hadd* punishment upon Muslims as much as you can. Whenever you find a way out for a Muslim, let him go. It is better for the Ruler to err in pardoning than to err in punishment."[55]

2. They have also relied on another narration by Ibn Abbãs, may Allah be pleased with them who said: the Messenger of Allah, peace be upon him has said: "If I am going to stone anyone without evidence, I would have stoned so-and-so (a lady). She has shown some suspicion in her behaviours and natures and those who come to her".[56] This Hadĩth is telling us that despite the fact that the Prophet has noted certain indicators that incriminate this lady, he did not implement the *hadd* upon her as circumstantial evidence cannot absolutely proof commission of the offence.[57]

3. They have also reasoned on *ma'qũl* (rationality) that if *hadd* can be proved with circumstantial evidence and bad character, a person whose harming is not permissible may be harmed based on mere suspicion. This is the reason why it is not permissible to proof either *hadd* or qiṣãṣ but with absolute certainty. Reliance on intuition, suspecting and doubt are subject to error and mistake and these cannot be the basis of putting a fellow Muslim to pain.[58]

Likewise, reliance on emergence of pregnancy in unmarried woman cannot be a basis of implementing hadd as there is a likelihood of *shubha* or rape; and *hadd* are dropped with shubha.[59]

In addition, presence of alcoholic smell does not prove consumption alcohol as the person may have only rinsed his mouth and did not drink it or was forced to drink it or only drunk it out of dire necessity. The same can also be said regarding a person who vomited it as he may have only drunk it out of coercion. These probabilities do

[52] Ibn al-Qayyim, *I'lãm al-Muwaqqi'ĩn,* vol. 4, Op. Cit., p. 284.
[53] Al-Dughaithir, Op. Cit, p. 148.
[54] Ibn Hamãm, M.A.A., *Sharh Fath Al-Qadĩr 'alã al-Hidãyah,* vol. 5 (Mustafa al-Bãbĩ 1389), p. 213; Al-Mãwardĩ, A.M.H., *Al-Hãwĩ Al-Kabĩr*, vol. 13, (Beirut, Dãr Al-Fikr, n.d.), p. 409; Ibn Qudãmah, *Al-Mughnĩ*, Op. Cit., vol. 9, p. 163; Al-Zuhailĩ, *Wasã'il al-Ithbãt,* Op. Cit., p. 526.
[55] Transmitted by Tirmidhi vol. 3, p. 85. Hadith No. 1424. Al-Hãkim in Mustadrak, vol. 4, p. 539, Hadith No. 8243. He described it as an authentic hadith with clean chain. According to Ibn Hajar, the chain of narrators include Yazĩd bin Ziyãd al-Dimashqĩ who is weak narrator. (Al-'Asqalãnĩ, A.A.M.A.H., *Talkhĩṣ Al-Habĩr fĩ Takhrĩj Ahãdĩth Al-Rãf'ĩ Al-Kabĩr*, vol. 4, Dãr Al-Kutub Al-'Ilmiyyah: 1419H/1979). p. 161).
[56] Ibn Mãjah, Sunan, Hadith No. 2559, vol. 2, p. 593.
[57] Al-Shaukãnĩ, M. A., *Nail Al-Auṭãr Sharh Muntaqã Al-Akhbãr,* vol. 7, (Mustafã Al-Bãbĩ Al-Halabi n.d.), p. 124;
[58] ibid.
[59] Ibn Qudãmah, *Al-Mughnĩ,* Op. Cit., vol. 9, p. 79.

not confirm certainty that the alcohol was willingly consumed and therefore *hadd* will be dropped.[60]

However, recognition of these hypothetical probabilities opens the door to invalidate rules of Sharĩ'ah and it will be difficult to close it as people will consume alcohol and use all sorts of tricks so long as it will save them from the *hadd*.[61]

On the proof of *qiṣãṣ* with *qarĩnah*, the jurists are also divided into two camps. The first camp is of the view that *qiṣãṣ* offence can be proved with circumstantial evidence.[62] This is the opinion of Ibn Taimiyya, Ibn al-Qayyim and Ibn Farhũn as well as the provision of the Mejelle. They usually cite the example of where a man holding a blood stained knife comes out of a house in panic; upon inspecting the house, a man was found with his throat slit. Under such circumstance, one will conclude that it was the doing of the man who just left the house. They backed their opinion with the following legal evidences:

1. The general provisions of Sharĩ'ah which confirms effect of *qarã'in* in proof of claims, whether these claims are of *hadd* or blood.[63] However, this reasoning has been disputed by others as there is no evidence that the authorities that permit use of *qarĩnah* do not prove generality to apply on the issues of spilling blood.[64]

2. The earlier Hadith we mentioned about the incident on the day of Badr that occurred to the sons of 'Afrã in which both claimed to have killed Abu Jahal. The Prophet, peace be upon him asked them: Have you cleaned your swords?" They said: No. He said: Show me your swords. When he looked at them he said: Both of you have killed him; and ruled that Abu Jahal's *salab* (possession) goes to one of them.[65] Here the Prophet relied on the signs on the swords.[66]

The second opinion taken by majority of jurists is that *qĩṣãṣ* cannot be proved with *qarĩnah* even if it is very strong indicator. Rather, the judge shall resort to *qasãmah* (fifty oaths) as precaution on the issues of blood. In addition, it is better to err in pardoning than to err in punishment. They also compared bloods to *hudũd* by analogy (qiyãs) and therefore it can also be dropped in case of shubha.[67]

Some of the authorities they relied on include the following:

1. The narration by Imam Bukhari, that Sahal bin Hathmah and some great men of his tribe said, Abdullahi bin Sahl and Muḥaiyiṣa went out to Khaibar as they were struck with poverty and difficult living conditions. Then Muḥaiyiṣa was informed that 'Abdullãh had been killed and thrown in a pit or a spring. Muḥaiyiṣa went to the Jews and said, "By Allah, you have killed my companion." The Jews said, "By Allah, we have not killed him." Muḥaiyiṣa then came back to his people and told them the story. He, his elder brother Ḥuwaiyiṣa and 'Abdur-Raḥmãn bin Sahl; and Abdur-Rahman who was also at Khaibar came (to the Prophet) started to speak, but the Prophet, peace be upon him said to Muḥaiyiṣa, "The eldest! The eldest!" Meaning,

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[60] Al-Kãsãni, A. M. A., *Badã'i' al-Ṣanã'i' fĩ Tartĩb al-Sharã'i'*, vol. 7, (Al-Matbũ'ãt Al-'Ilmiyyah 1327H), p. 40; Al-Nawawĩ, Al-Nawawĩ, Y.S., *Rauḍat Al-Talibĩn wa 'Umdat Al-Muftĩn*, vol. 10, (Al-Maktab Al-Islãmĩ 1405H), p. 170; Ibn Qudãmah, *Al-Mughnĩ,* Op. Cit., vol. 9, p. 163.

[61] Al-Fã'iz, Op. Cit.,, p. 268.

[62] Al-Zuhailĩ, *Wasã'il al-Ithbãt*, Op. Cit., p. 527.

[63] Hasan, Op. Cit., p. 334.

[64] Al-Fã'iz, Op. Cit., p. 272.

[65] Bukhãri, Op. Cit., Hadith No. 3141; Al-Naisãbũri, Muslim, Op. Cit., Hadith No. 4668;

[66] Al-Dughaithir, A.S., Al-Qaḍã'u bi al-Qarã'in wa al-Amãrãt fĩ al-Fiqh al-Islãmĩ in *Al-'Adl (No. 28 of Shawwal 1426)* p. 145.

[67] Al-Kãsãnĩ, Op. Cit., vol. 7, p. 286; Ibn Rushd, Op. Cit., vol. 4, p. 210; Al-Nawawĩ, *Rauḍat al-Tãlibĩn*, Op. Cit., vol. 10, p. 9; Ibn Qudãmah, *Al-Mughnĩ,* Op. Cit., vol. 8, p. 487; Al-Zuhailĩ, *Wasã'il al-Ithbãt,* Op. Cit.*,* p. 527.

Let the eldest of you speak." So Huwaiyiṣa spoke first and then Muḥaiyiṣa. Allah's Messenger, peace be upon him said, "The Jews should either pay the blood-money of your (deceased) companion or be ready for war." After that, Allah's Messenger, peace be upon him wrote a letter to the Jews in that respect and they wrote that they had not killed him. Then Allah's Messenger, peace be upon him said to Huwaiyiṣa, Muḥaiyiṣa and Abdur-Rahman 'Can you take an oath by which you will be entitled to take the blood-money?" They said, "No." He said (to them), "Shall we ask the Jews to take an oath before you?" They replied, "But the Jews are not Muslims." So Allah's Messenger, peace be upon him gave them one hundred she-camels blood-money from himself."[68]

2. They have also reasoned that taking precautionary approach in the proof of cases related to blood is obligatory; and dropping *hadd* in the existence of *shubha* (suspicion) is an established method of the Sharĩ'ah, *qiṣãṣ* cannot be proved with circumstantial evidence.[69] Therefore, crimes punishable with *ta'zĩr* and other punishments can be proved and *Sharĩ'ah* will not overlook these sorts of evidence due to their strength.[70]

Regarding the contemporary scholars view on circumstantial evidence (*qarĩnah*), the Organisation of Islamic Conference's Council of Islamic Fiqh Academy has resolved that circumstantial evidence could not be used to prove *qiṣãṣ* and *hadd* punishments.[71]

8. Ratiocination of Judicial Decision:

In determining matters based on testimony of witnesses or an oath taken by defendant in the absence of plaintiff's witness or an oath returned back to a plaintiff where a defendant declines to take the oath, there is a clear correlation between the effect of the testimony as well as the final decision. The judge can clearly show the basis of his decision by referring to the evidence presented by a party. But when it comes to reliance on circumstantial evidence to base decision, the correlation is not as clear cut as it should be. This is the reason why it is very important for the judge to show the connection between the *qarĩnah* and the effect of his decision. This is a mental activity that most be appropriately recorded by the judge for the strength of the decision to be obvious.

Admitting circumstantial evidence as conclusive proof requires the judge to have clarity of mind, depth of thought, intellectual ability and additional piety and sincerity to Allah, the Most High.[72] Thus, he should comprehend the fact in issue and should be able to deduce what actually happened between the litigants through the evidence presented as well as signs, indicators and circumstance of the parties and the incident. This is the reason why the judge is expected to establish a clear link between the incident, which he recognized as *qarĩnah*, and his decision. Failure to do such may subject the decision to review as the basis of the decision is not clearly spelt out.[73]

Furthermore, circumstantial evidence tends to prove one's case only by inference; that is, circumstantial evidence permits the judge to infer that the advocate has established one or more legal elements he/she is attempting to prove. Therefore,

[68] Bukhari, Op. Cit., Hadith No. 2502.
[69] Al-Fã'iz, Op. Cit., p. 274.
[70] Hasan, Op. Cit.., p. 31.
[71] Resolutions and Recommendations of the Council of the Islamic Fiqh Academy, Resolution No. 194, 9/20).
[72] Al-Zuhailĩ, M.M., *Wasã'il al-Ithbãt*, (Maktabat al-Mu'ayyid, Riyadh, 1414H/1999), vol. 2, p. 499.
[73] Al-Kharãshi, Op. Cit., p. 44.

for circumstantial evidence to be as persuasive as possible, the judges must not only accept it as true, they must also recognize and accept as valid an inferential connection between the evidence and what one contends it proves. Moreover, Circumstantial evidence consists of facts pointing, in a particular direction, to facts that are in harmony with one side or another, the hypothesis being analyzed, but standing alone this related evidence is not sufficient to draw any definite conclusions. The inference provoked from circumstantial evidence must flow logically, reasonably, and naturally from the facts presented.

Mental activity in form of reasoning must be employed to clearly and eloquently justify the final decision. Reasoning is a special mental activity called inferring. It can also be called making (or performing) inferences. To infer is to draw conclusion from premises.[74]

Inferences are made on the basis of various sorts of things – data, facts, information, states of affairs. In order to simplify the investigation of reasoning, logic treats all of these things in terms of a single sort of thing – *statements*. Logic correspondingly treats inferences in terms of collections of statements, which are called *arguments*. An ***argument*** is a collection of **statements**, one of which is designated as the **conclusion**, and the remainder of which are designated as the **premises**.

According to Al-Bãjĩ, inference is taking guide from *dalĩl* by following its signs to reach the required effect.[75] Al-Maqarrĩ has also described it as using the indicator to confirm the indicated either by moving from the effect to the cause, or from the cause to the effect;[76] and from one of two things to the other.[77]

Inference (*istidlãl*) is a thought over that which is being investigated to gain the knowledge from that which is available. A related term is also analogy. The core meaning of the word 'analyze' is *to break down a complex whole into its constituent parts*.[78] A logical analogy is a statement consisting of many propositions which when certified, another statement is implied from it.[79] According to Al-Bãuhsain, this is a general inference that can be applied in many disciplines including *fiqh* and *ũsũl* (Jurisprudence). It is a specific method for inference through which the unknown facts is reached through the known and available facts.[80]

From the above logical simplification, a judge can link facts based on the presented evidence before him to conclusions that are effects of such facts. Thus, facts that have effect on the decision (relevant facts) should be distinguished from ineffective facts (irrelevant facts) so the injunction (*al-hukm*) is attributed to the effective facts.

9. Some Judicial Applications of *Qarã'in*:

1. The Prophet has allowed known enmity (*al-lauth*) as a basis for initiation of *qasãmah*; and allowed plaintiffs to swear fifty oaths and claim compensation.[81] Al-lauth (enmity) between the victim and the accused indicates motivated killing. This is the reason why al-Maziri said: Qarã'in can stand as a witness. Ibn Qayyim adds,

[74] Herdegree, G., Symbolic Logic: A First Course, (Mcgraw-Hill College: 1999), p. 2-3.
[75] Al-Bãjĩ, *Al-Hudũd*, Op. Cit., p. 41.
[76] Al-Bãhusain, Y.A., *Turuq al-Istidlãl wa Muqaddimãtihã inda al-Manãṭiqah wa al-Uṣũliyyĩn*, (Riyadh, Maktabat al-Rushd 1422H/2001), p. 204.
[77] Ibid.
[78] Herdegree, Op. Cit., p. 8.
[79] Al-Bãhusain, *Turuq al-Istidlãl,* Op. Cit., p. 205-6.
[80] Ibid, p. 206.
[81] Bukhari, Op. Cit., Hadith No. 7192.

working with qasãmah is based on reliance upon evident signs that gives higher probability or conjecture that the plaintiff is telling the truth. Thus, it is permissible for them to take the oath. It is also permissible and even obligatory upon the judge to confirm the right of *qiṣãṣ* (retribution) or diyyah (blood money) although he is aware that the accused has not been seen or witnessed while committing the act.[82] Their claim acquires its strength from the *lauth* (which served as a witness). They obtained a favourable judgement based on their oath and it is the second witness.[83]

In *Minah al-Jalĩl*, too, he has this to say: "For the family of the slain, open enmity has stood as a witness; and the rule is that to demand a plaintiff to swear an oath along with one witness to complete the quantum. The oath is toughened due to the gravity of blood spilling.[84]

2. The Prophet, peace be upon him has recognized the silence of a virgin as an indicator of her consent in marriage.[85] Ibn Farhũn regards this as one of the strongest authorities on judgement based on *qarĩnah.*[86]

3. The Prophet, peace be upon him has also judged based on *qiyãfah* (through tracking the size of foot and the manner walk); and recognized it as evidence for lineage. Aisha, may Allah be pleased with her, has narrated that the Messenger of Allah has entered into her room while he was happy in jubilation; and he said: Didn't you see Mujazziz has just looked at Zaid bin Hãrithah and Usãmah bin Zaid and he said: these foot are from each other".[87] The same can also be said regarding DNA test confirming parenthood of a child; as these have greater certainty than even *qiyãfah* according to the 11th Council of Fiqh meeting in Kuwait in 1998.[88]

4. Administering an oath to a plaintiff if the defendant declares to swear an oath (*nukũl*). Thus, if a defendant is asked to swear an oath but declines to swear, the strength of the presumption of non-liability on his part weakens and the plaintiff's side becomes stronger and a *qarĩnah* on the assumption of the truth of his claim becomes obvious.[89] This is why most Malikis and Hanbalis are of the view that defendant's refusal to swear an oath (which is also a *qarĩnah* in its own right) stands as plaintiff's witness. In other words, refusal to swear an oath stand as a witness of plaintiff who will be asked to swear an oath to strengthen his claim as one witness is less than the required quantum but can be completed with an oath and a judgement will be in his favour. The defendant's refusal to swear through which the plaintiff's claim can collapse is an indicator (*Qarĩnah*) of the truthfulness of the claim made against him. It will be conclusive circumstantial evidence where the refusal to swear is one witness and the plaintiff's oath is another witness.[90]

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[82] Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah*, Op. Cit., p. 11, 191; Ibn Fahũn, Op. Cit., vol. 2, p. 120.
[83] Iqãmat al-Sabab al-Muqawwi li da'wã maqãm al-Shahãdah, p. 56.
[84] Alĩsh, M., *Minah Al-Jalĩl Sharh Mukhtasar al-Ikhlĩl*, (Matba'a Al-Kubrã, Egypt: n.d.), vol. 4, p. 286.
[85] Bukhari, Op. Cit., Hadith No. 6570; Al-Naisãbũri, Muslim, Op. Cit., Hadith No. 1421.
[86] Ibn Farhũn,vol. 2, Op. Cit., p. 120.
[87] Bukhari, Op. Cit., Hadith No. 6770.
[88] Hilãliyy, S. M., *Al-Baṣmah al-Wirãthiyyah wa 'alã'iqiyhã al-Shar'iyyah – Dirãsah Fiqhiyyah Muqãranah,* (Dãr al-Kutub al-Miṣriyyah, 1431H/2010), p. 82.
[89] The basis of adding an oath where a plaintiff has only one witness is the saying of the Prophet, peace be upon him as by Muslim, Ahmad, Abu Dãwũd and Ibn Mãjah from Ibn Abbãs, may Allah be pleased with them, that "the Messenger of Allah, peace be upon him has ruled base on an oath and a witness" (Muslim, Hadith No. 4569; Abu Dãwũd 3610; Musnad Ahmad bin Hanbal, Hadith No. 2969; Musnad Abu Ya'lã, Hadith No. 2511;)
[90] Ibn Rushd, M.A., *Al-Muqaddimãt al-Mumahhidãt*, vol. 2, (Al-Sa'ãdah 1325H), p. 293; Ibn Farhũn, Op. Cit., vol. 1, p. 331; Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah,* Op. Cit., p. 125; Ibn al-Qayyim, *I'lãm al-Muwaqqi'ĩn*, Op. Cit., vol. 1, p. 74.

5. It has been narrated from Ismã'il bin Hamad bin Abu Hanĩfa that a man has beaten a woman. She came and claim before Ismã'il bin Hamad that she has lost her hearing. He busied himself with other things before looking at her claim. He subsequently turned to her and said: O you! cover your private parts to which she gathered her veils around her. Having seeing that he noted that she was lying in her claim.[91]

6. According to Malikis and Shafi'is, where the possessor as defendant that benefits from the property is challenged by a plaintiff claiming ownership of the property, the defendant's evidence shall have preference over the plaintiff's. This is because the defendant is in a stronger position as possession is an indicator (*qarĩnah*) or circumstantial evidence for ownership.[92] They relied on a Prophet's tradition in which it was narrated that two men disputed over ownership of an animal or a camel and both presented their respective evidence claiming that it was born into his hand; the Prophet, peace be upon him judged in favour of one in whose hand was the animal.[93]

10. Conclusion:

Conclusively, this work has demonstrated versatility of Islamic Law of evidence in safeguarding rights of people even where the conventional means of proof cannot be attained or has been tainted. *Qarã'in* or circumstantial evidence as conceptualised by jurists is among the means that helps in bringing about conclusive decisions of the judge.

The paper first defined the concept of evidence (*bayyinah*) in Islamic law and confirmed the opinion taken by majority of jurists that it is anything that makes the truth evident. Several legal authorities have been cited regarding justification of *qarĩnah* as a means of proof. Circumstantial evidence has various classification and the most important classification looks at its strength. Conclusive *qarã'in* are the strongest while inconclusive *qarã'in* can serve as persuasive evidence along with other evidences presented in the Court; while Weak and imaginary *qarã'in* are however inadmissible as they are merely illusions. The conditions for the validity of circumstantial evidence include the existence of the evident or obvious indicator, a connection between it and that which is deduced and the relationship between the two must be effectively deduced. The jurists are generally in agreement over admissibility of *qarã'in* in pecuniary claims, personal laws as well as discretionary punishments. They did not however agree over its admissibility on offences punishable with *hadd* and *qiṣãṣ*. The paper also talked about the ratiocination of judicial decision by citing the connection between the *qarĩnah* and the fact that needs to be proved. This aspect is very important as it will demonstrate the judge's understanding of the matter and how he came at an appropriate decision. This will exonerate the judge from any accusation of foul play. The paper concluded by citing several applications or usage of *qarã'in* as a means of proof in adjudications in general.

[91] Al-Sarkhasĩ, Op. Cit., vol. 7, p. 317.
[92] Ibn Farhun, Op. Cit., vol. 1, p. 309; Al-Dardĩr, Op. Cit., vol. 4, p. 307; Al-Nawawĩ, Al-*Muhadhdhab*, Op. Cit., vol. 2, p. 312.
[93] Transmitted by Al-Dãr Qutnĩ in his Al-Sunan, Hadith No. 4477; but declared weak (*ḍa'ĩf*) by Ibn Hajar in Al-Talkhĩṣ, (Dãr Al-Kutub Al-'Ilmiyyah: 1419H/1979), vol. 4, p. 499.

Findings:

1. The term evidence (*bayyinah*) in Islamic law covers everything that makes the truth manifests. This also includes circumstantial evidence (*qarĩnah*).
2. Circumstantial evidence (*qarĩnah*) has been covered by principles of Islamic law and therefore, it is among the admissible means of proof as has been opined by the majority of jurists.
3. There must be logical connection between the known fact and the *qarĩnah* deduced therefrom.
4. *Qarĩnah* can be used as a means of proof in pecuniary claims, personal matters as well as discretionary punishments (*ta'zĩr*). Most jurists are of the view that it cannot be used in proof of *hadd* or *qiṣãṣ* offences.

Recommendations:

1. Sharĩ'ah Court judges should always take note of *qarã'in* presented before them or that which they have taken notice of during proceeding and apply it in their decisions.

2. Legal practitioners should take cognizance of the link between *qarĩnah* and the fact they want to deduce and make a logical connection that will be devoid from suspicion. This will help the judge to come up with appropriate decision.

3. The laws of procedure in *Sharĩ'ah* Court should adequately cover the usage of *qarĩnah* as a means of proof. This is because proper quantum of witnesses is not always available for proof of claims. This will guarantee that rights are appropriately protected by the *Sharĩ'ah* Courts.