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AHADIS ON EVIDENCE : AN ANALYSIS

MOHD. SAHRI B. ABD. RAHMAN

G9310366

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بِسْمِ ٱللَّهِ ٱلرَّحْمَٰنِ ٱلرَّحِيمِ

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ كُونُوا۟ قَوَّٰمِينَ لِلَّهِ شُهَدَآءَ بِٱلْقِسْطِ ۖ وَلَا
يَجْرِمَنَّكُمْ شَنَـَٔانُ قَوْمٍ عَلَىٰٓ أَلَّا تَعْدِلُوا۟ ۚ ٱعْدِلُوا۟ هُوَ أَقْرَبُ
لِلتَّقْوَىٰ ۖ وَٱتَّقُوا۟ ٱللَّهَ ۚ إِنَّ ٱللَّهَ خَبِيرٌۢ بِمَا تَعْمَلُونَ ﴿٨﴾

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

[Al-Maidah (5):8]

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Mohd Sahri bin Abd Rahman
G 9310366

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INTRODUCTION

Introduction

a. Brief History of The Islamic Law

On the basis of the Quran, Traditions of the Prophet, *Ijma'* (consensus of jurists' opinion), *Qiyas* (anological reasoning), practices of the guided Caliphs and other related principles of Islamic Jurisprudence formed the long history of Islamic laws that survived for more than 1500 years. Since the day of the Prophet Mohammed (pbuh), the Muslims were taught of how to settle the dispute of two litigants if they were brought before them. There were no written rules and laws as what we have nowdays. The only written rule is that of the Quran and the Sunnah (teachings of the Prophet). By following these two sources the Companions formulated their own rules and to matters that are new to them, they practiced *ijtihad* (reason opinion).

When Muaz was assigned as a judge to the people of Yemen, the Prophet asked him: "How are you going to judge if a case is brought before you?" He replied: "I will judge according to the Book of God (Al-Quran)" The Prophet said: "If you can't find it in the Quran?" He replied: "I will refer to the sunnah (practices) of the Prophet. The Prophet asked again: "But if you can't find it in

the sunnah of the Prophet?" He replied: "I will perform *ijtihad* and will never give up in doing so." The Prophet tabbed his chest and said: "Praise is to Allah who guided the messenger of His Prophet on what that pleased him."[1]

This simple juristic principle was followed by the pious Companions of the Prophet. They were conscious of the burden of responsibility involved in making legal judgments on any but factual questions, left aside all hypothetical issues. Ibn Abi Layla is quoted as saying: "I met one hundred and twenty of the Prophet's Companions, and each one of them who narrated a saying of the Prophet wished that another *Sahabi* (Companion) had narrated it, and each of them who gave an opinion wished that it had been given by another."[2]

Throughout the period of the first Islamic polity, in the city state of Medina, under the Prophet and the Guided Caliphs, the fundamental unity between the spiritual and the temporal remained unscathed. The advent of the Umayyad, the first dynasty in Islam (41-132 AH), saw the first distinction between the religious and the secular. The Caliphate, although retaining its spiritual title, gave way to the empire-state and the era of the

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[1]Reported by Abu Dawud, III, hadis 303, (3592), Tirmizi, III, hadis 616, Ahmad, V, hadis 236; see Al-Baghawi, *Syarah al-Sunnah*, V, Beirut, Dar al-Kutub al-Ilmiyyah (1992), 352.

[2]Dr. Farouk Hamadah, *Al-Minhaj Al-Islami Fi Al-Jarhu Wa Al-Ta'dil*, Rabat, Dar Al-Ma'arif Al-Jadidah (1989), 196.

formation of juristic doctrines and the recording of legal principle and the general rules.

Islamic juristic thought reach its peak during that period, starting with the death of the last Companion, in the last days of the Umayyad dynasty and spanning the whole of the Golden Abbassy era (2nd - 4th centuries AH). Islamic jurisprudence became a discipline in its own right to which a new class of jurists devoted their lives, recording to the general discursive rules and codifying the various juristic doctrines based either on political grounds, with the *Shias* and the *Kharijites*, or on scholarly research, as with the Hanafis and the Shafiis. Their rulings were derived from the texts of the Quran, the Sunnah of the Prophet and from the specific circumstances of their regional environments.

Thriving juristic thought of this period went hand-in-hand with the development of other disciplines: the exegesis of the Quran, arranged and collected in a single book (the Mushaf); the compilation of the Prophet traditions (*hadis*) under stringent rules, to sort out the authentic from the forged; and the translation of the Greek texts on philosophy and logic.

Various schools of Islamic juristic thought flourished, producing systematic doctrines that differed from one another according to their interpretation and knowledge of text, their customs, social environments and their political allegiances. It must be stressed, however, that the founding fathers of these doctrines presented them as plausible, non-binding opinions

which ought not to be followed blindly or fanatically, and recognized the existence of other equally valid interpretations.

Unfortunately, this advice went unheeded in the next stage of juristic though, known as the era of taqlid (imitation) and Jumud (rigidity), from the middle of the 4th to the 13th centuries AH. Independent juristic thought ceased and it was said then than "the door of *ijtihad* was closed." The imitative jurist became bound to single doctrine from which he could not convert to another. A Hanafi scholar (*faqih*), Al-Kharkhi, went so far as to say that "every Quranic verse or Tradition of the Prophet that goes against the opinion of our School shall be deemed liable to interpretation or altogether abrogated."[3]

Eventually the door of the *ijtihad* was re-opened during the 13th century AH, as the impact of the West was felt in Muslim society. The Traditionalists of the previous phase were regarded as being out of touch with the times. Modern juristic thinkers, such as Jamaluddin al-Afghani (1838-98) and his Egyptian disciple Mohammed Abduh (1849-1906), rebelled against stagnation and called for social and legal reforms. They disputed any paramount or exclusive authority of the basic doctrine of taqlid as embodied in the law recorded in the medieval manuals and claiming to represent the interpretation placed by the early jurists upon the Quran and the Sunnah of the Prophet. Contemporary jurists claimed the right to interpret independently the original divine texts in the light of modern

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[3]Ibn Al-Athir, *Al-Kamil fi al-Tarikh*, VI, Beirut, Dar al-Fikr (1984), 235.

social circumstances. What classical jurists interpreted as a moral exhortation, e.g. polygamy was regarded by modern Islamic law-makers as a positive legal condition to be enforced by the courts.

A new pluralistic eclectic juristic stream developed, with the aim of choosing, from among the various schools that best suited to the needs of modern Islamic society. This trend culminated in the compilation and the enactment of the Mejella or Ottoman Civil Court (1293 AH). Made up of 1851 articles, it was based, in principle on the Hanafi juristic school. It was not, however, restricted to that doctrine since it adopted provisions from the other schools which were deemed best suited to the people's interests and the spirit of the modern time.

However, the Islamic law courts, known as the Syari'ah Courts, have been abolished as a separate entity in Egypt and Tunisia, the original Islamic law, known simply as Shari'ah, is still applicable in its entirety in the Arabian Peninsula. It is Shari'ah law which is still in force in matters of personal law, including the law of succession and religious endowments (*waqf*) in all states with Muslim majorities except Turkey. In Malaysia, it is also confined to the matters mentioned.

Most recently the Islamic trend in the Islamic countries throughout out the world got their place in the political mainstream that called for the total implementation of the Shari'ah. Countries like Sudan, Pakistan, Iran and United Arab Emirates implemented the Syari'ah not only of the personal

matters but both criminal and civil. In Malaysia the call for total implementation of the Shari'ah is also an important issue. Although, it is alleged to achieve political interest, but the importance of Shari'ah in preserving the identity of the Islamic *Ummah* cannot be denied. Therefore effort has been made, and still making its way, improving the administration of the Syariah Court in all the states, with the hope that one day it becomes the only law of the country.

b. Method of Study

There are many reasons why I choose to start my research with *ahadis*[4] that is the Traditions of the Prophet. *First*, this is the method that was adopted by many of the commentators of *ahadis* such as Al-Baghawi[5], Ibn Athir[6], Ibn Hajar[7], Al-Syaukani[8], Al-

[4]The plural of hadis that is the Tradition of the Prophet.

[5]He is Abu Muhammad Hussain ibn Masud al-Baghawi (436-516 AH). His famous books written in this manner is *Sharah al-Sunnah* and *Masabih al-Sunnah*.

[6]Majduddin ibn Athir (died 606AH), the compiler of Ahadis titled *Jami' al-Usul min Ahadis al-Rasul* and he gave a brief commentary arranged according to subject matter.

[7]He is Ahmad ibn Ali Shihabuddin ibn Hajar al-Asqalani (773-852 AH). His famous commentary of Sahih al-Bukhari is considered as the most exclusive writing of this type, and he is also the compiler of the ahadis that

Kahlani[9] and others. By doing so one can easily distinguish between what was instructed by the Prophet regarding certain subjects and what was not. *Second*, the collection of all the ahadis concerning a certain subject can easily determine the purpose of the *ahadis*. This is the most important characteristic of Shari'ah and *ahadis* usually elucidate one another. *Third* reason is, when all ahadis has been collected on the subject, and there are no other relevant *nusus* (texts) on the problem then one should see the general rules of the Shari'ah. These general rules will govern any other sources that we are going to adopt, whether they be the *adat* of certain community or if possible the positive law of a particular country developed from other legal systems and traditions.

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later commented by al-Kahlani named *Bulughul Maram*, and the title of the commentary is *Subulus Salam*.

[8]He is Muhammad ibn Ali ibn Muhammad al-Syaukani (died 1255 AH). He is the commentator to the collection of hadis collected by Majduddin ibn Taimiyyah (*Muntaqi al-Akhyar*). The title of this commentary is *Nailui Awtar*.

[9]He is Muhammad ibn Ismail ibn Salah ibn Muhammad ibn Ali al-Kahlani, the author to the commentory *Subulus Salam. op.cit.*

c. *Arrangement*

I start the first chapter on litigation and evidence. In this chapter I collect the *ahadis* on respective subjects. After close examination of the *ahadis* two important sub-topics need to discuss deeply and that is *da'wa* (litigation) and *bayyinah* (evidence). I will define *da'wa*, and explain the position of the plaintiff, the defendant, and a brief procedure of the trial. Then, I will touch on *bayyinah*, its meaning, the difference between *bayyinah* and *shahadah*, the rule in giving *bayyinah* or *shahadah*, burden and standard of proof.

The second chapter is on admission that is Iqrar in the Islamic legal terminology. I collect the ahadis and discuss the meaning of Iqrar, the types, effects and conditions of the Iqrar. I emphasize on the conditions of Iqrar in the case of zina. Lastly, for this chapter I glance on the Kelantan Shari'ah Evidence Act 1991.

The next chapter I focus the study on shahadah. As usual, I collect the ahadis and give brief explanation to it. I then summarize the ahadis and identify the field it covers. The topics to be discuss are, the meaning of shahadah, it's requirement, shahadah *al-hisbah*. Next, I focus on the question of competency of the witnesses be it in *tahamul* or *ada'*. Other important points are; number of witnesses, examinations of the witnesses, retraction of the shahadah, hearsay evidence, shahadah *'ala shahadah,*, shahadah of Non-Muslim, the

shahadah in zina cases and shahadah al-zur that is false shahadah. All these will be in chapter three.

The forth chapter is on oath. I collect the ahadis on oath and specify the topics should be discussed, derived from these ahadis. The topis are, the meaning, procedure, purpose, and conditions of yamin. Next, is the situation when the defendant refuse to take the yamin. Other topic suitable for discussion in this chapter are qasamah and lian. I also lay down the Enactments on yamin.

Chapter five is on *Qarinah* that is facts that are relevant as proofs. The points of focus in this chapter after looking at the ahadis are; the meanings of qarinah, qarinah as a method of proof, types of *qarinah*, *Documentary*, *Ra'yu al-Khabir*, *Khabar al-mutawatir* and *Istifadhah*, *qiyafah*. I give my comment on the The Kelantan Syariah Criminal Code (II) Bill on qarinah. Lastly, I lay down the Kelantan Syari'ah Evidence Act and the Majallah on qarinah.

I end my dissertation with a conlusion.

Chapter 1:
DA'WA AND BAYYINAH

Chapter 1: *Da'wa* and *Bayyinah*

1.1. Ahadis on *Da'wa* and *Bayyinah*

1. Ibn Abbas reported Allah's Apostle (may be peace upon him) as saying: If the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant.[10]

2. Narrated Wail ibn Hajr said: "A man came from Hadramaut and another man from Kendah to the Prophet (pbuh), the man from Hadramaut said to the Prophet: " O The Prophet of Allah this man took from me my land." The man from Kendah said: " That is my land, it is in my possession and he has no right over it." The Prophet said to the man from Hadramaut: "Do you have any

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[10]Reported by Bukhari, Muhammad Ibn Ismail, *Jami' al-Sahih*, III, Beirut, Dar al-Jail, 116,159; Muslim, *Sahih Muslim*, V, Cairo, Matba'ah al-Babi al-Halabi, 128; Abu Daud, *Sunan Abi Daud*, III, Cairo, Matba'ah al-Babi al-Halabi, 331, (hadis no.3619); Tirmidzi, *Sunan al-Tirmizi*, I, Dar al-Jail, 251; Baihaqy, *Sunan al-Baihaqy*, X, Matba'ah al-Babi al-Halabi, 252,256; Daruqutni, *Sunan al-Daruqutni*, III, Cairo, Matba'ah al-Babi al-Halabi, 234, (hadis no.517); Nasai, Sunan al-Nasai, VIII, Cairo, Matba'ah al-Babi al-Halabi, 248; see Al-Kahlani, Muhamad ibn Ismail, ***Subul al-Salam***, IV, Beirut, Dar al-Kutub al-Arabi (1990), 255.

evidence?" He said: "No" The Prophet said: "And you have to take an oath." The man said: "O the Prophet of Allah, that man is unmoral he doesn't care on whom he is going to swear and doesn't refrain from anything." The Prophet said: "You have no choice other than that." The narrator said: "The man swore and went away." The Prophet said after he had gone: "Curse on sworn property of yours, taking the property of other through wicked ways, Allah will throw him and he will be discarded."[11]

3. 'Ali said: The Apostle of Allah (may be peace be upon him) sent me to the Yemen as judge, and I asked: Apostle of Allah, are you sending me when I am young and have no knowledge of the duties of a judge? He replied: Allah will guide your heart and keep your tongue true. When two litigants sit in front of you, do not decide till you hear what the other has to say as you heard what the first had said; for it is best that you should have a clear idea of the best decision. He said: I had been a judge (for long); or he said (the narrator is doubtful): I have no doubts about a decision afterwards.[12]

4. Umm Salamah reported Allah's Messenger (May be peace be upon him) as saying: You bring to me for (judgment) your disputes, some of you perhaps being more eloquent in their plea

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[11]Reported by Tirmizi, and he said:" hadith Hasan Sahih." See Ibn Qaddamah, *Al-Mughni*, IX, Beirut, Alim Al-Kitab, 146

[12]Reported by Ahmad, *Musnad*, I, Beirut, Dar al-Kutub al-Ilmiyyah, 143-150; Abu Daud, *op.cit.*, III, at 301; Tirmidzi, *op.cit.*, III, at 617; Ibn Majah, *Sunan Ibn Majah*, II, Egypt, Matba'ah Isa al-Babi al-Halabi, 774.

than others, so I give judgment on their behalf according to what I hear from them. (Bear in mind, in my judgment) if I slice off anything for him from the right of his brother, he should not accept that, for I sliced off for him a portion from the Hell.[13]

5. Abu Musa reported that two men were in dispute for an animal and were taken to the Allah's Messenger (may be peace be upon him) where non of them had any evident to their claim, so the prophet (may be peace upon him) divided it into two.[14]

1.2. Meaning of the Ahadis

The first hadis was narrated on an incident where two women were stitching shoes in a house or a room. Then one of them came out with an awl driven into her hand, and she sued the other for it. The case was brought before Ibn 'Abbas, he then narrated the hadis and said, "will you remind her (i.e. the defendant), of Allah and recite before her: *Verily! Those who*

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[13]Reported by Bukhari, II, at 161; IV, at .342,392,396; Muslim, V, at 129; Abu Daud, III, at 301; Tirmidzi, I, at 250-251; Nasa'i, II, at 308,311; Ibn Majah (hadis no.2317); Ibn Jarud, *Musnad*, Beirut, Dar al-Kutub al-Ilmiyyah, (hadis 999); Baihaqy, X, at 143,149; Ahmad, VI, at 203,290,308; Ibn Hiban, *Sahih Ibn Hibban*, VI, Beirut, Dar al-Jail, 235 (hadis no.1197).

[14]Reported by Abu Dawud, III, at 310; Nasa'i, II, 311; Ibn Majah (hadis no.2329); Baihaqy, X, at 254,255,257,258; Ibn Hiban (hadis no.1201); Daruqutni (hadis no.514-515); Ahmad, II, at 489,524.

purchase a small gain at the cost of Allah's Covenant and their oaths....[15]." So they reminded her and she confessed. Ibn Abbas then said, "The Prophet said, 'The oath is to be taken by the defendant (in the absence of any proof against him).'"[16]

There is an addition to the narration made by al Baihaqy to this hadis that is,'...but proof to the claimant and oath to the defendant'[17], and this addition according to Nasaruddin al-Albani is *sahih* (authentic).[18] Ibn Abi Mulaikah who reported this hadis from Ibn Abbas said: "I was a judge for Ibn al Zubair at Taif...," and repeated the incident twice and then said: "...I wrote to Ibn Abbas, he replied saying that the Prophet's of Allah had said: if the people were given according to their claims ...(the hadis)" and mentioned the whole hadis with this addition.[19] Therefore these ahadis emphasize on the necessity of evidence and at the same time warned those who take the oath lightly.

The second hadis, give us the basic rule in judging two persons in dispute. That is to hear bayyinah from the plaintiff and if he failed to produce bayyinah the defendant has to take an oath. The third hadis guides us of how to settle dispute

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[15]Ali Imran (3):77

[16]Reported by Bukhari, VI, at 74

[17]Reported by Baihaqy, See Ibn Hajar al-Asqalani, *Talkhis al-Habir*, IV, Beirut, Darl Ihya Kutub al-Arabi (1982), 208.

[18]Nasaruddin al Albani, *Irwa' al ghalil fi Takhrij Ahadis Manar al sabil*, VIII, Beirut, Maktab al-Islami (1986), 264-267.

[19]Nasaruddin al Albani, *op.cit.*, VIII, at 264-267.

between two persons, that is to hear both parties and never judge until the evidences are clear. The ahadis also indicate that the judge should preserve justice. The forth hadis is a warning from the Prophet that the judgment given by the judge constitutes only what is apparent from the bayyinah given during the trial and Allah knows the truth. If any judgment made against the truth, the one whose judgment was made in favour of should bear the chastisement of Hell. The last hadis shows that justice must be preserved in whatever means.

These ahadis give, in general, the court procedure in Islamic law. The discussion on this subject can be divided into two main topics, they are da'wa and bayyinah.

1.3. *Da'wa*

Da'wa in English is litigation, lawsuit, suit, action, case, cause or legal proceeding(s).[20] It is defined as the claim of someone's right on what is in the hand, or responsibility of others.[21] According to the definition it has four main elements; (a) the *mudda'i* that is the plaintiff who filed up the claim, (b) the *mudda'a 'alahi*, that is the defendant or the accused, (c) the *mudda'a bihi* that is the object of claim, and (d) The word used in

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[20]Dr. Rohi Baalbaki, *Al-Mawrid: A Modern Arabic-English Dictionary*, Beirut, Dar El-Ilm lil Malayin (1988), 588.

[21]Ibn Qudamah, *Al-Mughni*, X, Beirut, Dar al-Fikr (1984), 241.

the court that determined the plaintiff's claim. This is known as the *da'wa*.[22]

1.4. *Mudda'i* and *Mudda'a 'alaihi*

On the basis of the first hadis narrated by Ibn Abbas that was reported by al-Baihaqy, "evidence is to the claimant and oath is to the defendant" the judge should at the very beginning determine who is the claimant and who are the defendant. By doing so, both will remain on their responsibilities throughout the trial. To distinguish *mudda'i* and *mudda'a alaihi* are as follows:

a. The *mudda'i* are those who have to prove what they claimed and the *mudd'a alaihi* are those who defend themselves from what they ware accused of.

b. The *mudda'i* are those who claimed what was hidden and the *mudda'a alaihi* are those who in the defence claimed what is clear and apparent.

c. The *mudda'i*'s word usually contradicts to the *uruf* (custom), whereas the *mudda'a alaihi*'s word usually in touch with the uruf (custom).

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[22]Dr. Abdul Karim Zaidan, ***Nizam al-Qada' fi al-Shari'at al-Islamiyyah***, Baghdad, Muassah al-Risalah (1984), 275.

d. The *mudda'i* he can suspend the case if he likes but for the *mudda'a alaihi* he can't dismiss the case, in turn he is required to defend what he was charged.

e. The *mudda'i* are those who demand his right that is in the hand of other and the *mudda'a 'alaihi* are those who defend themselves from what was indicted.[23]

1.5. *Bayyinah* and *Shahadah*

The word *bayyinah* in the ahadis mentioned above means evidence or proof. The *hadis* indicates the requirement of a proof or any form of evidence in supporting the claim. The proof can be in any form, be it shahadah or other forms of *bayyinah* such as *iqrar, qarinah, kitabah, ra'yu al-khabir*, etc. That means *bayyinah* is a general term that includes all forms of evidence. This is the view of Ibn Qaiyyim al-Jauziyyah,[24] Ibn Farhun[25] and

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[23]*Ibid.*

[24]Ibn Qaiyyim al-Jauziyyah, *Turuq al-Hukmiyyah*, Beirut, Dar Ihya al-Ulum, 18.

[25]Ibn Farhun, *Tabsirah al-Hukkam*, I, Cairo, Maktabah Mustafa al-Babi al-Halabi, 202.