

Acceptability of Infant's Testimony in the Sharia Courts: Maliki's Point of View

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Abstract: All Praises be to Allah, the beneficent the merciful who send down His last Prophet as a mercy upon mankind. This paper has shown the different views of various Islamic scholars on whether the evidence of a person who is not of age, or who does not attain the age of maturity can be accepted and accordingly acts upon by the Sharia Courts. It touches on the situation that warrants the acceptability of the infant's testimony and the conditions to be observed by the Sharia Courts while accepting their evidence. The views however are centred towards allowing or disallowing infants from giving evidence in the Sharia courts. *Assabiyyu*, the singular of *Assibyan* meaning (**Infant**). A child in his early period or his childhood. This is found in *MisbahulMunir* page 354.

I. INTRODUCTION

In Shari'ah law, everything is not just left without conditions. Giving testimony is equally among the rules of Shari'ah as obtainable under the procedural rules of Shari'ah. A witness must possess some qualities before his evidence shall be looked into and accordingly be considered. Maturity is however one of the conditions to be observed before a witness is allowed to give evidence. It is generally agreed by the *Ulamas* (Islamic Jurists) that a witness must be of age (matured) before he is allowed to give evidence in the Shari'ah courts. However, Maliki law gave exceptions to the general rule by stating that testimony of infants may be accepted in cases viz: Homicide and wound cases. They laid down some conditions to be observed even in the above two cases, without which their evidence will not be accepted even in the above two cases (Homicide and Wound).

II. CONDITIONS TO BE OBSERVED

The testimony of a child who has not attained maturity is not acceptable according to the majority view of jurists consisting of the Hannafi, Shafi'i and Hambali schools. This has been stated in a book titled: "*Tara'iqulHukum, al-mutafaquAlaihawal-mukhtalifufiha fi shari'atilIslamiyyah*".

On the issue of maturity as a condition for giving evidence in the Sharia Courts, jurists have divergence of opinion among themselves that it is a condition that a witness must be classified into *Adil* (upright) and a person should be matured first before he will be classified into *Adil* or upright. The above proposition is found in "*Bidaya-tulMujtahidwaNihayatul – Muqtasid*".

The Maliki jurists accept the evidence of Infants, but even within the Maliki jurists there was disagreement on whether the evidence of infants will be valid if there is no adult among them or not. Their disagreement was also on whether it is a condition precedent that the infants should be males and not females before their evidence could be accepted. Another disagreement was whether it is a condition that in case of killing or homicide it must happen between them only.¹

The author of *Tuhfa* also stated the condition for the acceptability of infant's testimony, that "testimony of infant in homicide and wound cases has conditions that they must attain *Tamyiz*. *Tamyiz* can be defined as a period of distinguishing between good and bad. Some jurists stated it to be seven years. The person or child who attained *Tamyiz* is called *Mumayyiz*. They should also agree with themselves in their testimony, and before they separate or mingle with adults for the fear that he will change their thought".²

From the above, we can understand that testimony of infant is accepted only in two cases; namely: Homicide and Wound cases only. Furthermore, it is a condition that before infant's testimony is accepted in the above two cases there are conditions to be observed by the judge. The conditions are: -

1. The infant must attain *Tamyiz*;
2. The infant must be male not female;
3. They should agree with themselves in their testimony;
4. They must not separate;
5. They must not have mingled with adults after the incidence, before giving evidence.

In another development, a book called *Tara'iqulHukum* the testimony of infants, specifically mentioned the jurists that disagree and those that agree with their testimony. According to the Maliki School it can be accepted in cases of Homicide and Wound only. Even though, the Maliki school had given about eleven (11) conditions for the acceptance of their testimony.

1. He should know what is testimony;
2. They should be free not slaves;
3. They should be males not females;
4. They should be Muslims;
5. They should be only alone, no adult in-between them;
6. They should be heard before they separate;
7. They should agree with each other;
8. They should be two at least;
9. They should not mingle with adults;
10. The body of the deceased should be presented before they testify;
11. The testimony can only be accepted in cases of Homicide and Wound.

It is accepted in wound cases only according to Ash'hab. This was followed by Shafi'í and Abu-Hanifa.

It is important to note that the acceptance of their evidence is subject to the conditions as enunciated in *Tara'iqulHukum*. That is to say that the eleven conditions must be satisfied before it could be accepted.

Qata'data said from Hassan who said: Aliyu bn Abi Talibin said: Testimony of an infant over an infant is acceptable and also the testimony of a slave over a slave. Hassan added that Muáwiya said: Testimony of infants over infants is acceptable if they did not enter houses for fear that they will be thought on how to testify.³

From the above, it is clear that a *Sahaba* equated the testimony of infants over an infant and a slave over a slave that they are all acceptable. Muáwiya added that there is a condition that their evidence can only be accepted if they testify before they enter into their houses, why because of a fear that they may meet some adults inside the house who are going to teach them on what to say when they appear before the court.

"*Rabiáh and Sureh*" had given their view on infant's testimony where they added that it can be accepted if they have not separated and they agree with themselves.⁴

It is therefore clear that all the conditions as laid down by the individuals is pointed out by the Maliki School on the admissibility of the infant's testimony.

It was reported by Ibn-Abi-Shaybah from Wakii, from Abdullahi bn Habeebn Ali Thabit, from Masruq that six children (Infants) went to river swimming. One of them was sunk into the River. Three of the infants gave testimony that the two children sunk him into the river as a result of which he died. The other two infants also testified that it was other three who sunk him into the river, as a result of which he died. Aliyu bnAbi-Talibin gave judgment that the three infants are to pay *Khumusidiyy-ah (1/5 of Diyyah)* and the two infants are to pay "*ThalathatiAkhmasin*" i.e. *3/5 of Diyyah*.⁵

It was also reported from Wakiú, from ibnJuraj from Ibn Abu Mulkia "I asked Ibn Abbas and Ibn Zubayr on the testimony of infants: Ibn Abbas said: just look at the saying of Allah:

"Such as agree as witnesses"

And they are not those that we can agree with.

Still in a book called "*Tara'iqulHukum*" It is said that the majority jurists who are saying that evidence of infants is not acceptable relied on some verses of the Holy Qurán, for instance Suratul Baqara verse 283 where Allah says".

*"And conceal not the evidence, for he who hides it,
Surely his heart is sinful".⁶*

*"They went further to explain that he who conceals evidence has
committed an offence as stated by the verse and an infant cannot
commit an offence or a sin".⁷*

If we can have a look at the above quoted verse of the Holy Qurán we can understand that infants cannot give evidence generally. Even though the verses are not specific on infants, it was a kind of Qiyas or analogy done by the respective jurist to convey a message that infants by analogy cannot give evidence.

Starting with the first verse, it says from it's beginning lets two men from among us give evidence, and if there are no two men, then a man and two women (such as we agree as witnesses) by analogy therefore, Abbas and Zubayr were saying that infants are not the type of people we can agree with and accordingly be relied on, as such their evidence is not acceptable.

The second verse is saying that we should not conceal evidence, for whoever conceal it (has offended his heart), or has committed a sin. It is agreed that infants cannot commit sins as such; they will not be allowed to give evidence.

If we can look at what a Book called *Jagorar Masu Hukunchi* which is a translation of *Tuhfatul Hukum*. The author explained the situation as "the sixth's type of evidence from the first section of the types of evidence that established a right or claim without the addition of taking oath, that is, testimony of infants on what happened between them in cases of wound or homicide. If the infants gave testimony on what happened between them, their testimony will be accepted without the need to corroborate it with an oath in so far as following conditions are satisfied: -

1. The infants should be intelligent;
2. They should be males not females;
3. They should agree with themselves while giving the evidence;
4. They should not separate;
5. They should not mingle with adult so that he will not change their thought.⁸

III. CONCLUSION

Any intelligent and inquisitive judge will not or is not supposed to be basing his judgment on only one school of Islamic jurisprudence.

It is said by the jurists that disagreement between the Islamic jurists is *Rahama*. As such, it is important for every *Sharia Court* judge when a matter is presented before him to do as what the Prophet said to MuázbnJabal that if a matter is presented before him, with what is he going to adjudicate? Muáz replied that he will refer to the Holy Qurán. The Prophet (S.A.W) further asked: What if you could not find a solution in the Holy Qurán? Muáz replied that he will refer to the Hadiths of the Prophet (S.A.W). Prophet further asked what if you could not find the solution in the Hadiths? Muáz replied that he will use his initiatives (Ijtihad). The prophet then thanked him and said that was what he wants.

It is obvious therefore, that a matter may come to a judge where it has not been dealt within the Qurán or in the Sunnah. He is therefore allowed to resort to Ijma or Ijtihad and or Qiyas to some extent.

In this write up, I tried in making a thorough research as to whether an infant or a child can give evidence in the Sharia Courts or not. I started with the general view of all four Sunni Schools that an infant cannot give evidence before the Sharia Courts, as such; their evidence will not be accepted. I went further to give the dissenting view of the Maliki school that their evidence is accepted in two cases viz: - Homicide and Wound. Even though there are about eleven (11) conditions to be observed before the evidence will be considered and accordingly act upon.

IV. RECOMMENDATIONS

It is hereby recommended that:

- Before giving evidence, a witness should be asked to state his age.
- If a witness is not of age (an infant), his evidence is not to be accepted.
- All the conditions to be observed shall be seen and clearly established before the evidence of infants be accepted.
- Where the need arise, a judge is recommended to use the view of a particular school to the expense of the majority.

NOTES

1. Page 246, *Bidayatul – Mujtahid*
2. Page 11 *Al-Bhja, Fi SharhTuhfa*
3. Page 224, *Tabsiratul – Ahkam*
4. Page 225, *Supra*
5. Page 83, *Taratqul – Hukum*
6. Page 2 *Verse 283*
7. Page 83 *Ibid*
8. Page 55 *JagorarMasuHukunchi*

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