

Procedural guarantees for witnesses in Islamic jurisprudence

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Abstract:

In Islamic jurisprudence, we do not find a term that corresponds to procedural protection for witnesses. Therefore, in this research, we will attempt to investigate and compile all relevant procedures and guarantees that provide witness protection in Islamic jurisprudence. This will be achieved by examining the details and specifics that must be provided, and ensuring their implementation for the safety of witnesses, both in normal circumstances and in exceptional cases in the event of a danger or threat at any stage of the case.

Keywords: Guarantees; Witnesses; Procedural Protection; Islamic Jurisprudence

Introduction

In the name of God, the Most Gracious, the Most Merciful. Peace and blessings be upon the Messenger sent as a mercy to the worlds, Muhammad ibn Abdullah, and upon his family, companions, and those who follow him. Now then:

Testimony is considered one of the most important forms of evidence upon which judges rely in their rulings. It is through it that the prescribed punishments are implemented, blood is protected, and property and all rights are preserved. Therefore, Islamic jurisprudence has placed it in the forefront of all means of evidence, and has made it a comprehensive authority in all incidents and events. It is a religious duty for the individual before it is a legal obligation. The witness provides a public service to justice by assisting the judiciary when he provides the information he has obtained through his senses about a crime. He may be exposed to attacks or threats from the accused with the aim of changing the truth. These risks may push him to refrain from providing his testimony, or even to change the facts in order to preserve his life and safety on the one hand, and the security and safety of his family members on the other. Therefore, ensuring that the witness fulfills his duty towards justice necessarily requires taking the necessary protective measures for him, including imposing criminal protection on him. The witness may be harmed when he performs his duty to give testimony, as his life or the life of those he cares about, or his honor or his money, may be exposed to harm. Testimony is of utmost importance in criminal evidence, as most criminal cases derive their proof from the testimony of witnesses, which may in most cases be the only evidence in this case. Testimony plays a very important role in the latter, as it is the only way for the investigating and ruling authorities to know what the witnesses witnessed with one of their senses. However, witnesses need protection guaranteed to them by various legislations from threats and attacks that may be issued by one of the parties to the case as a result of their testimony against them; which requires the legislator to create a legislative system that protects them within the framework of an integrated

criminal policy. Despite the novelty of the subject, this does not prevent research in Islamic jurisprudence about the various protection procedures that Islamic law provides to witnesses.

Importance of the Study:

This topic is significant given its sensitivity, addressing one of the most important forms of evidence: the procedural protection provided by the legislature for witnesses. It examines how Islamic jurisprudence addresses witness protection, which contributes to achieving justice and encourages members of society to testify in criminal courts. This testimony is considered one of the most important elements in providing information related to the facts of a criminal case.

The research problem:

The research problem arises from the question of the extent to which criminal protection is provided to witnesses during the various stages of the criminal case, to prevent the witness from becoming a victim of crime, in Islamic jurisprudence. This requires an examination of various Sharia and legal texts to extract the protection systems provided to witnesses. Hence, the research problem was formulated as follows: What are the procedural guarantees stipulated for the protection of witnesses at the various stages of the case in Islamic jurisprudence? To answer this main problem and the subsidiary questions revolve around it,

Section One: General Guarantees for Witnesses

In this section, we address the general guarantees that the legislature has guaranteed to witnesses throughout all stages of the lawsuit (first section), followed by the guarantees for hearing witnesses before the court (second section).

Section One/General Guarantees for Witnesses

One of the supreme objectives of Islamic law is to preserve the rights of people, bringing them benefits and preventing harm. Accordingly, Islam has established rulings that specifically establish rights from the standpoint of existence, and rulings that specifically protect them from the standpoint of nonexistence. Since testimony is one of the most important means of proof by which rights are preserved, it is necessary to clarify the rights of witnesses guaranteed to them by Islamic law in court.

First: Good Treatment of Witnesses

Islamic law is keen to treat witnesses well, based on two principles. The first is a general principle, which is the right to treat all people well, both the general public and the private ones. Allah Almighty says, {And speak to people kindly} [Surat Al-Baqarah: 82], and {So speak to them gentle words} [Surat Al-Isra: 28]. He also says, “Indeed, you cannot satisfy people with your wealth, but what satisfy them from you is a cheerful face and good character¹.” A special principle is to treat witnesses well and not harm them, as God Almighty says: {And let not the scribe or witness be harmed. And if you do, it is indeed a transgression on your part.} [Surat Al-Baqarah: 281]. The jurists have mentioned matters to be taken into consideration when hearing witnesses. The witness should not be abused, reprimanded, or interfered with while being heard. He should also not be prompted to give his testimony, and he should not be made to suffer hardship. We will detail these matters as follows:

/1Not to make the witnesses suffer: Being harsh means making the witnesses do something difficult. The judge should not make the witnesses suffer, meaning that he embarrasses them with questions until he goes into details that might cause them harm, such as asking them how they knew this or how they bore the testimony or perhaps they made a mistake. The judge should not be angry with the witnesses or reprimand them, or separate them, because that is a kind of humiliation and harshness towards them, and making the witness suffer is a disparagement and a bias towards the one being testified for, and leads to abandoning the testimony. If the judge deliberately mocks them and humiliates them, it is forbidden, not disliked, because God Almighty says {And let not the scribe or the witness be harmed} [Surat Al-Arafah]. [Al-Baqarah: 281] However, when there is doubt and the

¹Narrated by Al-Hakim: Muhammad ibn Abdullah Al-Hakim, Al-Mustadrak ala Al-Sahihain, Dar Al-Kutub Al-Ilmiyyah, Beirut, 1477 AH / 1990 AD, Book of Knowledge, Hadith No. 427, Vol. 1, p. 212. Classified as hasan by Al-Albani in Sahih Al-Targheeb wa't-Tarheeb, Maktabat Al-Ma'arif, Riyadh, 1st ed., 1421 AH / 2000 AD, Vol. 3, p. 13.

judgment depends on their statements, then it is obligatory to differentiate between them in a way that combines their dignity and the judgment with justice..¹

/2Not interfering with the witnesses' words:

The judge is not permitted to interrupt the witness's utterance, or to follow it with words, or to follow it up after he has finished with words to make it complete his testimony, or to lure him into it so that the testimony becomes binding, because that would lead to a bias towards the one for whom the witness is testified. Rather, he must refrain from doing so until he has finished what he has to say. However, if the goal is to help him justify his intention, then that is permissible. If the witness hesitates in testifying, it is not permissible to encourage him to proceed with it. If the witness is firm, then it is not permissible for the judge to hesitate and discourage him from giving it, because it involves enjoining evil and forbidding good. This is the case if it concerns human rights. However, if it concerns the limits of God Almighty, then he is not permitted to do so, because in this case, the judge is commanded to use deception to ward off the prescribed punishment, not to carry it out, and this constitutes deception to carry out the punishment. limit²

3/ Not prompting witnesses: It is disliked to prompt witnesses, which is when the judge says something that will benefit the witness in terms of knowledge about the incident, so he leaves what he had of testimony and speaks what the judge prompted him to say, and prompting is education, and the judge is forbidden from acquiring anything that would lead to him being accused of bias, and the meaning of prompting the witness is not without that; Abu Yusuf approved prompting the witness who is shy, confused, or fears the courtroom, so he leaves out some of the conditions of testimony, so the judge appoints him by saying: "I testify to such and such," on the condition that there is no accusation; because it is possible that he may be restricted due to the awe of the courtroom, which would prevent him from establishing proof, so prompting is an affirmation of a proven proof, so there is nothing wrong with it.³

Second: Not harming witnesses

Testimony regarding the rights of people is fundamentally obligatory, but it may be a communal obligation. If a group undertakes it and only those who are sufficient perform it, then the obligation is dropped from the rest, because the purpose is to preserve rights, and this is achieved by some of them. If everyone refuses, then they are all sinful, as Allah, the Most High, says (interpretation of the meaning): {And do not conceal the testimony of anyone, for indeed, his heart is sinful.} [Surat Al-Baqarah: 282] So, it is obligatory to perform it when requested, because testimony is a trust. Performing it may be an individual obligation on the witness if there is no one else who is sufficient, and the right depends on his testimony. In this case, he must perform it, because the purpose cannot be achieved without him. However, if the testimony is related to the rights of people and their causes, i.e., in the pure right of a human being, such as a debt or retaliation, then the one for whom the testimony is given must request it in order for it to be paid. If it is requested, then it is obligatory for him to pay it, and if he refuses after the request, then he is sinful⁴. It is a condition for the obligation of giving testimony that he be able to do so. If he is unable, then he is not obligated to do so, because God Almighty says: {So fear God as much as you are able, and listen and obey, and spend [in charity]; it is better for yourselves. And whoever is protected from the stinginess of his soul - it is those who will be the successful.} [Surat At-Taghabun: 16]. It is also a condition that giving it does not cause harm to the person giving it, in the form of beating, imprisonment, or difficulty traveling, or to his wealth, by taking something from it or losing it, etc., or to his honor, due to fear of being exposed to

¹See: Abu al-Hasan Ali al-Mawardi: The Etiquette of the Judge, edited by: Muhi Hilal al-Sarhan, Al-Ani Press, Baghdad, 1972 AD, Vol. 2, p. 255.

²See: Zayn al-Din bin Ali al-Amili (the Second Martyr): Paths of Understanding to the Purification of Islamic Laws, Islamic Knowledge Foundation, 1416 AH, Vol. 13, p. 417.

³See: Ibn al-Humam: Sharh Fath al-Qadir, previous source: Vol. 7, p. 276. / al-Kasani: Bada'i' al-Sana'i': previous source, Vol. 7, p. 10. / al-Sarakhsi: al-Mabsut, previous source, p. 87.

⁴See: A group of authors: The Kuwaiti Encyclopedia of Jurisprudence, Dar Al-Salasil, Kuwait, 2nd ed., 1404 AH/1983 AD, Vol. 2, p. 340.

squandering by giving alms. If it happens, It is not necessary to do anything to him¹ ‘The forms of not harming witnesses are limited to not causing hardship and embarrassment to the witnesses, as well as giving the witnesses a fee, which is the alimony.

1/ Not causing hardship and embarrassment to the witnesses:

Islamic law stipulates that witnesses should not be harmed. For a witness to travel long distances to reach the place where he can give testimony is a hardship for him and a harm to himself and his property. Jurists have differed regarding the distance at which a witness is called to testify. The basic principle is whether there is hardship or not. Some of them say that he must come to testify if he is about two mile away from the court, that is, about twelve miles, due to the small hardship. If the distance is more than two mile away, he is not obligated. Others say that he is called to testify if he is the distance of the contagion or less, which is forty-eight miles, which is the distance at which an early witness can give testimony and return to his family on the same day. If he is called to a distance further than that, he is not obligated to answer and come. It has been said that he must attend if it is less than the distance at which shortening the prayer is possible. If there is a distance between him and the place where he can give testimony, he is not obligated to travel to give it². If the witness is unable to attend due to the distance, i.e., he is beyond the distance of contagion or shortening, the Sharia permits testimony about testimony to make it easier for him and to preserve rights. He should give his testimony before the judge in his country and write it to the judge who is within the distance of shortening³. Some of them permitted the testimony to be transferred from the witness by giving it to two men who would transmit it from him, and they would give it to the judge who was at a short distance⁴. Or the judge writes for a man who has two witnesses testifying before him, and he writes down their testimony.⁵

It is required that they be summoned before their testimony is accepted, as Allah the Most High says: {And do not, O witnesses, refuse to testify against them, when they are summoned.} [Surat Al-Baqarah: 281]. And that the witness be able to testify against them without causing him harm to his body, wealth, family, or honor, and without spending money on purification, that is, without causing him harm by spending his life if he is asked to purify it. If any of that harm befalls him, then it is not obligatory⁶. This protects the witness from falling into embarrassment by sacrificing himself or having his testimony rejected if he is one whose testimony is not accepted. If the judge rejects his testimony due to a wound in him, or enmity between him and the one being testified against, then he is not required to testify⁷. Because we burden the witness with effort and hardship for no benefit, the witness abandons his own interests and family and goes to testify without being accepted. There is no benefit in the face of the harm he has suffered. Furthermore, rejecting his testimony is a disservice to him, and that is his harm.

/2Paying Witnesses (Maximum)

This means taking whatever the witness needs from the person testified for in order to testify, such as money, transportation, etc. The jurists agreed on the permissibility of taking a fee for bearing witness without a fee for performing it, and it is represented by the witness's expenses and the fare for riding for the period of his going and returning. If the distance between the witness's location and the place of performing the testimony is a short distance, then he is not required to travel to perform the testimony, but rather to perform it before the judge in his country, and write about it to the judge

¹See: Abd al-Rahman ibn al-Qasim: Hashiyat al-Rawd al-Murabba', n.d., 1st ed., 1397 AH, vol. 7, p. 582.

²See: Abd al-Rahman ibn al-Qasim: Hashiyat al-Rawd al-Murabba', n.d., 1st ed., 1397 AH, vol. 7, p. 582.

³See: Al-Dasouqi: Hashiyat al-Dasouqi, previous source, vol. 6, p. 115. / Al-Kharashi: Hashiyat al-Kharashi on Mukhtasar Sidi Khalil, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, n.d., 1997 AD, p. 75.

⁴See: Ahmad bin Muhammad al-Sawi: In the Language of the Traveler to the Nearest Paths, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, Vol. 4, p. 133.

⁵See: Muhammad Alish: The previous source, Vol. 8, p. 486.

⁶See: Al-Buhuti: Kashf al-Qina' an Matn al-Iqna', previous source, vol. 6, p. 514.

⁷See: Ibn Farhun: Tabsirat al-Hukkam, previous source, vol. 1, p. 166. Ibn al-Hammam: Sharh Fath al-Qadir, previous source, p. 366. Ibn Qudamah: al-Mughni, previous source, vol. 10, p. 129.

who is at a short distance. If he travels to perform it, then it is permissible for him to eat the food of the one for whom the testimony was given, even if he has money, just as it is permissible for him to ride his animal, even if he has an animal, just as it is permissible for him to benefit from the one for whom the testimony was given, with expenses for him and his family for the period of his going and returning. The basic principle in that is the existence of hardship from its absence.¹

If the witness is close to a place where it is necessary to come from it, i.e. at a distance of two burds (twelve miles) or less, then if he benefits from something of the one for whom the testimony is given, his testimony is invalid and it is a bribe that undermines his integrity, because he took a wage for performing an obligation upon him, and it is not permissible except for what the witness rides if he does not have an animal and is not able to walk. However, if the witness is poor and cannot afford the expenses, it is permissible for him to benefit from the one for whom the testimony is given in the form of an animal and provisions, because his presence in the courtroom will distract him from seeking a livelihood for himself and his family, and in this there is a preference for the interest of others over the interest of oneself, so it is permissible for the one for whom the testimony is given to give what the poor witness needs in terms of expenses during his immersion in the matter of testimony, whether he is close or far away.² Because the criterion is not to harm the witness, a witness cannot harm himself to benefit someone else.

As for the fee for giving testimony, the majority of jurists hold that it is not permissible for a witness to take a fee for giving testimony if it is obligatory for him, because performing it is an obligation. However, if it is not obligatory for him, and he is in need, and giving it requires abandoning his work and enduring hardship, then the majority of jurists hold that it is not permissible to take a fee for it, but he is entitled to a fee for transportation to the place of testimony.³ Some Shafi'is and Hanbalis held that it is permissible, because a person's spending on his family is an obligation, and testimony is a communal obligation. Thus, the obligation of the individual does not become preoccupied with the obligation of sufficiency. If he takes the provision, he combines the two matters. And because testimony, although it is not obligatory upon him, it is permissible for him to take a fee for it, just as it is permissible for him to write a document.⁴

Section Two: Guarantees for Hearing Witnesses Before the Court in Islamic Jurisprudence

Witness testimony varies depending on their integrity and the judge's knowledge of this integrity. If the judge is aware of the witness's condition, whether positive or negative, he will act on his knowledge of the witness's condition by consensus. If the judge is unaware of the witness's condition, the witness against whom the testimony is given must either discredit the witness, or affirm his integrity, or neither discredit nor affirm him. In this case, the witness must be questioned to ensure his validity. If the judge has doubts about the witnesses' statements, he may separate them and have them swear an oath. This protects them from committing perjury. The judge is also obligated to silence the opponent while the witness is giving testimony and to discipline anyone who verbally or physically abuses the witness. All of these guarantees are provided by Islamic jurisprudence to witnesses when they testify before a court. We will discuss them below:

First: Justice in Witnesses

From the above, we find that jurists in the four schools of jurisprudence have defined justice as being satisfied with the person. The true meaning of a just witness is one who is accepted in terms of

¹See: Al-Kharashi: Hashiyat al-Kharashi, previous source, vol. 8, p. 75. / Al-Qarafi: Al-Dhakirah fi Fur' al-Malikiyah, previous source, vol. 8, p. 162. / Ibn Farhun: previous source, p. 178. / Al-Dasuqi: Hashiyat al-Dasuqi, previous source, vol. 4, p. 200. / Al-Nawawi: Rawdat al-Talibin, previous source, vol. 8, p. 249.

²See: Al-Kharashi: Hashiyat al-Kharashi, previous source, vol. 8, p. 75. / Al-Qarafi: Al-Dhakirah fi Fur' al-Malikiyah, previous source, vol. 8, p. 162. / Ibn Farhun: Tabsirat al-Hukkam, previous source, p. 178. / Al-Dasuqi: Hashiyat al-Dasuqi, previous source, vol. 4, p. 200. / Al-Nawawi: Rawdat al-Talibin, previous source, vol. 8, p. 249.

³See: Al-Dasuqi: The previous source, Vol. 4, p. 199. / Alaa Al-Din Al-Mardawi: Al-Insaf, The previous source, Vol. 12, p. 6. / Ibn Qudamah: Al-Mughni, The previous source, Vol. 10, p. 139.

⁴See: Al-Shirazi: Al-Muhadhdhab fi Al-Fiqh Al-Shafi'i, previous source, Vol. 3, p. 436. / Ibn Qudamah: Previous source, p. 139.

his religious commitment and integrity, as God Almighty says, {From among the witnesses whom you accept} [Surat Al-Baqarah: 281]. Justice, then, is for a person to avoid all major sins, to avoid minor sins to the best of one's ability, and not to persist in them when they occur. Requiring the avoidance of all minor sins to determine the justness of a witness blocks the door to testimony, while the door to testimony is open to reviving people's rights. The justness of witnesses is determined by questioning them to evaluate their integrity and integrity, as explained below:¹

1/ The question about witnesses

Justice is only known by the continuation of justice in this form. It is not a temporary form, but rather a permanent form known through those close to justice who accompany him and observe his condition.² The jurists differed as to whether it is sufficient to base a judgement on his apparent justice, and thus to accept his testimony, or whether it is necessary for the judge to investigate the justice of the witness by asking about his integrity and recommendation. This is according to two opinions: The first is the opinion of Imam Abu Hanifa and Ahmad in one narration that apparent justice is sufficient. As for asking about the condition of the witnesses for the sake of integrity and recommendation, this is not a condition according to them. It is ruled that the judge may limit himself to apparent justice, because justice is the original; the witness was not born a sinner, and sin is a suspected incident, so it is not permissible to abandon the original based on suspicion.³ He is not required to investigate it except in cases of prescribed punishments and retaliation. The same applies if the opponent challenges the witness, and they cite as evidence the Prophet's acceptance of the testimony of a Bedouin regarding sighting the crescent moon, just as they cite what Umar wrote to Abu Musa: "Muslims are just, some of them against others, except for one who has been flogged for a prescribed punishment, or one who has been tried for false testimony, or one who is suspected of being a traitor or a relative."⁴

The second opinion is the opinion of the majority, and it stipulates that the judge must ask about witnesses in all rights.⁵ They explained the necessity of asking about witnesses and not being satisfied with the appearance of justice by the Almighty's saying: {From among those witnesses whom you accept} [Surat Al-Baqarah: 281]; and it is not known that he is acceptable until we know him and ask about him and his conditions, just as justice is a condition, so it is necessary to know it like Islam, just as the ruler must be cautious in his ruling to protect it from being violated by asking secretly and publicly.⁶ Money is a right, just like the boundaries, so it is not sufficient to testify to it based on the appearance of justice, like the boundaries.⁷

2/ Witness attestation

Purification in the language: the source of the verb "zakka" is "yuzakkaytu" and it means "praising." It is said: A man purified himself if he described and praised himself.⁸ It is also said: He approved the witnesses if he deemed them just and informed the judge of their conditions.⁹

¹ See: Badr al-Din al-Ayni: *Al-Binaya Sharh al-Hidayah*, previous source, Vol. 9, p. 156.

² See: Afnan bint Muhammad Talmisani: *The Justice of Witnesses According to Jurists*, on 07/20/2020 AD, at 11:30 PM, on the "Al-Muslim" website, on the World Wide Web, from the following page: <http://almoslim.net/node/188164>

³ See: Al-Mawsili, *Al-Ikhtiyar li-Ta'lil Al-Mukhtar*, Al-Halabi Press, Cairo, 1356 AH/1937 AD, Vol. 2, p. 142.

⁴ Narrated by Al-Bayhaqi: *Al-Sunan Al-Kubra*, previous source, Book of Testimonies, Chapter on the one who said: His testimony is not accepted, No. (20572), Vol. 10, p. 262./ Authenticated by Al-Albani in *Al-Irwa'*, previous reference, Vol. 8, No. 2634, p. 258.

⁵ See: Abu al-Hasan al-Marghinani: *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, edited by: Talal al-Youssef, Dar Ihya al-Turath al-Arabi, Beirut, Lebanon, n.d., p. 154. /Ibn Abd al-Barr: *Al-Kafi fi Fiqh Ahl al-Madinah*, previous source, vol. 2, p. 901. /Al-Mawardi, *Al-Hawi*, previous source, vol. 17, p. 156. /Ibn Qudamah, *Al-Mughni*, vol. 10, previous source, pp. 417-418.

⁶ See: Al-Mawsili: *Al-Ikhtiyar li-Ta'lil Al-Mukhtar*, previous source, Vol. 2, p. 142.

⁷ See: Ibn al-Arabi: *Ahkam al-Quran*, previous source, vol. 1, p. 302.

⁸ See: Ibn Manzur: *Lisan al-Arab*, previous source, chapter on waw and ya, entry on zaka, vol. 14, p. 358.

⁹ See: Al-Zubaidi: *Taj Al-Arus*, edited by: a group of investigators, Dar Al-Hidayah, n.d., chapter on the letters waw and ya, entry on zaka, vol. 38, p. 220.

Technically, recommendation is “a legitimate right that the judge demands if he is ignorant of the evidence, as the validity of his ruling depends on it and the opponent remains silent about it ‘¹” ”. Recommendation involves the judge sending two testifiers to investigate the witnesses' circumstances to ensure they are fit to testify. The testifier is the one who attests to the witnesses' integrity before the judge. Several conditions are required of him, the most important of which are:

-The testifier must be just, righteous, and ascetic, whose words can be relied upon. He must also be experienced in the circumstances of those he associates with, so he can distinguish between what is just and what is not. He must not be greedy or poor, so as not to be deceived by money. He must also be a jurist who knows the reasons for disparagement and praise. The judge writes down the names and lineages of the witnesses and asks about them from their neighbors, the people of their market, and their neighborhood. If he does not find any trustworthy individuals, he can rely on the continuous transmission of news about them.²

-To have inner experience with people through companionship, dealings, and the like, and to be involved with them. This matter is not known except through mixing and involvement, so it is not permissible except for someone who has inner experience and long-standing knowledge.³

The one who recommends witnesses should be intelligent, not be deceived in his mind, not be misled in his opinion, knowledgeable about the fabrications of witnesses, the characteristics of just people and their opposites, and the conditions of people, relying in his recommendation of witnesses on the length of his association with them in the home and on travel, and referring to custom in its length and shortness.⁴

If the judge knows of the witness's condition, whether it is good or bad, he may act on his knowledge of the witness' condition by consensus.⁵ If the judge does not know the witness's condition, the jurists differed on three opinions. The first is that he is to be praised in the case of hadd and retaliation, but not in other cases. This is the opinion of Abu Hanifa and Ahmad in one narration.⁶ The second is that it must be purified absolutely, and this is the opinion of the majority. The third is that it must not be purified absolutely.⁷

The recommendation can be made in secret or in public. Secret recommendation is when the judge writes the names of the witnesses, their descriptions, and everything related to them on a piece of paper and sends it by the hand of the person he pierces secretly to the one who recommends him. The one who recommends him also responds to him.⁸ If the witness is immoral or has been defamed, the one who attests should not write anything down to avoid damaging his reputation, unless someone else attests to his good character and he fears that if he does not state this explicitly, the judge will rule in favor of the witness's testimony based on attestation from other sources, even though he knows of his impartiality. Therefore, he must state his defamation. Here, the benefit of attestation in secret becomes clear, because public questioning may lead to something that should not be done, since the person responsible may fear the witness or the one being testified for, so he attests to him if he is immoral, or he may fear the one being testified against, so he defames the witness even if he is impartial.⁹ The judge is satisfied with one witness in the secret attestation, because it is not testimony but rather information. This is the opinion of Abu Hanifa, Abu Yusuf, and Malik in one of his two

¹See: Al-Mardawi: Al-Insaf, previous source, Vol. 11, p. 289.

²See: Ibn Al-Hammam: Fath Al-Qadir, previous source, Vol. 7, p. 379.

³See: the same source./ Al-Mardawi: the previous source, p. 290.

⁴See: Muhammad Alish: Explanation of Manh al-Jalil on Mukhtasar Khalil, previous source, vol. 8, p. 407.

⁵See: Ibn Rushd al-Hafid: The Beginning of the Mujtahid, Dar al-Jeel, Beirut, Lebanon, 1st ed., 1409/1989 AD, vol. 2, p. 385.

⁶See: Al-Sarakhsi: Al-Mabsut, previous source, Vol. 16, p. 88.

⁷This is what Al-Hasan said, and it is a narration from Ahmad. See: Ibn Qudamah: Al-Mughni, previous source, vol. 10, p. 108.

⁸See: Ibn Al-Hammam: The previous source, Vol. 7, p. 379.

⁹See: Abdul Majeed Lakhdari: Witness Protection, previous reference, p. 291.

opinions. As for the Shafi'is, Hanbalis, and the other opinion of Malik, they said that two are necessary.¹

As for public attestation, it is that the judge brings together the one who attests and testifies, and the one who claims and is claimed against, and the attester singles out the intended witness, pointing to him with the attestation, so that no one else is mistaken.² And the recommendation was initially public, then Judge Shuraih introduced secret recommendation, so it was said to him, "You have introduced it, O Abu Umayyah," so he said, "You have introduced it, so we have introduced it." So he combined secret recommendation with public recommendation, so he would ask about the condition of the witnesses in secret, then the witnesses and those who recommended would attend to recommend them publicly, and they would say, "These are the ones we recommended," which is the most complete precaution. The judges worked with secret recommendation rather than public, in order to cover up the witnesses, and they were satisfied with secret recommendation to cover up for the people and to be cautious about backbiting that occurs between those who recommended and the witnesses if they distinguish the one who was wounded in the public recommendation. For this reason, secret recommendation is sufficient in our time.³ The Malikis recommended that the judge perform secret and public piety by combining the two, because public piety may be mixed with flattery. If the secret piety is limited, then it is acceptable, just like public piety.⁴ The judge will only accept two witnesses in this case, because it is a testimony according to the majority opinion.⁵

Second: Witness protection during sessions

Witness protection in Islamic law is based on a general principle that all Muslims must be protected, and a specific principle that is related to providing protection to witnesses, especially in the words of God Almighty: {And let not the scribe or the witness be harmed} [Surat Al-Baqarah: 281]. Jurists have stated that a witness is not obligated to give his testimony if he is harmed, in accordance with the generality of God Almighty's words: {And let not the scribe or the witness be harmed} [Surat Al-Baqarah: 281], and in accordance with the generality of the words of the Prophet, peace and blessings be upon him: "There should be neither harm nor reciprocating harm."⁶ Because preventing harm to oneself is more important than preventing harm to others. We also find some jurisprudential rules that order the protection of the witness and not causing him harm by burdening him with what he cannot bear. Islamic law stipulates that "there should be neither harm nor reciprocating harm," thus establishing the meaning of mercy and facilitation and not burdening a person with what he cannot bear. It is not possible to find in its rulings a command that contains harm, or a prohibition of something that achieves the greater interest. A person is not permitted to harm himself or others. We find that the law has prioritized the interest of the witness over the interest of the one for whom the testimony is given. It is not reasonable for a witness to harm himself in order to benefit others, because "preventing corruption is more important than bringing benefits," and "that without which an obligation cannot be fulfilled is itself an obligation." The duty of testimony is not fulfilled on the witness unless he feels safe regarding himself, his money, and his family from... The harm of performing it, and (the gain is with the loss), so the witness does not benefit from his testimony, but rather the one for whom the testimony is given benefits. The gain of testimony is for the one for whom the testimony is given, and its loss is upon the witness. Therefore, the witness is not obligated to testify if it causes him harm in exchange for the benefit for the one for whom the testimony is given. The courtroom is considered a place of seriousness and dignity, a place of

¹See: A group of authors: The Kuwaiti Encyclopedia of Jurisprudence, 2nd ed., 1408 AH/1988 AD, Dar That Al-Salasil, Kuwait, Vol. 11, p. 243.

²See: Ibn Nujaym al-Misri: Al-Bahr al-Ra'iq, Explanation of Kanz al-Daqa'iq, Dar al-Kitab al-Islami, Egypt, 2nd ed., n.d., vol. 5, p. 6.

³See: Al-Sarakhsi: Al-Mabsut, previous source, Vol. 16, p. 91.

⁴ See: Al-Dasuqi: Hashiyat Al-Dasuqi, previous source, Vol. 4, p. 170.

⁵See: The Kuwaiti Encyclopedia of Jurisprudence, previous reference, Vol. 11, p. 243.

⁶Narrated by Ibn Majah: Sunan Ibn Majah, Book of Rulings, Chapter: Whoever builds something on his property that harms his neighbor, No.: 2340. Authenticated by Al-Albani: Irwa' Al-Ghaleel, previous reference, Vol. 8, p. 272.

judgment and adjudication between people. There is no room in it for frivolity, arrogance, bad manners, and foul language from those present, whether they are opponents to the case, witnesses, or others. Based on this, if one of the two parties says something that is inappropriate and unbecoming of the courtroom, the judge will look at him askance as a form of discipline. He may also raise his voice at him. If the judge forbids one of the two parties from speaking and he does not comply, the judge may order his assistants to remove him as a form of discipline. If one of the two parties commits something that requires discretionary punishment, prescribed punishment, or retaliation against a witness or any other person, the judge shall impose on him the punishment that is appropriate to the act, except if the act committed against the judge personally, such as one of the two parties attacking the judge in the courtroom with words that reach the level of slander against him, and this is included in the crimes of slander. In this case, the judge must establish witnesses from those present to what he said, then he shall refer this case to another judge to rule on it. The judge does not have the right to rule on him himself because he is one of the parties. However, if the attack on the judge does not reach the level of slander, the judge may discipline him with whatever he sees fit, and he may pardon him.¹

In order for the testimony to be correct, effective, and free from all defects, the freedom and will of the witness must be protected while giving it. The witness may be exposed to many pressures and illegal methods that influence him and make him act with a defective or non-existent will, for fear of harm to his body, money, children, or honor. Islamic law has established the protection of the witness in general assault crimes as a Muslim individual. It has set limits for the crimes stipulated, such as murder, slander, and theft..., and discretionary punishment for crimes less than limits, such as insult and beating..., and it has prohibited the judge from oppressing and reprimanding witnesses, taking into consideration their psychological aspect.²

The second requirement: Exceptional guarantees for witnesses.

These are the guarantees that Sharia law provides to witnesses in the event of fear of harm from one of the parties to the lawsuit due to their testimony. This guarantee provides them with protection to encourage them not to retract their testimony. This includes restricting the defendant's movements or adopting certain procedures adopted by the judge if he suspects their testimony, to protect them from false testimony. This guarantee also allows witnesses to refrain from testifying out of fear for their safety if there are no guarantees to protect them if they testify. These guarantees are explained below:

Section One: Ignoring Witnesses in Islamic Jurisprudence

Here, we differentiate between not naming witnesses verbally in court proceedings and not naming them in writing in the minutes and records. This is explained as follows:

First: Declaring the names of witnesses verbally in court proceedings:

The majority of scholars hold that one of the rights guaranteed to the person against whom the testimony is given is to know his testimony and who testified against him, regardless of whether the person against whom the testimony is given is someone whose harm is feared or not. This enables him to discredit witnesses and investigate their circumstances, as discrediting witnesses is impossible without knowing them.³

An excuse to him, and he is not even named as a witness, and the judge must not neglect the right of the one testified against to inquire into the condition of the witnesses completely, but rather he is placed in the position of the one testified against in asking about them, and the purpose of the excuse

¹ See: Jaidan bin Mutab Al-Mutairi: Session Control and Violation in the Saudi Procedural System, Master's Thesis, Naif Arab University for Security Sciences, 1431 AH/2010 AD, p. 277.

² See page 86 of the research.

³ See: Al-Dasouqi: Hashiyat Al-Dasouqi, previous source, Vol. 4, p. 150. / Al-Shafi'i: Al-Umm, previous source, Vol. 7, p. 131. / Al-Sarakhsi: Al-Mabsut, previous source, Vol. 16, p. 88. / Al-Buhuti: Kashshaf Al-Qina', previous source, Vol. 6, p. 350.

to him is achieved by someone else while ensuring security for the witnesses ¹. This is similar to the judge's ruling based on his knowledge, as it is a way for people to accuse the judge and attack his reputation. Some Hanbalis agreed with this and said that it is forbidden to object to the judge for not naming the witnesses.²

Second: Recording the names of witnesses in writing in the minutes and records:

Jurists' opinions differed regarding this matter according to the different schools of jurisprudence:

The Hanafis indicate that the clerk records the names of the witnesses, leaving a gap afterward. When the case is brought before the judge, he writes the date himself and writes the opponent's response in the manner prescribed.³

The Malikis differentiate between a judgment issued against a present person and one issued against an absent person. As for a judgment against an absent person, they require the names of the witnesses to be clearly stated. They explained this by saying that naming witnesses postpones the argument for those who are absent, so he cannot disparage them without knowing their names. As for a judgment against a present person, they differed regarding recording their names, with two opinions. The first is that the names of the witnesses should not be recorded, because the judge may rule against them while they are just and then they are injured, or the judge may be dismissed or die, and the one against whom the judgment was made claims that the judge accepted unjust witnesses. The second is that the names of the witnesses should be recorded, and this is what has been practiced, so it is recommended for those who are present, but obligatory for those who are absent, in order to postpone the argument for them.⁴

As for the Shafi'is, they agreed on the permissibility of both matters, and they differed on the first between naming the witnesses whose testimony was ruled upon in the minutes and the record and leaving it out.⁵

As for the Hanbalis: they mentioned that what is recorded in the register are the names of the witnesses.⁶

In conclusion, one of the rights of the witness against whom testimony is given is to know who testified against him. This is the view of the majority, contrary to some Malikis.

Section Two: Witness Protection

Islamic jurisprudence attaches great importance to this aspect. It protects the witness from himself and protects him from falsehood and forgery in his testimony. It also protects the witness from harm that may be inflicted on him by others.

First: Protecting Witnesses from False Testimony

If a judge has doubts about witnesses and their testimony, the legislature allows him to take measures aimed at arriving at the truth and giving witnesses the opportunity to retract their testimony if it is false. This protects them from false testimony. Witnesses may retract their testimony when they are sworn in, separated, or admonished.

/1 Taking Witnesses to Oath

The majority of early Hanafi jurists held this view⁷. And some Malikis⁸ And the Shafi'is⁹ And the Hanbalis¹⁰ The judge is not permitted to make a witness swear, as Islamic law commands that

¹ See: Hashiyat al-Dasuqi: The previous source, Vol. 4, p. 149.

² See: Al-Mardawi: Al-Insaf, previous source, Vol. 11, p. 286.

³ See: Al-Kasani: Bada'i' Al-Sanai', previous source, vol. 7, p. 12.

⁴ See: Ibn Farhun: Tabsirat al-Hukkam, previous source, Vol. 1, pp. 97-98.

⁵ See: Al-Mawardi: Al-Hawi Al-Kabir, previous source, Vol. 16, p. 296.

⁶ See: Al-Buhuti: Kashf al-Qina', previous source, Vol. 6, p. 368.

⁷ See: Ibn Nujaym al-Misri: Al-Ashbah wa al-Naza'ir, Dar al-Kutub al-Ilmiyyah, Beirut, 1st ed., 1999 AD, p. 199.

⁸ Among those who supported this view are Mutraf and Ibn al-Majishun. See: Ibn Farhun: Tabsirat al-Hukkam, previous source, vol. 2, p. 216.

⁹ See: Zakaria Al-Ansari: Asna Al-Mataleb, previous source, Vol. 4, p. 392.

¹⁰ See: Burhan al-Din ibn Muflih: Al-Nukat wa al-Fawa'id al-Sunniyah ala Mushkil al-Muharrir, Maktabat al-Ma'arif, Riyadh, 2nd ed., 1404 AH, vol. 2, p. 281.

witnesses be honored, and swearing an oath may lead to insulting and harming them, as stated in the general statement of Allah the Almighty: {And let not scribe or witness be harmed.} [Surat Al-Baqarah: 281], and their evidence for this is as follows:

-That making a witness swear an oath is based on a dispute, and the witness is not an opponent to either party to the lawsuit.¹

God Almighty has commanded us to honor witnesses and not harm them. Honoring them does not include making them swear.²

The word of a just witness is sufficient and does not need to be strengthened with an oath, because we know his justice. An unjust witness is not supported by an oath, as he may not hesitate to swear falsely.³

It can also be argued that swearing a witness often leads to people of integrity turning away from bearing witness and giving testimony, which results in the loss of rights, because swearing before a judge is an act of extravagance. He also cannot be sure that he will not encounter fate and it will be said that he swore and was punished, or that this is the ill omen of his oath, so he is accused of lying and that he was punished for swearing falsely.⁴

2/ Preaching to witnesses

The judge has the right to admonish the witnesses so that they may fear disgrace in this world and torment in the Hereafter, whether they agree or not. If they appear before the judge and are known for their justice, their testimony is listened to, and there is no need to question them about their justice.⁵ If the judge has doubts about the witnesses, he should reveal the truth of what he has accused them of. If the truth of what he has imagined becomes clear to him, he should act on what has become clear to him in accordance with what is required by the Shari'ah. If nothing becomes clear to him, he should admonish them, frighten them with God, and remind them if he sees a place for that.⁶ If they persist in a matter, their names and nicknames are written, and their lineages are raised by what distinguishes them from others, and their adornments, descriptions, colors, and bodies are established so that names and lineages are not confused. So, it is written: bald, or dark-skinned, or white, or with a hooked nose, or with a flat face, or with thick or thin lips, or tall or short, or four-headed, or with a beard, or with thin or thick legs. And their trades, the location of their dwellings, their livelihoods, and their prayers are written, so that their neighbors, the people of their markets, and their mosques do not ask about them. The purpose of that is that they are distinguished, so that one name does not fall upon another, for a man may be known by his nickname without his first name, and by his name without his nickname. This is to facilitate looking into his condition and asking about him.⁷

It was narrated on the authority of Judge Shurayh that he would say to the two witnesses when they were present: "O you two, don't you see? I did not call you, and I will not prevent you from returning. Rather, you are the ones who are judging this, and I am fearing you, so fear God." In another version: "And I will judge by you today, and by you I will fear God on the Day of Resurrection."⁸ It was also narrated that two men testified before Ali ibn Abi Talib, may God be pleased with him, that a man had stolen from a man. The one who was testified against said, "By God, I did not steal. By God, I did steal. By God, he lied about me." Ali admonished them, and the two men gathered in the crowd. Ali said, "If the evidence had been truthful, the man would not have been cut off."⁹

¹ See: Al-Sarakhsi: Al-Mabsut, previous source, Vol. 16, p. 119.

² See: Al-Haddadi: Al-Jawhara Al-Nayra, previous source, Vol. 2, p. 217.

³ See: Ibn Farhun: Tafsirat al-Hukkam, previous source, Vol. 2, p. 216.

⁴ See: Ibn Qudamah: Al-Mughni, previous source, vol. 10, p. 209.

⁵ See: Abdul Wahid Al-Ruwayani: Bahr Al-Madhab, Dar Al-Kotob Al-Ilmiyyah, 1st ed., 2009, Vol. 11, p. 174.

⁶ See: Ibn Farhun: The previous source, Vol. 2, p. 219.

⁷ See: Abdul Wahid Al-Ruwayani: The previous source, Vol. 11, p. 174.

⁸ See: Ibn Qudamah: Al-Mughni, previous source, vol. 10, p. 63.

⁹ Al-Mawardi, Al-Hawi Al-Kabeer, previous source, Vol. 16, p. 184.

Abu Hanifa said: I was with Muharib Band Thar, the judge of Kufa, when a man came and claimed a right against another man, but he denied it. So the claimant brought two witnesses, and they testified to what he claimed. Then the one against whom the claim was made said: By Him by whom the heavens and the earth stand, you did not lie in denial, and you lied about me in testimony. If you asked about them, two people would not differ about them. Muharib bin Thar was reclining, so he sat up straight and said: I heard Ibn `Umar say: I heard the Messenger of Allah, may Allah bless him and grant him peace, say: "The birds beat their wings and throw away what is in their crops from it on the Day of Resurrection, and the false witness will not move his feet until he takes his seat in the Fire." So if you tell the truth, then remain steadfast, and if you lie, then cover your heads and depart. So they covered their heads and departed.¹

The ruler must be cautious in the case of someone whose condition is unknown, testing him as much as possible through testing and preaching. If he recants after preaching, he should cover up for him and not expose him, unless he is certain that he gave false testimony in revealing his condition, so that the rulers may be cautious about him. But if he persists in his testimony after preaching, his name should be recorded in order to investigate justice.²

3/ Separation of witnesses

The origin of people is innocence, so there is no distinction between just witnesses in terms of punishment or anything else.³ Because separating witnesses gives priority to the side of accusation and doubt about them over the side of truthfulness and innocence, and accordingly the principle is that witnesses should not be separated when they give testimony, and some of them made an exception for witnesses to adultery, as they are separated.⁴ It was also said that the judge has the right to separate the witnesses except in the testimony of women. Imam Al-Shafi'i narrated that a female slave testified with a woman before a judge, and he wanted to separate them, but she said to him: Do not separate us, for God Almighty says: {If one of them errs, the other may remind her.} [Surat Al-Baqarah: 281]; and with this verse those who forbid the judge from separating the witnesses cite as evidence..⁵

If the judge has doubts about their testimony, he may prove the validity of that by separating them. The judge should not separate the witnesses except to raise an accusation, and he should do so gently, gently revealing everything he wants until he proves their innocence of the accusation, or until doubt is proven against them, in which case he invalidates their testimony.⁶ The permission of some judges to swear witnesses and separate them so that each of them gives his testimony separately, is based on the fact that it is one of the interests that the Shari'ah has ordered the mujtahid to take into account. Separating the witnesses is one of the greatest things that can be used to differentiate between the truth of testimony and its falsehood, especially if the judge asks them about some of the conditions in which their collusion is permissible. The first person to separate the witnesses was Imam Ali ibn Abi Talib, may God be pleased with him. He separated two women who testified against an orphan girl that she had committed adultery. By separating them, it became clear that their testimony was false. Ali said: God is Great! I am the first to separate the two witnesses.⁷

¹ Ibn Qudamah: Al-Kafi in the Jurisprudence of Imam Ahmad, Book of Judgments, Dar Al-Kutub Al-Ilmiyyah, Beirut, 1st ed., 1414 AH/1994 AD, Vol. 4, p. 232. It was authenticated by Al-Hakim in Al-Mustadrak, previous source, Book of Rulings, Vol. 4, p. 109.

² See: Al-Mawardi: The previous source, Vol. 16, p. 184.

³ See: Abdullah bin Abdul Rahman Abu Zaid Al-Qayrawani: The Book of Rarities and Additions to What is in Al-Mudawwana from Other Sources, edited by: Muhammad Al-Amin Bukhabza, Dar Al-Gharb Al-Islami, Beirut, Lebanon, 1st ed., 1999 AD, vol. 8, p. 356.

⁴ See: Ibn Farhun: Tafsirat al-Hukkam, previous source, Vol. 2, p. 219.

⁵ See: Muhammad Al-Khidr Hussein: Encyclopedia of Complete Works, Dar Al-Nawadir, Syria, 1st ed., 2010 AD, vol. 2, p. 36.

⁶ See: Ibn Farhun: The previous source, Vol. 2, p. 219.

⁷ See: Ibn Qayyim al-Jawziyya: The Wisdom Methods in Islamic Politics, previous source, p. 55.

Imam Al-Shafi'i said about this: "I like that if they do not have the capacity for reason, they should be separated and then each one of them should be asked separately about his testimony, the day on which he testified, the place and in which he testified, so that there is no evidence of a defect in his testimony, if there is one. Even if they are of good character and reason, this is not permissible for them." Therefore, separating witnesses when giving testimony should not be done except when necessary, fear of the witnesses colluding to lie.

Second: Preventive protection of witnesses

Preventive protection for witnesses consists of the precautionary detention of the accused and the suppression of testimony in certain cases that may cause them harm. Therefore, this protection must be addressed in the following elements:

/1 Precautionary detention of the accused

Linguistically, detention means prevention and restraint, and it is the opposite of release, by preventing, detaining, and imprisoning someone. Confinement is the place where someone is confined, and it can also mean absolute prohibition.¹

Technically, according to the Hanafi school, imprisonment is "preventing the incarcerated person from going out to his work and duties, such as Friday prayers, holidays, funerals, visiting the sick, and hospitality."² "According to the Maliki school, it is "the imprisonment of a person until he pays what he owes, or dies in prison, or it becomes clear to the Imam that he has nothing with him, so he releases him." Imprisonment may be due to the prisoner being tied to a tree, and it is not necessary to place him in a special building for that.³

Sheikh Al-Islam Ibn Taymiyyah defined it as "Hindering a person and preventing him from acting on his own, whether in a house or in a mosque, or by appointing the opponent, or accompanying and monitoring the accused, and preventing him from going out to his work and religious and social duties."⁴

Definitions agree that imprisonment is the deprivation of the accused's freedom and the prevention of his or her actions for a specific period of time, subject to extension and renewal until the accused serves his or her dues. Imprisonment and detention have the same meaning in the texts of the Qur'an and Sunnah, as both imply a restriction of personal freedom.

Jurists have divided imprisonment into two types: imprisonment for punishment, which is discretionary, and imprisonment for security purposes, which is based on an accusation, the postponement of the execution of a sentence, or precautionary measures, which is the focus of our study.

A- Definition of Precautionary Detention:

Linguistically, precautionary detention comes from the root word "harza" (to seize). Harz (preservation) is a secure place. To guard against it means to avoid it and to guard against it.⁵

Precautionary detention, technically, is the detention for the public interest of someone whose release is expected to cause harm and does not necessitate the existence of an accusation, such as protecting witnesses from pressure and influence by the accused. The period of precautionary detention ends when its cause is removed, and when it is assured that no harm will occur from the release of the detainee or prisoner.⁶

B- The Legitimacy of Pretrial Detention: The basic principle of Islamic law is that a person may not be imprisoned merely on the basis of an accusation. However, jurists have approved and permitted pretrial detention in appropriate circumstances, taking into account the public interest and the harm

¹See: Ibn Manzur: Lisan al-Arab, previous source, vol. 6, (Chapter: Imprisonment), p. 44

²See: Al-Kasani: Bada'i' Al-Sanai', previous source, Vol. 7, p. 17.

³See: Ibn Farhun: Tabasiruhu al-Hukkam, previous source, Vol. 1, p. 373.

⁴ See: Ibn Qayyim al-Jawziyya: The Wisdom Methods in Islamic Politics, previous source, p. 89.

⁵See: Ibn Manzur: Lisan al-Arab, previous source, (Chapter on the silent Ha), Vol. 5, p. 333.

⁶See: Hassan Abu Ghuddah: Prison Provisions and Treatment of Prisoners in Islam, Al-Manar Islamic Library, 1st ed., 1978 AD, p. 110.

that leaving the accused at large can cause to individuals and society. However, this is subject to conditions that reduce the possibility of aggression and injustice against the accused and enable the offender to be punished if his crime is proven. The majority of scholars hold that pretrial detention is permissible for the accused, and they permit the imam to detain him for the purposes of discipline, reform, and the fulfillment of rights, as well as to detain the accused until he is acquitted, or until the prescribed punishment or retaliation is proven against him until the full penalty is meted out, or to prevent harm. They have provided evidence for its permissibility, including:

From the Holy Quran: The Almighty said: {O you who have believed, let there be as witnesses between you, when death approaches one of you at the time of making the will, two just men from among you, or two others from outside you. If you travel throughout the land and a disaster of death befalls you, you should detain them after the prayer.} [Surat Al-Ma'idah: 108], and The verse indicates that the two witnesses should be detained at that time to be sworn in. This is a text that permits imprisonment. This verse is the basis for the imprisonment of someone who is owed a right, meaning short-term imprisonment.

-From the Sunnah: "It was narrated that the Prophet (peace and blessings be upon him) imprisoned a man on suspicion, then released him".

-Abu Hurairah narrated: "The Prophet (peace and blessings be upon him) sent cavalry towards Najd, and they came upon a man from Banu Hanifa, whose name was Thamamah ibn Aththal, and they tied him to one of the pillars of the mosque. The Prophet (peace and blessings be upon him) came out to him and said, 'What do you have with Thamamah?' He said, 'I have something better, O Muhammad...'" It also states that the Prophet (peace and blessings be upon him) left him tied up for more than two days, then ordered his release.¹

-From the hadith: It was narrated that Ali, may God be pleased with him, used to imprison someone for debt, just as Judge Shuraih, when he ruled against a man, would order him to be imprisoned in the mosque until he fulfilled what he owed, otherwise he would order him to be imprisoned..²

C- Conditions for Pretrial Detention:

Jurists have set conditions for pretrial detention that restrict the resort to it, protecting the accused from arbitrariness and transgression. It may only be resorted to under certain conditions, including:

-That the accused be of a background in the act of which he is accused. If he is known for his righteousness and integrity, the judge is not justified in detaining him merely on the basis of the accusation.

-That the plaintiff present evidence of his claim against the accused. If he does not present such evidence, the accused is not detained, by consensus.

-That the detention order be issued by someone with such jurisdiction. Jurists have differed over who has the right to order detention. The majority hold that the right to detention lies with the ruler or the judge, while the Shafi'i school holds that pretrial detention is the prerogative of the prince or the governor of criminal matters, not the judge or the governor.³

-Detention is intended to simply confine the accused in a specific place until the judge determines his fate. It is not permissible to go beyond that with torture, harassment, or other forms of abuse.

-There is sufficient evidence that the person committed the crime or contributed to it, including the case of being caught in the act. Even if the accused is unknown or known for immorality such as theft, highway robbery, murder, etc., in this case, some jurists have permitted his precautionary detention.

¹Narrated by Al-Bukhari: Sahih Al-Bukhari, previous source, Book of Military Expeditions, Chapter on the Battle of Banu Hanifa, No. 4372, Vol. 5, p. 170.

²See: Badr al-Din al-Aini: Umdat al-Qari' Sharh Sahih al-Bukhari, Dar Ihya' al-Turath al-Arabi, Beirut, Vol. 4, p. 236.

³ See: Ali bin Muhammad al-Mawardi: The Sultan's Rulings, edited by: Ahmad Jad, Dar al-Hadith, Cairo, no date printed, 2006 AD, p. 322.

-The period of detention should not exceed what is necessary, and should not be prolonged to the point of causing harm to the accused or causing him or his family to miss out on significant benefits. Jurists differed in determining the period. Some of them made it not more than one month, and some of them referred it to the imam's ijtihad. The Hanafis determined it at three months, and the Malikis determined it at one month, and they permitted an increase beyond that according to the seriousness of the crime and the strength of the accusation.¹

- The rights of the pretrial detainee should not be lost. Although detention entails the deprivation of many rights, such as freedom of movement, this does not deprive the detainee of rights that do not conflict with the purpose of their detention, which is to preserve evidence and ensure that the criminal does not escape justice.

Thus, we conclude that Islamic jurisprudence only permits pretrial detention, despite the necessity of such detention during the investigation of a crime, including the protection of witnesses and the fear of influencing them. Therefore, it is not permissible to proceed with it except under conditions and controls that enable the administration of justice. However, these conditions remain insufficient to ensure full protection of witnesses².

/2Concealing testimony

Concealment in the language: comes from the verb katam (to conceal), and to conceal something means to cover it up and hide it. God Almighty says: {And who is more unjust than he who conceals a testimony he has from God?} [Surat Al-Baqarah: 139]. Concealment means concealment, which is the opposite of announcing. A concealed camel is one that does not moo when ridden.³

Concealment indicates concealment, concealment, and withholding of information. If it is attributed to testimony, it indicates concealment, concealment, and failure to carry it out. In light of this, the meaning of concealing testimony is determined as "withholding from informing a judge of knowledge, such that this prevents the judge from ruling in accordance with it."⁴

Concealing testimony means that the witness conceals it in his heart and does not utter it, as the witness intends in his heart to refrain from giving testimony verbally. Therefore, concealment is attributed to the heart, because it is the origin of the concealment process. God Almighty says: {And whoever conceals it - indeed, his heart is sinful.} [Surat Al-Baqarah: 282]. Concealing testimony can be either by hiding it and the witness intending in his heart to refrain from giving it verbally, or by the witness refusing to give testimony despite the person with the right requesting it and inviting him to give it. This may be in the rights of God Almighty or the rights of humans.⁵

Islamic law has made it obligatory to give testimony to demonstrate rights and protect blood and property. It is an obligation that binds the witness. If there is no one else and the plaintiff requests him to prove it, then he cannot conceal it.⁶ And because God Almighty said: {And do not conceal the testimony of anyone you call upon, for indeed, his heart is sinful. And God is Knowing of what you do.} [Surat Al-Baqarah: 282], so the prohibition is regarding abstention in the first verse, and concealment in the second. The Shari'ah has set conditions for the obligation to perform it and has permitted concealing it and abstaining from performing it if it will cause harm to the witness. If the witness realizes that the dispute for which he was called to testify has been referred to an unjust judge,

¹See: Ibn Farhun: The previous source, Vol. 2, p. 322.

²See: Al-Kasani: The previous source, Vol. 7, p. 174.

³See: Ibn Manzur: Lisan al-Arab, previous source, (Chapter on the letter Kaf), Vol. 5, Vol. 12, p. 507.

⁴ Nimer Muhammad Nimer: The legal justifications for concealing testimony, Faculty of Sharia, Al al-Bayt University, published in the "Jordanian Journal of Islamic Studies", Volume Three, Issue (2), 1428 AH/2007 AD, p. 2.

⁵ Ibn Qudamah al-Maqdisi said: "Whoever has a testimony from a human being and knows about it, he should not testify until the person who gave it asks him. If he does not know about it, it is recommended to inform him of it." See: Ibn Qudamah: The previous source, Vol. 4, p. 520.

⁶See: Al-Hattāb al-Ru'aynī: Mawaahib al-Jalīl fi Sharh Mukhtaṣar Khalīl, Dar al-Fikr, Beirut, 3rd ed., 1412 AH/1992 AD, vol. 6, p. 165. / Al-Shirāzī: al-Muhazzab, previous source, vol. 3, p. 435. / Ibn Qudāmah: al-Sharh al-Kabī' ala Matn al-Muqni', Dar al-Kitab al-Arabi, Beirut, n.d., n.d., vol. 12, pp. 4-6. / Al-Buhuti: Sharh Muntaha al-Iradāt, Alam al-Kutub, Egypt, 1st ed., 1414 AH/1993 AD, vol. 3, pp. 575, 576..

then it is permissible for him to conceal his testimony until... It is submitted to a just judge, and likewise if he fears for himself from an unjust ruler or someone else, or does not remember to testify properly, then he may refrain ¹. We mention the cases in which it is permissible to refuse to testify to protect witnesses as follows:

A- Withholding testimony if the witness is harmed

A witness is not required to testify if it causes him unusual harm. The one who refuses to testify is sinful if he is not harmed and his testimony is beneficial. If it causes him harm in bearing and performing it, he is not required to testify ². Because God Almighty said: {And neither the scribe nor the witness shall be harmed.} [Surat Al-Baqarah: 281], and the Prophet, peace and blessings be upon him, said: "There shall be neither harm nor reciprocating harm ³". Harm is removed in Sharia, and one of the established rules is that harm must be removed. The jurists have stated that testimony is considered an obligation upon him if he is called upon and able to do so without harm befalling him in his body, honor, money, or family ⁴. It is permissible for a witness to refrain from testifying if he is harmed, because if the testimony benefits others and conflicts with personal harm, then the right of the person takes precedence over the right of others. Or if the harm is equal to or greater than the benefit resulting from the testimony, it is permissible to conceal it, because preventing harm takes precedence over attaining benefits. B- Concealing testimony if it leads to injustice

Injustice is forbidden in our tolerant Sharia, and therefore a witness is not permitted to cause injustice to another. If the witness knows that the slanderer is telling the truth, or that the dispute in which he is called to testify has been referred to an unjust judge, then he is permitted to conceal his testimony until it is referred to a just judge who can testify to uphold the truth. This is due to the statement of Allah, the Most High: {O you who have believed, be persistently standing firm for Allah, witnesses in justice.} [Surat Al-Ma'idah: 9], so Allah, the Most High, has forbidden acting unjustly, and an unjust judge does not rule with justice and fairness. And His statement: {And cooperate in righteousness and piety, but do not cooperate in sin and aggression.} [Surat Al-Ma'idah: 3], and there is no greater sin and aggression than for someone to know that the slanderer did not lie and then demand of him what people of liars demand of him ⁵.

C- Concealing testimony if the judge does not accept it

If the judge rejects a witness's testimony due to a grievance against him or animosity between him and the person against whom the testimony is given, he is not required to testify, because testimony in this case does not achieve the legal objectives of establishing the truth and resolving a dispute. If the testimony is rejected by the judge, its existence or nonexistence is the same, and rejecting his testimony, rather than accepting it, would be detrimental to him ⁶. Because he leaves his interests and his family and goes to perform them without them being accepted from him, there is no benefit in facing the harm that befell him, in addition to the fact that rejecting the testimony is a wound to him, and that is a harm to him ⁷.

¹ See: Al-Haddad Al-Zubaidi: Al-Jawhara Al-Nayra, previous source, Vol. 2, p. 520. / Ibn Abidin: Ibn Abidin's Commentary, previous source, Vol. 11, p. 83.

² See: Ibn Qudamah: Al-Mughni, previous source, vol. 10, p. 129.

³ Narrated by Ibn Majah: Sunan Ibn Majah, Book of Rulings, Chapter: Whoever builds something on his property that harms his neighbor, No.: 2340. Authenticated by Al-Albani: Irwa' Al-Ghaleel, previous reference, Vol. 8, p. 272.

⁴ See: Ibn Muflih: Al-Mubdi' fi Sharh Al-Muqni', Dar Al-Kutub Al-Ilmiyyah, Beirut, Lebanon, 1st ed., 1418 AH/1997 AD, Vol. 1, p. 189. Al-Buhuti: Al-Rawd Al-Murabba', previous source, Vol. 3, p. 415. / Ibn Qudamah: Previous source, Vol. 10, p. 129. / Al-Buhuti, Kashshaf Al-Qina', previous source, Vol. 6, p. 405. / Sayyid Sabiq: Fiqh Al-Sunnah, Dar Al-Kutub Al-Arabi, Beirut, Lebanon, 3rd ed., 1397 AH/1977 AD, Vol. 3, p. 428.

⁵ See: Ibn Hazm: Al-Muhalla, previous source, vol. 11, p. 299.

⁶ See: The Encyclopedia of Jurisprudence: The previous reference, Vol. 26, p. 217. / Muhammad al-Tahir ibn Ashur: Al-Tahrir wa al-Tanwir, Tunisian House of Publishing, 1984 AD, Vol. 3, p. 117.

⁷ See: Ibn Al-Humam: Sharh Fath Al-Qadir, previous source, Vol. 7, p. 366. / Ibn Farhun: Tabsirat Al-Hukkam, previous source, Vol. 1, p. 166. / Al-Bahuti: Al-Rawd Al-Murabba', previous source, Vol. 3, p. 415.

Conclusion

From the above study, we find that Islamic law is keen to treat witnesses well. Jurists have mentioned matters to be taken into consideration when hearing witnesses. The witness should not be abused, reprimanded, or interfered with while being heard. He should not be prompted to give his testimony, and he should not be burdened. It is considered harmful for a witness to travel long distances to reach the place where he is to testify, due to the difficulty the witness faces. Through this study, the researcher reached a number of conclusions, as follows:

-/1The judge must investigate the fairness of the witness by asking for approval or recommendation. If the judge knows of the witness's condition, whether it be good or bad, he will act on his knowledge of the witness's condition by consensus. If the judge does not know the witness's condition, the person against whom the testimony is being heard must either criticize the witness, approve of him, or neither criticize him nor approve him. In this case, the witness must be questioned for approval. Approval must be based on The judge dispatches witnesses to investigate the witnesses' circumstances and determine whether they are fit to testify.

-/2Some later Maliki scholars held that if there is a fear of harm to witnesses who testify against him, their names should not be mentioned verbally in court. The judge, in questioning them, should treat them as witnesses testified against. If the judge has doubts about the witnesses' statements, he may separate them, have them swear in oaths, and admonish them, thus protecting them from false accusations.

-/3The majority of scholars held that precautionary detention of the accused is permissible for the purposes of disciplinary action, reform, and the fulfillment of rights, and for the preservation of the accused until he is acquitted or a prescribed punishment or retaliation is proven against him until the full penalty is meted out, or to prevent harm.

-/4Sharia law permits concealing testimony and refraining from giving it if it would harm the witness, or if the testimony is presented to an unjust judge until it is presented to a just judge. The same applies if the witness fears for his life from an unjust ruler or other authority, or if the witness does not remember the testimony as it should have been.

-/5The judge should avoid resorting to threats and intimidation, or belittling and mocking the witness. He must also treat all witnesses equally and avoid discrimination.

-/6Sharia law is distinguished by a special procedure, which involves investigating the fairness of a witness by asking for approval and recommendation. Recommendation involves the judge dispatching testimonial experts to investigate the witnesses' circumstances and determine their suitability for testimony. Similarly, if the judge has doubts about the testimony of witnesses, he may separate them, swear them in, and admonish them. This is to protect them from committing falsehood. These are exceptional procedures used by the judge when there is suspicion and doubt about witnesses. 7/ The public has held that pretrial detention of the accused is permissible for disciplinary purposes, to fulfill rights, and to detain the accused until he is acquitted, or until a prescribed punishment or retaliation is proven against him, or until harm is prevented.

Conversely, the most important proposals and recommendations made through this study are as follows:

/1The necessity of implementing the procedures stipulated in Islamic law to embody witness protection on the ground, and to expedite the enactment of regulatory texts that precisely define how witness protection measures are implemented.

/2It is suggested that all legal texts related to witness protection should be compiled into a single law, and that there should be a special register for witnesses covered by protection.

/3Expanding the scope of protection for threatened witnesses, so that it is proposed that the legislator decide to protect witnesses in all crimes in which witness protection requirements are available, as well as expanding the scope of protection to include witnesses in civil lawsuits.