

## Ethical challenges of expert witness on sexual violence in Islamic perspective

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### Abstract

Cases of sexual violence are often difficult to prove. Modern litigation often involves experts. Qualifications of the expert is usually determined by the judge, not regulated by law, required knowledge, skill, experience, training, competence and authority is determined by the judge. Lawyers often require someone with technical expertise to explain the material or background of this case. However, the use of experts also raises a number of ethical issues, and interesting to note that the court did not consider the ethical rules of the expert witness. Qualifications and attitudes required an honesty, objective, thorough, scientific, impartial, neat, polite, prepared, assertive and confident expert, but there needs to be other considerations such as ethics and religion, especially in cases with weak/lack evidence. There are so many verses in the Al-Quran forbid us to do a deal in falsehood. "Help you one another in Al-Birr and At-Taqwa (virtue, righteousness and piety); but do not help one another in sin and transgression. And fear Allah. Verily, Allah is Severe in punishment." (Al-Quran Al-Ma'idah [5]: 2). In the story of losing armor of Sayidina Ali in the Battle of Shiffin, which was taken by the Jews, where the incident occurred without witnesses made a judge decided to free the Jewish people, although Sayidina Ali filed expert witness of his own son who later denied this judge indicates that the perpetrator crime cannot be punished if without sufficient evidence and witnesses, consideration of some proposition in Al-Quran and Al-hadith in Islamic perspective allows us to reject an expert witness in order not to give false facilities to the perpetrators of the post-decision later.

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### Introduction

#### Background

Sexual abuse of children is sadly common (1). The true prevalence of sexual abuse is unknown because the crime is shrouded in secrecy. Research suggests that approximately twenty percent of girls

experience some form of sexual abuse during childhood (2) Boys appear to be sexually abused at a lower rate of five to fifteen percent (2). Abusive experiences range in severity from brutal rapes to relatively minor events like witnessing a single episode of indecent exposure at a park.

Not all victims of sexual abuse suffer psychological damage from the experience. Most victims go on to lead productive, happy lives. Yet, there is no gainsaying that every year thousands of children are damaged by sexual abuse (2).

Because sexual abuse occurs in secret and because most of the time the only witnesses are the child and the perpetrator, sexual abuse is often difficult to prove. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. In a similar vein, the California Supreme Court remarked, "There are particular difficulties with proving child sexual abuse: the frequent lack of physical evidence, the limited verbal and cognitive abilities of child victims, the fact that children are often unable or unwilling to act as witnesses because of the intimidation of the court room setting and the reluctance to testify against their parents(1)". Every effort must be made to improve the legal system's ability to protect children and punish offenders. At the same time, great care must be taken to safeguard the innocent against false accusation (1).

Most forms of sexual abuse do not cause physical injury. If injury occurs, it is typically minor and heals rapidly. Paediatrician Martin Finkel explains: Physical findings that reflect acute or chronic residua to sexual contact are infrequent. For the most part, this is the result of 2 dynamics:

- (a) The individual engaging the child does not intend to hurt the child physically, and
- (b) Most of the children do not disclose immediately following their last contact for fear of harm. The lack of physical evidence alone should not lead to the conclusion that inappropriate sexual contact did not occur; if the child incurred an injury that was superficial, and the time interval since the last contact is more than 72 hours, it is unlikely that any residual will be identified. Healed diagnostic genital and anal findings that can stand alone to confirm sexual contact are present in approximately 5% of cases (3).

The investigation typically includes an examination despite the fact that medical examination seldom finds evidence of sexual abuse. When medical evidence is discovered, courts agree that expert testimony describing the evidence is admissible. Even if the medical examination finds nothing, the

examination is an opportunity to provide psychological support for the child and reassure both the child and the parents that the child is physically unharmed (1). The presence of spermatozoa on a child is powerful evidence of sexual contact (4). Motile sperm are capable of movement. The duration of motility depends in part on where sperm lands. This motility decreases quickly following ejaculation. Inside the vagina or rectum, sperm can remain motile for a number of hours. Non motile sperm is detectable for long periods. Indeed, non-motile sperm can be isolated on cloth for months (5). Seminal fluids that do not contain sperm nevertheless provide evidence of sexual contact. Acid phosphatase, for example, is produced by the prostate gland and indicates ejaculation (4). Acid phosphatase is detectable on cloth for many months. Men who have had a vasectomy still produce normal level of this enzyme. DNA is a reliable method of placing an individual at a crime scene. DNA can be isolated from sperm, saliva, blood, skin, and hair root (4).

Sexually transmitted infections (STI) are documented in 1% to 5% of pre-pubertal victims of sexual abuse. In sexually active adolescents, it can be difficult to determine whether an STI is the result of abuse (6). The fact that the suspected perpetrator does not have an STI does not rule out the suspect because he may have had medical attention (7).

The presence of certain sexually transmitted infections in pre-pubertal children provides strong evidence of sexual abuse. The following STIs are persuasive evidence of sexual contact if transmission from mother to baby at birth (perinatal transmission) is ruled out: gonorrhoea, syphilis, human immunodeficiency virus, and Chlamydia trachomatis (8).

Transmission of gonorrhoea requires bodily contact with infected material. Gonorrhoea can be found in the genitals, rectum, and mouth of sexually abused girls and boys. Similarly, chlamydia trachomatis is transmitted by contact with infected tissue and is found in the vagina, rectum, and mouth of a child who contracted the infection from the abuser. The following STIs raise suspicion of sexual abuse, but are not diagnostic: Trichomonas vaginalis, Condylomata acuminata (warts), and genital herpes simplex(7).

As previously mentioned, sexual touching often causes no injury. When injury does occur, it is often superficial and heals quickly leaving no residua detectable on physical examination(3). Rubbing a penis or finger back and forth across a child's genitals can cause irritation and redness (erythema), but the irritation soon disappears. Following digital-genital or genital-genital contact, some children report painful urination (dysuria). This symptom can corroborate a child's disclosure. The odds of finding injury increase when a child is examined within seventy-two hours after abuse. In most instances, the examination takes place long after abuse and the result is a "normal" physical examination (8). The hymen does not completely cover the vagina. In actuality, the hymen contains an orifice. The shape of the hymen varies among children (3). It was once thought that the size of the hymenal orifice could provide evidence of penetration, but it is now understood that the size of the opening varies from child to child (8). In the same child the size of the orifice can change as the child changes position. Although the hymen does not completely cover the vagina, orifice is not by itself diagnostic, the presence of acute or chronic trauma to the hymen and other genital structures can provide evidence of sexual abuse. It is a misconception that all females bleed when they first have sexual intercourse (3). When medical professionals describe injury to the hymen, they locate the injury by reference to the hands of a clock. With the child lying on her back (supine position), and viewing the hymen from the child's feet, 12 o'clock is at the top; 6 at the bottom (posterior). Thus, an injury at the 2 o'clock position is near the top of the hymen, slightly to the right (child's left).

Penetration of a child's vagina by a finger, penis, or object may cause serious injury or no damage at all. The type of injury caused depends on the amount of force, use of lubricant, the child's age, and the size of the penetrating object (3). If the child is pre-pubertal, penile penetration is likely to injure tissue and, in some cases, damage the hymen and/or leave scar tissue. Some sexually abused girls have a transection (tear) through the entire width of the hymen. A complete transection between 4 and 8 o'clock in a pre-pubertal child is fairly strong evidence of penetration. Some pre-pubertal children have a notch that does not extend the entire width of the hymen. A deep notch is probative, albeit not diagnostic, of penetration (8).

Fellatio typically causes no injury. If force is used, however, there may be tiny red dots called petechiae on the roof and back of the child's mouth (3). This injury results when capillaries are ruptured (8). Penetration of the anus may or may not cause injury. The anal sphincter is elastic and is designed to open wide enough to pass stool that is as large as the average penis. A finger or a penis can penetrate the anus without causing injury, particularly when lubrication is used. Rubbing a finger or penis between the buttocks cheeks may cause temporary erythema, but erythema alone is not probative of sexual abuse.

When a child has acute lacerating or impaling injury to the genitals or rectum, accident must be ruled out. In girls, accidental straddle injury can occur when the child falls onto an object like the horizontal bar of a bicycle or playground equipment. Accidental injury is unlikely to affect the hymen, though, which is recessed inside the child's body. Similarly, an accident is unlikely to lacerate the rectum, which is protected by the buttocks (3).

Penetration is an element of the crime of rape as well as certain other sex offenses. Ejaculation is not required. Any penetration of the female genitals—including the genital lips (labia majora and labia minora)—constitutes penetration. Similarly, any anal or oral penetration is sufficient. Penetration may be established with expert testimony. On rare occasions, an eyewitness observes penetration. Finally, penetration can be established by testimony from the victim. Not surprisingly, young children have a limited understanding of penetration. When a young child says, "He put it in me," does this mean he put "it" inside the vagina, between the genital lips, or in the vicinity of the genitals? Penetration has occurred if the child is describing the vagina or between the genital lips. However, the young child may not be aware of this occurrence. When a child's description of "in me", is accompanied by testimony that "ithurt", the inference of penetration is strengthened. Similarly, if "in me" testimony is corroborated by injury or irritation of the child's genitals, confidence in the child's description grows. In some instances, perpetrators admit penetration (3).

Medical evidence can provide convincing proof of child sexual abuse and courts are comfortable with expert testimony describing medical evidence.

However, more often than not, sexual abuse leaves no physical residua. When there is no medical evidence, courts sometimes allow expert testimony to help the jury understand that absence of physical findings is consistent with sexual abuse. Such testimony is appropriate when the defence argues that absence of medical evidence points away from abuse (1).

Child sexual abuse is difficult to prove. Usually there is no medical evidence, although when such evidence does exist it is admissible. These cases rise and fall on the child's shoulders. In an effort to bolster or undermine the child, prosecution and defence sometimes turn to expert testimony. Some forms of expert testimony are straightforward and uncontroversial, other forms are complex, controversial, and of dubious reliability(1).

#### **Discussion**

Modern litigation often involves experts. In today's complex world, a lawyer frequently needs someone with technical expertise to explain the subject matter or background of the case. The litigator may also need someone to provide a similar explanation to the fact-finder at trial or other hearing, or to demonstrate to the litigator's adversary that the litigator has a sound case deserving serious consideration during settlement talks. Thus consulting (non-testifying) and testifying experts frequently support litigators and the clients whose interests litigators seek to promote(9). However, the use of experts also raises a host of ethical issues. In this article, I focus on of these ethical issues in payment for expert witnesses and conflict of interest in experts within itself to decide to defend their clients.

The definition of what is an expert witness, Federal Rule of Evidence 702 states, in America establishes the framework for expert testimony (10).

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- 1 the testimony is based upon sufficient facts or data,
- 2 the testimony is the product of reliable principles and methods, and

- 3 the witness has applied the principles and methods reliably to the facts of the case.

Unlike non expert witnesses, who may testify about their opinions and information outside their personal knowledge only in rare circumstances, an expert witness may testify about subjects within their specialized knowledge "in the form of an opinion or otherwise." FRE Rule 702. The Notes to FRE Rule 702 explain how an expert might testify as follows:

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts (10).

Before retaining an expert, lawyers need to research an expert's background, the expert's former clients, and the expert's relationship with the opposing party to avoid conflict of interest problems. Expert testimony often proves essential to a successful claim or defence in complex litigation (10).

The integrity of criminal litigation depends on the bar and the bench. For attorneys locked in pitched battle it is tempting to offer any expert testimony—even dubious testimony—that helps to win the case. This is not a criticism of lawyers; it is reality. Of course, one can argue that the check on unreliable expert testimony is cross-examination, and many prosecutors and defenders are fully capable of dismantling. Sometimes, however, unreliable expert testimony slips past trial court judges and is not caught on appeal. However, is that many attorneys have only a superficial understanding of the complexity of expert testimony regarding child sexual abuse (1).

Law of evidence in litigation is a very complex part in the litigation process. State complexity increasingly complicated, because evidence relating to the ability to reconstruct the events of the past events and the truth. Difficulties in the process of proving the truth

because the evidence it contains: a suspicion and prejudice; factors lie; element of artificiality.

Another area in which ethics concerns affect expert witness preparation and testimony is the compensation of the expert for his or her time and work product. These concerns arise in two ways: whether payment of the expert can be tied to the outcome of the case, and how the burden of paying the expert for a deposition is allocated between the plaintiff and the defendant. There is a broad consensus that contingency fee payments to experts are unethical because they compromise the expert's objectivity.

In Islam this term called Tahaluf. Tahaluf is mutually binding and promise in helping, help support and agreement. (IbnKathir: Nihayah fi Gharibil Hadith; I / 424).Tahaluf is an agreement and resolutions between group (party), between two or more parties to realize understanding or cooperation, help one to face the opponent or enemy bigger and dangerous on purpose to uphold justice, forbidding and enforcing the kindness and objectives pure force justified in Islam and Muslims together or even unbelievers. To better understand the concept of this tahaluf, it simply is an understanding agreement to face the same opponents. In sum, tahalufsiyasi is a cooperation negotiations regulation between the two sides in the face of a problem or conflict that each objective can be achieved while where no pawn and violate the principles of Islamic law.

From the point of law as well, based on two fiqh regulation on the muamalat chase namely 'origin but rather something the matter should be no proof that forbid' and 'must not exacerbate and disadvantaged', then the legal origin to tahalufsiyasi is a must in Islam while which may give benefit to the Muslims and in the same time does not violate Islamic law.

The case can be exemplified here is: If an expert called to testify in cases of sexual violence, especially against children, which is difficult and proven evidence, the judge may be exempt perpetrators, but if the perpetrator is then free and commit crimes again, the question whether the this case is whether the expert statement can obscure the truth is there? Whether in this case can be said to be an expert witness to give false facilities to the perpetrators to commit a crime again?

Law of tahalufsiyasi(11): *"The believers, men and women, are Auliya' (helpers, supporters, friends, protectors) of one another, they enjoin (on the people) Al-Ma'ruf (i.e. Islamic Monotheism and all that Islam orders one to do), and forbid (people) from Al-Munkar (i.e. polytheism and disbelief of all kinds, and all that Islam has forbidden); they perform As-Salat (Iqamat-as-Salat) and give the Zakat, and obey Allah and His Messenger' (Al-Quran At-Taubah 71). This tends attitude forbidden by Allah (12) (Al Quran 2010):*

وَلَا تَرْكَبُوا السَّالِئَ بِيْظَلْمُوا فَتَمْسَكُمُ النَّارُ وَمَا لَكُمْ مِنْ دُونِهَا هُمْئِلَاءَ تَمَلَّتْ نُصْرُ  
وَنُ

*"And incline not toward those who do wrong, lest the Fire should touch you, and you have no protectors other than Allah, nor you would then be helped."* (QS Huud [11]: 113)

All agreements or resolutions which are forbidden in Islam, when the goal is contrary to the teachings of Islam, agreements of this kind is unlawful, according Prophet SAW (13):

لَا حُلْفَةَ إِلَّا بِإِسْلَامٍ

*"There should be no agreement [falsehood] in Islam."* (Hadith narrated by Bukhari no 2130; Muslim no 4593; Abu Dawud no 2536; Ahmad no 13475).

*A falsehood agreement because it contains terms that conflict with syara'. Prophet SAW has said:*

كُلُّ شَرْطٍ لَيْسَ فِي كِتَابِ اللَّهِ فَهُوَ بَاطِلٌ إِنْ كَانَتْ مِائَةً شَرْطٍ

*"Any terms that are not in accordance with the Book of Allah, then he is falsehood, although there are a hundred terms."* (Hadith narrated by Bukhari no 2375; Muslim no 2762; IbnuMajah no 2512; Ahmad 24603; IbnuHibban no 4347).

IbnuHajar Al-'Asqalani in *Fathul Bari* said:

أَنَّ الشَّرْطَ وَالغَيْرَ الْمَشْرُوعَ بَاطِلٌ لَوْ كَثُرَتْ

*"Surely the terms of which do not conform syara'is falsehood, despite numerous."* (IbnHajar Al-'Asqalani, *Fathul Bari*, 8/34).

Then the otherword of the Prophet Muhammad:

(رواه البيهقي) البينة علمنا دعوا اليمين علمنا نكر

Meaning: *"The Evidence was imposed on the plaintiff and oath is charged to the defendant (Those who deny the lawsuit)"* (Hadith narrated by Al-Baihaqi)

Prohibition of helping in sin and transgression, (13)

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

"Help you one another in Al-Birr and At-Taqwa (virtue, righteousness and piety); but do not help one another in sin and transgression. And fear Allah. Verily, Allah is Severe in punishment." (Al-Quran Al-Mâ'idah [5]: 2)

Imam IbnKathir explains the above verse: "Allah has commanded His servants who believe for mutual help in doing good deeds, namely virtue (al-birr), and leave badness, namely piety (at-taqwa). Allah also forbids them to mutual help in falsehood (al-bâthil), sin (al-ma'âtsim) and in the things that are forbidden (al-mahârim) (13)."

Prophet has said:

كُلُّ شَرْطٍ لَيْسَ فِي كِتَابِ اللَّهِ هُوَ يَاطَلُّوْا إِنَّا كَأَمَانَةٍ شَرْطٍ

"There should be no agreement [falsehood] in Islam." (Hadith narrated by Bukhari no 2130; Muslim no 4593; Abu Dawud no 2536; Ahmad no 13475).

IbnHajar Al-'Asqalani in *Fathul Bari* said:

أَنَّ الشَّرْطَ وَالغَيْرَ الْمَشْرُوعَ بَاطِلَةٌ وَلَوْ كَثُرَتْ

"Surely the terms of which do not conform syara'is falsehood, despite numerous." (IbnHajar Al-'Asqalani, *Fathul Bari*, 8/34).

Syara' regulation in this case determined:

الْوَسِيْلَةُ إِلَى الْمَحْرَمِ مَحْرَمَةٌ

"Any instrumentality which would lead to the haram, isharam." (Anwar Al-Buruq fi Anwa' Al-Furuq, 3/46)

### How Islamic Criminal Law in the case without evidence?

In Islam there is an event that can be used as a lesson or be learned through hayaatussohabah (life companions are honoured), the story of Sayiddina Ali who lost his armour in the Battle of Shiffin, where a few days after the war ended, Ali saw his armour lost it in the hands of a Jew. Ali said to the Jewish; "The dress is mine. I never give or sell it to anyone." Answered by the Jewish; "No! This armour is mine long time ago." Neither Ali nor Jew each maintains their respective rights. Finally, nor can the settlement, the two agreed to go see the judge of Syuriah to ask for a fair and just settlement. In it, there was a dialogue between the judge with the accuser and the accused. Ali said; "The armour is in the hands of the Jews, the mine a long time ago." The judge of Syuriah said to the Jews; "How, Ali has expressed that the armour in your hand it is his?" Answered by the Jews; "No, this armour is mine." Judge of Syuriah asked Ali; "Is there any evidence in

the hands of Commander of the Faithful that indicate where the armour that belonged to the king?" Ali replied; "There! My son Hassan and Hussain knew that armour is mine alone." The judge of Syuriahsaid; "The testimony of his own son against father unacceptable under applicable law." Furthermore, the judge of Syuriahsaid; "As Commander of the Faithful himself cannot prove the recognition of two witnesses are legitimate, then I decided that the armour is owned by the Jews." Then the judge of Syuriah dropping the hammer as a sign of the trial has been completed. While Caliph of Ali IbnAbiTalib though as Commander of the Faithful Leader or he may take action or at least put pressure on the judge to win it, but he did not take that path. He remained obedient to the provisions of applicable law. The judge of Syuriah has shown an example of how it should be the attitude of a judge who must defend the legal justice above everything. As for the Jews who witnessed the incident was amazed to see a magnifying high adherence to the provisions of law, the establishment of a judge assertiveness in enforcing the laws that are all sourced to the elements of justice in Islam. Fascinated by the incident, the Jews then also entered Islam.

### Conclusion

Child sexual abuse is difficult to prove. Usually there is no medical evidence, although when such evidence does exist it is admissible. These cases rise and fall on the child's shoulders. In an effort to bolster or undermine the child, prosecution and defence sometimes turn to expert testimony. Some forms of expert testimony are straightforward and uncontroversial, other forms are complex, controversial, and of dubious reliability. Modern litigation often involves experts. Ethical issue that arises is the payment as the compensation of the expert for his or her time and work product. There is a broad consensus that contingency fee payments to experts are unethical because they compromise the expert's objectivity. Besides the ethical issues that often arise is the conflict of interest within the members of expert testimony in cases of child sexual abuse. In Islam, it is recognized the existence tahaluf and many proof which abolished entered into an agreement to falsehood. Also the story of Sayyidina Ali who lost his armour in the Battle of Shiffin can be used as a role model in the case of existing law.

### Conflict of Interest

None

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