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EDITORIAL NOTE

Premier Law Journal (PLJ) is a research Journal published by Premier Research Center, Premier Law College Gujranwala in English Language. This is a 2nd volume, issue 8, which is going to be published in Dec, 2022. It is a quarterly Journal dedicated to provide original research articles in Legal Studies as well as analysis and commentary on issues related to Legal & Social Issues. This Journal brings together many of today's distinguished scholars and thinkers, practicing lawyers, teachers and students making their research available on Current Issues need to be legislated in Pakistan.

It is an interdisciplinary Journal of peer-reviewed research and informed opinion on various intellectual and academic issues in areas of Legal & Social Studies. Its readership includes Legal practitioners, policy makers, Judges, Teachers and Students of Law. The articles published in this Research Journal undergo initial editorial scrutiny, double blind peer-review by at least two experts of the field, and further editorial review.

Maraj Alam's article is a good account leading questions in court. Pakistan being a common law depending on parties to the case to extract evidence which is the utmost requirement for the fair and to meet the end of justice from the court of law for that purpose parties put their efforts in the form of Questions from the witness to find out the truth of case.

Zummar Naveed's article is actually a discussion of the legitimacy and acknowledgment of children. This research not only took the purview of the general law regarding the legitimacy of a child but also see the Islamic perspective on the paternity of a child.

Ali Haider's article is a study to investigate the definitions, categories, purposes, and structures of presumptions in common law before using this

information as a conceptual framework to examine presumptions in Qanoon e Shahadat (hereinafter QSO). After conducting a doctrinal analysis, the current study discovered that presumption in common law is seen as a legal principle that permits courts to reach particular decisions based on a set of established facts.

Shabnum Amanat's article is a confidential statement that must be kept secret by the recipient for the benefit of the communicator is referred to as privileged communication. A privileged communication is not admissible as evidence in court, even if it is pertinent to the case.

Hafiza Madiha Shehzadi's article is an analysis of the maxim "Nemo moriturus praesumitur mentire" is basis for "dying declaration", which means essentially saying that "a man will not face his maker with a falsehood in his mouth." "This study looks at the value of the deathbed statement as evidence in various nations, which is one of the most important pieces of evidence.

Muhammad Zahid's article presents briefly that Evidence is like a backbone for any trial procedure. Islamic law of evidence has a complete and fruit full mechanism for admission of Oral Testimony. It ensures authentic and reliable oral testimony in all respects.

Dr. Muhammad Amin
The Editor

ADMISSIBILITY OF LEADING QUESTIONS DURING EXAMINATION OF WITNESS: AN ANALYTICAL STUDY

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DR. SHAHID RIZWAN BAIG**

Abstract; Pakistan being a common law depending on parties to the case to extract evidence which is the utmost requirement for the fair and to meet the end of justice from the court of law for that purpose parties put their efforts in the form of Questions from the witness to find out the truth of case ,one of the mode is leading question which conferring the answer to the person putting before such type of questions and expected or wish to get a desirable answer from witnesses in order to reach at the ambit of truth, leading questions are also called binding, hinting, suggestive and pointing questions which required answer in No or Yes without going in length to answer.

Leading questions usually puts by the cross-examiner under Article 138 of QSO to safe time of court and brings him to materials points as soon as possible, in a leading questions witness are struck to play both side of the pitch

Leading and pointing questions are not allowed in examining-in-chief because witnesses have to answer according to his own sense of mind what he want to tell and what he actually saw or heard or conceived by any other sense of organ court want to hear from his mouth itself without any kinds of filtering it by the counsel.

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The questions that put in cross-examination by the adverse party to witness are often difficult and confusing to answer in the point of time. the Questions may includes negatives, double negatives, leading questions, closed questions with complicated syntax and vocabulary.

Introduction; In an adversarial legal system, there will be no value of witness evidence unless he may go through different stages of examination (cross-examination, direct-examination and redirect-examination) cross-examination is always conduct by the adverse party and examination in chief and re-examination is done by the calling party under Article 132 of QSO 1984. In cross-examination witnesses always have to confront such a complex and confusing types of questions of cross-examiners among them leading questions are one of them. Leading questions are also called close-ended questions that ask from witness to pick up from the set of pre- noticed and pre-define response are inherently leading, it restrict the witness to play in one direction only in the form of 'NO' or 'YES' without explaining the answer in length.

"Leading question," as defined by Article under Article 136 of QSO 1984, is one that leads the witness to the response that is expected and wishes from him. Furthermore, it is not leading if it only raises a subject without providing an answer or a particular part.

Unless the court forbids the question or orders the witness not to respond, a party may ask from witness a leading-question and pointing questions during cross-examination and in direct examination, If the court is determined that the fact would be ascertained in better way

if leading questions were not to be used, the question must be disallowed or the witness must be told not to answer it.[1] In court, witnesses usually support the party who brought them, and this emotion compels them to withhold some information and mislead others that they believe may be harmful to the side they are testifying for. When we combine the partisanship of the witness with the lawyer leading the examination, it is simple to produce evidence that deviates very widely from the exact truth. This partisanship in the witness box is most fatal to fair evidence. Overzealous practitioners frequently accomplish this by asking leading questions or combining two basic questions into one, tricking the witness into answering "yes" to both of them, and therefore producing an altogether false result.[2]

The court of evidence gives permission to put leading and suggestive questions to a calling Party from hostile witness identified as adverse party by the court and may use leading-questions because the witness is unfavourable to the calling party. The court would not extend that permission to other parties in whose favour witness (to whom the witness is not hostile and identical to that party) diverted his state of mind completely.

A leading question is one that gives the witness a hint about response which the examining party wants to hear. The general view is that that the leading question has suggestive abilities and undesirable for witness, but the same tradition allows exceptions for witnesses who are hostile, uncooperative, or biased, witnesses who have communication issues, witnesses who are children, witnesses whose memories have been exhausted, and

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[1] 1995, EVIDENCE ACT- SECT 42

[2] the art of Cross-Examination by Francis well man of the New York Bar

witnesses whose testimony is unchallenged in the earliest stages.[3]

1 Determination of leading questions

There is no set standard for determining whether a question is improper based solely on its form, the Court must consider beyond the form both the question's substance and effect of inquiry. Leading is not an absolute concept, but rather a relative one. There is no such thing as leading in reality because the same type of question that depending on the specifics of the situation might be the most egregious form of leading might be the most appropriate method of interrogation in another.

Furthermore, in the court of evidence judges has a lot of latitude in deciding what constitutes a leading question in his court of law, and the higher court judges are always reluctant to set aside a decision on the grounds that improper leading and hinting questions was permitted during taking evidence in subordinate court by way of direct-examination.[4]

It is a general assumption that a good lawyer is not the one who asks many questions from the man who is standing in the witness box, but the good lawyers are those who knew which question is to be asked and which are not need to put. Just because of that sometime the question left the adverse effect on the party who put such types of questions so a vigilant always care before putting any leading questions

2 Purpose of asking leading questions

The rationale behind the leading questions is to take back the witness towards the proceeding and as soon as

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[3] Evidence Articles 774–778 in Wigmore (3d ed. 1940)

[4] United States v Ranney 719 F.2d 1183, 1190 (1st Cir. 1983)

possible to the bulk of material point upon which he is to speak, counsel may persuade him on that line length and may lead him the recognized facts of the case which have been already established. Presumption would be that evidence has been accepted by the opponent against whom it was given now it's his turn to question to disprove such presumptions [5]

The concept of the basic importance for putting such type of suggestive and leading-question is to lead him to an disputed point to save the time and to avoid him to repeat what has been already accepted by him or to skip it over the undisputed facts. [6]

Court has a duty of continuous monitoring as a referee between the parties and decides the admissibility and non-admissibility and in order overcome the following.

1) To put the Queries and presentation of evidence effective and essential for determining and to find out the truth.

2) In order to avoid time consumption of court of law.

3) To provide Protection to witnesses from intimidation or excessive stress and confusion, the court would supervise the exercise of reasonable control over the manner in which witnesses are questioned and the order in which evidence is presented.[7]

Leading questions are permitted during cross-examination from the dissenting witness because the goal of the cross-examination is to shift the witness's already stated facts during his direct-examination, and to test the correctness and credibility, and in general the worth and role of the evidence proceeding further. Sometimes, it becomes necessary for a party to use leading questions to

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[5] (YLR ,2009, 289)

[6] [ILR (1977) Bom. 1505]

[7] Haw. rev. stat. § 626-1, Rule 611 (2010).

get facts for the assistance of his case, even though the facts so Obtained may be completely unconnected with the facts testified before court[8]

3 Why leading questions not permissible in Examination-In-Chief

Ordinary, the rules prohibit use of leading questions in Examination-in-chief and Re-examination because witness is regarded as biased towards the party questioning him and could therefore be prompted. If Leading-questions are allowed it would empower a party to construct their Concocted and false story and develop it in court using their own words and the testimony of their witnesses. It would generally make it more difficult to tell a narrative is concocted and made up. If a witness is given a freedom to tell his story in his own words, he is surely leave some gaps in the account of it and it would be easy for Cross examiner to reach at the real story of the case otherwise it is not possible if the witness is dictated in examination in chief

The state Prosecutor cannot put leading questions on the material Part of evidence from his Witness and Witness must be allowed to account to what he himself had seen and perceived by his senses. [9]

Leading suggestive pointing and hinting questions cannot be asked in direct-examination because of the following main reasons

Reason-I) Witness always potentially biased in favour of the calling party and shows hostility against the opponent party.

Reason-II) Asking leading questions may only bring out only the evidence which favours to the calling

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[8] Lalta Prasad v. Inspector General of Police, 1954 A 438.

[9] Review of AIR.1993, 1892. SC.

party in that situation asked leading questions is synonymous to extract only so much knowledge and information of the witness which would favouring to his side only or even put false gloss upon the whole?[10]
Reason-iii) witness may not express his full meaning and knowledge in their own state of mind

The ordinary rule that leading questions must not be asked on material points by a party to his own witness, because he often impatient to assist the party from whose side he is representing as a witness so this rule is to protect against the bias in favour of the side to which his Evidence is paramount, where no such bias is apprehended rule must of its utility. [11]

4 Exception to leading questions in Direct-Examination and Redirect- examination.

Generally Leading questions are prohibited during the direct or redirect examination (examination by the calling party) of witness Leading questions should only be used if they are required to develop the witness statement during direct-examination and in the following instances as well:

(1) When the court declared that the witness is hostile on the application of the calling party, when witness not willing to speak truth or associated with an opposing party under Article 150 Qanun-e-shahadat Order 1984

2) When the calling witness gives evidence in order to surprise or deceive the examiner.

3) When it is important to develop a witness testimony before the court

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[10] Best, 12" Edn., S 641, p. 561

[11] Review of AIR.1931, 401. Cal.

4) When it is required to establish the undisputed and preliminary matters to the suit[12]

In certain conditions under article 137 of QSO leading questions may not if prohibited by the opposite party, but if court allows while using discretionary power than the calling parties would ask in direct examination and redirect examination which are as follows

4.1 Introductory matter

A witness may be asked about introductory matters which preliminary to the main issue of controversy between the parties and the rule of close-ended questions relax in direct and redirect examination which doesn't affect any party rights e.g. witness name, parentage, residence and age etc.

4.2 Undisputed matters

The rule against leading questions also relax in undisputed Matters which are not in the point of dispute like the relation between the parties, date of institution of suit, disputed property, reasons of dispute, these types of questions doesn't injured the right of any side, instead it safe the time of court and parties as well and to put the witnesses before the disputed facts as soon as possible.

4.3 Matters sufficiently proved.

Counsel may guide the witness to that length and may recapitulate the admitted facts of the case that have already been established in order to resume the proceedings and move the witness as quickly as possible on to the important matters on which he is to testify before the court.

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[12] Connecticut. Superior Court. 1999. *Connecticut Code of Evidence*. Leading Questions

4.4 Witness to contradict former witnesses

If witnesses summoned to contravene another over language used by the previous, the first witness will be questioned about whether the language in question was actually used rather than just what was said, as this would prevent a contradiction from being established[13]

The leading remark, however, is inappropriate in cases where the conversion is not only demonstrated for the sake of contradiction. [14]

When a witness is asked to rebut another regarding the wording of a lost diary, letters or any printed document but is unable to recall every line of it off-hand, the specific Article may be given to him, at least after his natural memory has been exhausted

Opportunity to explain the contradiction must be given to the witness before branding him as a prejudice when confronting him [15]

4.5 To refresh memory of witnesses

According to article 155 of QSO 1984 witness may refresh his memory. The witness's memory may be helped by a question that suggests the answer if he is unable to recall the desired point without any outside assistance, i.e., if he understands the topic but is unable to recall what he knows. As a result, it was permissible to offer names of firm members when a witness said he couldn't remember them adequately to recalls them on his own but thought he may recognise them if it was helped by his councel.it is usually happens in case of investigating officer or medical expert in criminal cases like medico legal report it is difficult for a Dr to remember all the report because they face many case in daily base or sometime the

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[13] (Edmonds v. Walter, 3 Stark 7; Courteen v. Touse, 10 RR 627)

[14] (Hallet v. Cousens, 2 M&R 238)

[15] PLD.1964, 194. Pesh(DB).

assistant or junior of that Dr have to confront the court due to unavailability of the Doctor who actually prepared the medical legal report or officers other than investigating officer so it is difficult for them to remember all the reports well conversant mode so they need some suggestive answers to recollect his memory .

When the nature of the case prevents the witness from focusing on the subject of issue without a specific description of that subject, such as when he is summoned to rebut other witness regarding the contents and subject of a lost dairy and is unable to recall every detail off-hand, the specific lines may be referred to him at least after his unassisted recollection has been depleted so that he may recall his memory regarding the said subject.[16]

4.6 When the witness declare hostile

The court may, under Article 150 of QSO has a discretionary power to allow the calling party to ask from that witness any question that might be asked of him during cross-examination by the opposing party, and since a party is permitted to put leading questions to their own witness As it put during cross-examination and same rules will be followed. Leading questions are permitted to be asked from witness who by his act of conduct in the witness cell, obviously shown to be biased in favour of the opponent party than the calling party may ask for court to declare a witness hostile so that the party may impeach the credit of a witness by putting leading questions. A party cannot demand as a right to treat the witness as hostile it's up to the court so as to entitle the party calling him to put leading questions to him[17]

The evidence of a hostile witness cannot be wholly disregarded; it must be taken into account just as the

[16] (Courteen v. Touse, (1807) 10 RR 627; Taylor, § 1405.)

[17] QSO article 150 and 151

testimony of other witness to the case, but with due care because of the simple facts that he had used different tone of voice. Which voice he tells the truth in will be determined by the Court. In these situations, the evidence must be examined for consistency with the other evidence as well as for independent source confirmation. [18]

It is never acceptable to label a witness as hostile and permit his cross-examination simply because his answers are in stark contrast to the testimony of other witnesses. Yet, the court has complete authority to permit a witness's cross-examination so that they may put leading questions.[19]

The judge has the exclusive power to determine whether a witness is hostile based on his appearance or the manner in which he provides his testimony. The appellate court is not authorised to examine the judge's determination. If a Judge allows a leading question, pleader should insist on having question and order disallowing it recorded [20]

Where the leading questions make evident that the fact that the favouring counsel lead the calling witnesses to what he calculated and fixed that they should say about the main part of the prosecution case so that it will go against the accused, that would be not permitted and unfair with the accused and offends his right to fair trial enshrined under It is not a curable irregularity, [21]

The last Para of 611(c) evidence rules, doesn't allow the use of pointing questions from the party to whom the witness is favours and friendly. But sometime the court uses its discretion to permit close-ended questions in a

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[18] PLD 1959 Dac 613 Ref. PLD.1964,1053 lahr
[19] SCMR, 1984 ,154, E.A560 Muhammad Boota
[20] [AIR 1918 Low Bur 22] (AIR 1916 Cal 188)
[21] [AIR ,1993 ,SC 1892]

certain type of case E.g. pointing and suggesting questions, may be fitting and reasonable when the evidence of a witness who was summoned and examined as a hostile witness by that party.

One party considerably harm the interest of another party with whom the witness is neither friendly nor unfriendly with any side we may call him neutral witnesses who is not favours one side in such types of certain cases leading-questions are reasonable for both parties[22]

The evidence act 1995 also provides way to ask leading questions in the direct and redirect examinations which is as follows

a. The testimony provided by the witness during the chief interrogation goes adverse to the party who produced the witness before court.
b. If any witness interest overlaps to the interest cross-examiner.
c. If a witness has a favourable attitude towards the party who leads the cross-examination either in general or with regard to a specific point.
d. If a witness replies may be affected by their age or any physical, mental, or intellectual disability they may have.[23]

5 Leading questions and children witness

Leading questions or close ended questions are that which suggests the answer itself in yes or no but in some situations it is unreasonable to disallowed the leading questions to the calling party when the victim and witnesses are also child the rationale behind allowing leading questions is that the child are always in fear and in

[22] Federal rule of evidence 611(c)
[23] Evidence act 1995 sec 42 sub-sec (a, b, c, d)

upset mood. Most of the countries that are following adversarial system allow the leading questions to calling party because child witness in a very upset mood and was unaware that it was necessary to prove that the defendant had permeated her. When a witness is incapable of understanding, such as a child, or someone who may be illiterate, the rule against leading questions may occasionally be relaxed.

Allowing the state prosecution to put leading-questions during the direct-examination of child witnesses or victim itself of sexual assault was not have misuse its power of discretion in this case because the victim was extremely hesitant to testify about her victimisation and the questioning had to be stopped several times so that she could assemble herself and be willing to discuss the events happening[24]

If the court decides that allowing leading and pointing questions at the court of evidence by the prosecution or defense counsel from any victim or witness in a case whose age is below than 10 years age will advance the interests of justice, it may do so in any criminal case prosecution for a sexual abuse or a bodily offence .In any criminal case involving the sexual molestation of a kids under the age of 16, the claimed victim is a youngster who is under the age of 16 years, A leading question's scope and extent may be limited by the court at the request of either the state represent by prosecution or the defense or on the court's own initiative[25]

The court of evidence has discretionary power to allow hinting-questions for young victim and witnesses or when the sensitivity nature of the subject matter forbids elaborate response to general inquiries. The ruling did

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[24] (United States v. Tome, C.A.10 (New Mexico), 3 F.3d 342, }

[25] ALA. CODE § 15-25-1 (2010)

provide a caution that testimony obtained through the use of leading questions might not hold the same weight as voluntary evidence. The decision to allow leading-questions was up to the trial court and was not subject to reconsideration on a writ of certiorari by higher forum. Moreover, that there was no error committed by the trial judge when he permitted the prosecution to put leading-questions on 13-years old victims and witness.[26] The initial court of evidence did not misuse its discretionary power to allow the State to put leading-questions in its direct-examination of the victim, who was just five at the time of the event happening and six at the time of the when commence proceeding.[27]In a criminal case to permit the use of leading-questions is wide discretion of court when the witnesses are minor[28].the rule relax for the young ones who have suffered usually feel hesitation and doesn't know the importance of their speaking by his own mouth which is consider as best piece of evidence to reached at the culprits, by that reason court allows prosecution in criminal cases to put leading and hinting questions so that the child collect the memory and feel confident to tells what happened with him or with his companion before the trail court of law.

6 Kinds of leading questions

There are following kind of leading questions which are asking in court among them directive and non-directive leading questions are important one.

A directive leading question is one that compels respondents to offer a particular response, typically the yes. Directive leading questions are presented in an

[26] Anderson v. State, 101. 202 (Fla. 1924),
[27] Weisenstein v. State (1985), 367 N.W.2d
[28] State v. Brown 285 N.W.2d 843 (1979);

exceptionally aggressive manner, in contrast to other forms of leading questions.
Non-directive statements are open-ended and do not require a yes or no response instead, they ask the witness to defend a position, articulate their opinions, or make a decision.

In cross-examination, they distinguish between direct and indirect leading questions. The lady who come to the door and opened had hair covered, didn't she? This is an example of a directive-leading Question form, and 2nd "Does the woman who opened the door have hair covered?" is the example of non-directive leading form.
The legal system implicitly recognises that in unusual and challenging circumstances, witnesses can provide reliable testimony. But a single word alteration in a proposition might an impact on the way people react. Although the question's content is the same, asking, "Are you lying?" (Non-directive) may have a very different impact on a witness who is used to and apprehensive in a courtroom. As opposed to "You're lying, aren't you?" this is directive.[29]

Consider at just how distinct these questions are: A non-leading question is "Did anything happen?" A non-directive leading question is "Did he touch you?" A directive-leading question is "He didn't touch you, did he?" The latter is the most challenging and risky for witness statements' veracity.

7 Leading-Questions may not be asked in Cross-Examination in some exceptional cases

The rule that leading, hinting and pointing questions only conducted in Cross-Examination is not, at least in some other systems of jurisprudence, without its exceptions.

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[29] R v McDonnell (1919 Cr App R 322

However, there are two types of leading and suggestive questions which cannot be put at all from any side in either direct examination or redirect-examination and in Cross-examination as well.

Firstly, it is accepted principle by all means that leading-questions may in general be put in examination but this does not mean that the counsel of both side may go to the depth of putting the exact words into the mouth of such witness so that the same fact and words would echo back again. [30][31]

Secondly, a question which presumes facts and statement as proved but which had not been proved against witness yet. Or which considers or deemed that particular kind of statement and reply have been given, which in fact have not been given by the witness yet is not reasonable to consider either in direct examination and redirect-examination or in cross-examination. [32]Or may not be assume that particular kind answers have been given which have no connection to the fact.[33]

This is no reason to say that the party who calls the witness has taken an evil upon once own head , sometime a witness who make his mind to defraud with party or fixed already with any party might concealing his biasness in favour of any party in order to compel or induce other party to summons him as witness or to show him as attesting-witness or any other person whom it was essential to call him to establish any part of fact in nutshell these two may be a neutral witnesses for both parties, to

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[30] R. v. Hardy, (1794) 24 St Tr 659 (755). Taylor was of the opinion that the true objection to such a course as to the value of answers so obtained in the case of a witness obviously too friendly to the cross-examiner's side. See Taylor, footnote (e) to § 1431, 913 of the 12th Edition.

[31] Malaysian evidence act sec 143,a

[32] Taylor, § 1431. See notes under the heading "Kinds of leading questions, questions assuming a controverted fact." 4. Wigmore, § 773, Taylor, § 1431.

[33] Malaysian evidence act 1950

allow a counsel to ask leading questions from such a witness to get the favourable reply suggested to him before through the medium of leading-questions would be sheer unjust and against the natural justice [34]

Where an opponent witness shows by his conduct while answering the above mentioned two questions to be biased in favour the adverse party while cross-examination the danger of declaring hostile witness and leading-questions arises so such type biased questions may therefore, be forbidden to avoid consuming lengthy time of court without any fruitful output from such kinds of Questions.

7.1 Restrictions on the Right of Cross-Examination

As a general rule only the adverse counsel Have the Right to cross-examination under the Evidence Act. So, the defendant may only have to cross-examine and a Co-defendant right to Cross arises only where the interest and claims of Co-defendant is at conflict with the defendant claims. A defendant who does not have a conflict of interests with the plaintiff cannot question the plaintiff in a cross-examination. The only party who has the right to cross-examination is the opposing party. The law permits the right of cross-examination to the extent of co-defendant interest is permissible.

Co-respondents may exercise their right to cross-examination if their interests are directly in conflict with one other. When the interests of Defendants No 2 and 3 are somewhat related to those of Defendant No 1, the court will allow them to cross-examine to Defendant No. 1 and will then ask the Plaintiff to do same.[35]

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[34] Taylor, § 1431. For further notes on this point. See notes to Article 154.

[35] Sarkar at pp 3381-3382: (By P S Ranjan & Co. Advocates & Solicitors Malaysia)

8 Conclusion

Leading questions is a part of questions which are usually put in the order of examination by both sides in the circumstances of the case. The rationale to allow leading and pointing questions is to put before adverse witness Or hostile witness is to test the accuracy and correctness of evidence and to check Reliability and general value of the evidence given and to analyse the facts already stated by the witness it is sometime becomes essential for a party to put That types of hinting questions in order to extract facts in support of his case, even though the facts obtained may be entirely unconnected with facts testified to in an examination-in-chief. It is up to the Judge conducting the inquiry to disallow a particular question when that question is of mixed nature, irrelevant or confusing and Favouring one side.

But in general Rule restricting or allowing the petitioner or prosecution side to put any leading and suggestive question at all stands on a complete different Ground and cannot be justified, until and unless the circumstance allows and it is up to the court discretion like in case of hostile witness and in contradicting or refreshing the memory of the witness. Leading questions are always close-ended and hinting questions that ask the witness to choose from the set of pre- noticed and pre-define response.it restrict the witness to play in one direction in the form of 'NO' or 'YES' without explaining the answer in length. Leading, pointing, hinting and suggestive question are alternative to leading-questions and this is best mode to extract the truth from the adverse witness by opposite party or when any witness at a point of testimony change his mind in order to conceal the truth against the party who summoned him as a witness of their side in such a situation leading-Questions are used as a weapon to shake the credit of witnesses so that truth will come out in order to meet the end of justice

LEGITIMACY AND AN ACKNOWLEDGMENT OF PATERNITY OF CHILD WITH SPECIAL REFERENCE TO ISLAMIC LAW

Zummar Naveed*
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Abstract; This Article discusses the legitimacy and acknowledgment of children. This research not only took the purview of the general law regarding the legitimacy of a child but also see the Islamic perspective on the paternity of a child. Ar.128 of QSO, 1984 added after independence. Being an Islamic state, Pakistan repeals all provisions of law that against the injunctions of Islam. Ar.128 considers the birth during a marriage as conclusive proof of legitimacy. While under Islamic law, somehow the same perspective but schools of Islamic law have a different perspective on the delay of the birth of a child. It shows leniency in legitimacy rather than stigmatization. Lastly, the acknowledgment of a child is only recognized by Mohammedan law. In which only sonship is not necessary but lawful legitimacy of sonship is a requirement of acknowledgment. The major purpose of acknowledgment is to give a right of inheritance to the acknowledged person from the acknowledger property. This research paper inferred that there is a need for time to amend the Ar.128 of QSO,1984. To make some leniency on the legitimacy of the child.

Keywords: legitimacy, acknowledgment, child, ordinance, Islam.

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INTRODUCTION: The legitimacy of a child always become a serious issue in society with time. The issue has been raised when a female demand khula from the husband or the husband give a divorce to his wife and the maintenance of children is imposed by law on the hands of the husband. Majorly issues stand when inheritance shares are distributed and then at that time, the question of legitimacy takes first place. So, when a child is born from wedlock is legitimate. Instead, under the Islamic charter, an infant born out of the nuptial is illegitimate or considered ***filius nullius*** which means a **"son of nobody"** or bastard. Article 337 under Mohammadan Law describes parentage as the relation of parents (real father and mother) to their children[36]. The word parentage is further divided into two categories: (1) Paternity means a relationship between father and infant (2) Maternity means a relationship between mother and newborn. The well-settled rule of paternity is established by the marriage of parents[37](real father and mother) under Islamic Law and they begot a child from the nuptial [38]. Marriage may be valid(sahih), or irregular (fasid), but it must not be void (batil)[39]. While maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter[40].

Marriage may be confirmed by prima facie evidence, and in the desertion of direct proof or prima facie evidence it may be established by drawing the presumptions of certain facts, or presume from an acknowledgment of the

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[36] Ibid, see Sec.337 of D.F Mulla's principles of Mohammdan law, chapter 17, parentage

[37] PLD 1988 SC 8

[38] Sec.250 of Mohammadan law, marriage or Nikah means a contract which has for its object the procreation and legalizing of children.

[39] Ibid, see Sec.339 of Mohammadan law (PLD 2010 Lah.422)

[40] Ibid, see Sec.338 of Mohammadan law

legitimacy of the child, or presume from prolonged cohabitation and when the paternity of the infant is established, its legitimateness is also confirmed[41]. Under the Islamic charter, the son considers legitimate if he/she is an offspring of a male, his spouse, and his bondslave, and any other children are considered to be of illicit intercourse or Zina and consider an illegitimate children[42]. If a male commits Zina with a female, and an infant is born as a result of illicit intercourse (Zina), then it considers to be a child of its mother and acquires a share of property from her and her relatives[43]. And the begot not belong to the father of the infant because paternity is only confirmed by marriage, not by illicit intercourse. In that case, the child did not inherit from him and considers to be illegitimate or a bastard.

Under Pakistani law, childbirth during nuptials considers to be definitive evidence of legitimacy and cannot be rebuttable. While under Islamic law scholars have different views Sunni law has a different perspective and Shia law has a different purview on the legitimacy of a child. The rationale behind the legitimateness of an infant is to prevent stigmatization (the child is born from a valid marriage to the husband). Pakistani courts held that our Islamic law leans in favor of legitimization rather than stigmatization[44] (Sikandar Ali vs the State) and also abhors the contention of legitimacy[45] (Manzoor-ul-Haq vs Kaneez Begum).

This Article was coined to discuss the view of Islamic jurists, societal norms, and peculiarities of a

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[41] AIR 1922 PC 159
[42] Baillie, p. 391.
[43] See, Qanun-e-Shahadat ordinance,1984, page 200., para: 1 (revised edition 2018) by M. IQBAL (PLD publishers)
[44] See, 2000 PCR. LJ 214, PLD 1995 Pesh 124
[45] 1993 CLC 109

particular class of community on the legitimacy of the child. It also discusses the statutory provision of Article.128 of the Qanun-e-Shahadat Ordinance,1984 which affirmed stipulates that the legitimacy of a child born from marriage is definitive evidence. And the acknowledgment (*Iqrar*) of a child is also discussed.
The legitimacy of the child mostly prevails in Pakistan. Pakistan as an Islamic state follows the injunctions of Islam and cannot make any law that is against the injunctions of the Quran and Sunnah. If any law is made against the injunctions of Islam then the state declares it to be null and void[46]. Other Islamic countries like Saudi, Iraq, Iran, UAE, etc. also recognize the legitimacy of a child.

9 RESEARCH METHODOLOGY:

This research article is qualitative. This research explores the data after reading articles, case laws, views of Islamic scholars, laws, rules, principles, and judicial precedents on "legitimacy and acknowledgment of child". With a theoretical view, research becomes comprehensive and coherent in form. And cover all areas which are necessary to know about the legitimacy of a child.

10 The relevant provision of law-

The relevant provision of law is Article.128 of QSO,1984 coined that "a child born from the continuation of valid nuptial (between his mother and husband) and not earlier than the end of 6 lunar months from the date of nuptial(approximately 180 days), or within 2 years after the dissolution of marriage, and the mother remains single shall be definitive or conclusive that legitimate child is the son of that male[47], except (a) the husband disown the

[46] See, Article. 8 of the Constitution of Pakistan, 1973
[47] See, Article. 128(1) of QSO,1984

newborn[48] (b) or the child has been begotten after 6 lunar months from the date on which the female had accepted the period of iddat had come to an end"[49]. But this provision of law repeals the effect of Article.112 of the Evidence Act,1872 after partition in which "a child born within 280 days(which is approximately 9 months) after the dissolution of a continuance of valid nuptial shall be a conclusive evidence of lawful son of that person except the parties had no access to each other at the time of begotten". Article.2(9) of QSO,1984 states that "when one fact is declared by this order to be conclusive proof of another, the court shall on the proof of one fact, regard the other as proved, and shall not allow giving evidence to disprove it" and it is also known as" rebuttable presumption" and when the Ar.128(1) of QSO, 1984 become to operate the court cannot allow giving evidence to disprove the legitimateness of a infant begot within the duration aforementioned[50].

11 Principles of paternity under Islam-

The four principles assert by Islamic law for the establishment of paternity.

1. The first principle for the establishment of paternity is a valid marriage is sufficient evidence that the newborn is begotten from this marriage. The assumption of paternity according to Sunni Law is that infant is begotten not earlier than 6 months from the date of nuptial or born within 2 years after the dissolution of marriage by way of a divorce, by the demise of the husband and the simple denial of paternity by husband cannot take

[48] See, 2001 YLR 731 and also see Ar.128 of QSO,1984
[49] See, Ar. 128 (1)(b) of qso,1984
[50] PLD 2015 SC 327

away from the legitimacy of the child[51]. In Musammat Kaniza vs. Hasan the Oudh Court defines a "valid marriage" means "flawless"[52].

Note: An infant begotten within 2 years after the dissolution of the nuptial is assumed to be lawful except disclaim by li'an[53] and this is the settled principle of Hanafi law. Under Shafei and Malki school of law, the duration is 4 years while under Shia law is ten months[54]. In Ashraf Ali vs. Ashad Ali, Calcutta case in this case court before passing the Evidence Act, the court diminish to act in accord with this principle of Mohammedan law in which an infant is begotten within 19 months, after the date of divorce on the ground to hold that such infant as lawful "would be contrary to the course of nature and impossible"[55]. Another rule under Islamic law is that an infant begotten under 6 months after marriage is illicit[56]. In other circumstances, if an infant begot after 6 months from the date of nuptial is assumed to be lawful unless the putative father disowns the newborn by li'an[57].

2. The second principle under Islam is regarding the age of the child. So, the minimum age for a child to be born alive and properly formed according to Quran is six months and this is the shortest period

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[51] See the commentary of QSO,1984 by M. IQBAL (PLD publishers) revised 2018 edition

[52] (1926) 1 Luck, 71,92 I.C. 82, (26) A.O. 231

[53] Lian in which husband has falsely charged the wife with adultery and wife is entitled to seek a divorce. See, sec. 333 of Mohammadan law.

[54] See the commentary of sec.340 of D.F mullah principles of Mohammadan law page.468, para second, third rule of Mohammadan law (Pakistan edition)

[55] (1871) 16 W.R. 260

[56] See, the commentary of sec. 340 of D.F mullah principles of Mohammadan law, page 467, last para of the page (Pakistan edition)

[57] See the commentary of sec.340 of D.F mullah principles of Mohammadan law, page. 468, first para, second rule of Mohammadan law

of gestation admitted by all schools[58]. While the longest duration of gestation[59] is 2 years and the usual time is 9 months[60].

3. The third principle under Islam is regarding the attribution of paternity. This is a different concept. Our law is very stringent against immorality and considers adultery a great sin. According to Hadith and Quran:

"Zina or fornication or adultery has been declared a major sin and an evil way. The believers are strictly forbidden to come near it". Quran says: "nor come nigh to adultery for it is a shameful (deed) and an evil, opening the road (to other evils)" (17:32)[61].

If married women commit adultery[62] with another person, then the paternity of the child does not belong to the person to whom the adultery was committed. But it is referred to her husband unless he repudiates it, but the acceptance of such repudiation suffers many restrictions and reservations under the method of acknowledgment[63].

4. The last and fourth principle of Islamic law is acknowledgment or Iqrar. Under Sunni law father alone establish the paternity of the child with the total debarred of the mother and other relatives[64].

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[58] See the commentary of Ar.128 of QSO,1984, page:128 by M. IQBAL (PLD publishers) revised edition 2018

[59] Period of gestation means fetal development period from the time of conception until birth.

[60] PLD 1995 Pesh. 124

[61] Book" women's rights in Islam" by M. sharif Chaudhary, chapter# 17 right to protection of honour, page. 139

[62] Adultery means a voluntarily sexual intercourse between a married person and a person who is not their spouse.

[63] PLD 2010 Pesh. 10, 2001 YLR 731

[64] See the commentary of Ar.128 of QSO,1984 of M. IQBAL (PLD publishers) revised 2018 edition, page 198

12 The legitimacy of a child may also presume from presumptive marriage-

Marriage must presume from direct proof but in the absence of direct proof the legitimateness of a newborn may be assumed from the conditions that the nuptial held between the parents (father and mother)[65]. Marriage is also assumed from prolonged cohabitation[66] between husband and wife, through acknowledgment by the father in respect of the paternity of a child and the conditions of acknowledgment must be fulfilled[67], and the acknowledgment by the man or woman of his wife[68], and the community always perceive as a husband and wife, and also consider by a respectable member of the locality. Ar.46(5) of QSO,1984 also provides that the statement regarding the existent of relation by marriage, bloodline, or adoption between persons or persons declare that has special means of knowledge and all these statements provided when the question regarding relationship in dispute was raised are relevant[69]. Another article provides that when the court made a point of view concerning the relation of one person to another and the opinion of any person who is a member of a family or has special means of knowledge expressing the existence of a relationship is considered a relevant fact[70]. In Mohd Haneefa vs. Pathummal beevi states that an infant born in nuptial

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[65] See the sec. 341 of D.F MULLAH principles of Mohammadan law, Pakistan edition, page 469

[66] Khaja Hidayat vs. Raj Jan (1884) 3 M.I.A 295

[67] Habibur Rahman vs. Aitaf Ali (1921) I.A. 114

[68] M. Amin vs. Vaakil Ahmad, Murad khatoon vs. M. Afzal Khan 1993 MLD 719.

[69]See the Ar. 46 of QSO,1984 by M. IQBAL (PLD publishers) revised edition 2018-page: 85, para: second.

[70] See the Article.64(opinion on relationship when relevant) of QSO,1984 by M. IQBAL (PLD publishers) revised edition 2018-page: 121.

cannot be bastardized except on direct evidence of distance[71].

13 Denial of the legitimacy of a child-

Sec.2 of the Muslim Personal Law Shariat Application Act, 1962 provides that, "Notwithstanding any custom or usage, in all cases questions regarding succession, marriage, legitimacy, bastardy, will, gifts, wakf, property…..subject to the provisions of any enactment for the time being in force shall be the Muslim personal law(Shariat) in cases where the parties are Muslim"[72]. Where both parties are Muslim the above provision applies and creates a conflict against Article.128 of QSO,1984. Under Pakistani law, the father denies the legitimacy of a child if he is not born within a stipulated period prescribed under Ar.128 of QSO,1984. While Muslim personal law (Shariat) is a well-settled rule in this context. According to Imam Abu Hanifa, the paternity of the child or legitimacy of a child must be denied by the father promptly after the nativity of a newborn[73] but according to Imam Muhammad and Imam Yousaf father denies the legitimacy of a child within 40 days after the nativity of a newborn (within the post-natal duration). Islamic law does not permit anyone to deny the paternity of a child after a stipulated period. And all of the Islamic scholars, fatwa-e-Alamgir and Hedaya agreed on this principle of paternity.

The superior court held that the statute does not permit anyone and especially unethical and immoral fathers, to make outlawed and illegal assertions and become a basis of hurt to children as well as their mothers[74]. Our

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[71] 1972 K.L.T. 512

[72] See the Sec.2 of Shariat Muslim personal law.

[73] See the page 200 of QSO,1984 by M. IQBAL (revised edition 2018) PLD publisher

[74] PLD 2015 SC 327

Constitution also protects the marriage, family, mother, and child[75]. And duty imposed on the state to protect family, etc. But according to the customs, a husband can renounce the infant, on the day of his nativity, at the time of purchasing articles that are necessary for the birth of a child, or during the period of re-joining. One view is that if the husband is not present, he must renounce the newborn promptly after he was enlightened of his birth[76].
In case of the husband's demise or procured divorce to the wife, and the woman at the time of Iddat, admits that she bore a child within 2 years of separation of nuptial, and the husband denied the nativity of the newborn or his heirs denied the fact then the birth of child proved by 2 trustworthy male witnesses or by one male witness and two woman witnesses having a good reputation unless the husband or his heirs formerly contended that the women bore a child or she was pregnant or unless the signs of pregnancy were manifest[77]. When the woman bears pregnancy after 6 lunar months of the nuptial or the infant is born after six lunar months of marriage, the child cannot consider illegitimate unless denial has been made and the wife and husband appeared before a judge and take an oath against each other after that judge make an order of their separation[78]. The child was held illegitimate in criminal proceedings having no evidentiary value in civil proceedings[79].

14 Acknowledgment of Child:

The acknowledgment of a child or Ikrar is only recognized by Mohammedan law. Where the paternity of a newborn

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[75] See the Article.35 of Constitution of Pakistan,1973
[76] Hamilton's Hedaya, Vol. 1 Book IV, chp. 10, p. 26, see pg. 201 of QSO, 1984 (revised edition 2018) by M. IQBAL (PLD publishers).
[77] Hamilton's Hedaya, Vol. 3 book, 24, chp .5, p. 426
[78] Baillie, book 3, chp 10, p 334, 336
[79] PLD 1995 Pesh. 124

cannot be established from a lawful nuptial of parents at the time of conceiving of nativity child but an acknowledgment of the legitimacy of a child only descent from his father[80]. Under Sunni law, the acknowledgment or sonship is only established by the father with the entire debarred of the mother or all other relatives. In a case, where no prima facie evidence of nuptial is accessible and paternity is also not established, in this scenario Muslim law prescribes a method through which marriage and paternity are established as a "substantive law for purpose of inheritance" and this is an acknowledgment of paternity[81]. Where prima facie evidence of marriage is accessible then the question of acknowledgment does not arise.

15 Conditions for valid acknowledgment:

There are some conditions for valid acknowledgment which must have to fulfill-

- **Express or implied;**
  The acknowledgment is not necessary to present only in express form but also present in implied form. It may be implied when a father habitually treated someone as his child or his conduct towards the child, is considered his legitimate child[82](Mohammed. Azmat vs. Lalli begum).
- **Age;**
  There must be an age gap between the acknowledger and the acknowledged person. The age of the acknowledger is such that he is admitted as a father of a child[83](Habibur Rehman vs. Altaf

[80] See the p. 470 of D.F Mullah Principles of Mohammedan Law (Pakistan edition)
[81] M. Allahdad khan vs. M. Ismail khan (1887)
[82] (1831) 91.A..8,18,8 Ca.422
[83] (1921) 48 I.A. 114, 120-121

Ali). The age of the acknowledger must be 12 ½ elder than the person acknowledged[84].

- **The intention of legitimacy;**
  There must be an intention of a legitimate son but not merely sonship. The acknowledgment of merely a sonship has no evidentiary value[85](Usmanmiya vs. Valli Mahomed).
- **Competency;**
  Acknowledger must be a competent person. It means he can make a contract, sound, and sane mind person.

- **Revocation;**
  The acknowledged person revokes the acknowledgment when he understands the terms and conditions of the transaction performed.

16 Case laws on paternity-

A child begotten within 6 months of a valid marriage is a lawful child under Shariah law[86]. When the legitimacy is inferred from surrounding circumstances, the court is reluctant to declare a child bastard and generally refused to admit legitimacy[87]. A newborn is begotten during a valid marriage; the father cannot supplant false allegations of legitimacy to avoid the liability of paying maintenance to his child[88]. A child born within 229 days (approximately seven and half months) of husband's coitus, and child appearing mature and full term, illegitimate[89]. To resolve

[84] Baillie, 411
[85] (1916) 40 Bom.
[86] PLD 2003 Lah 264
[87] PLD 1976 S.C 767 (p.775)
[88] 1997 MLD 142
[89] PLD 1950 P.C. 75

the problem of the paternity of a child conducting of blood test is admissible[90].

17 Conclusion:

According to Muhammadan law, the child only considers legitimate if born from a valid wedlock and all the conditions of a valid marriage are fulfilled by the parents. But on the paternity of child schools of Islamic law has differently opined. Under Mohammedan law, the presumption on the legitimateness of a child is if the infant is begotten within 6 months of nuptial (180 days) or born within 2 years after the separation, although, Islamic law could not consider the child illegitimate on the bases of premature birth or born the usual delay of two years. Scholars have differently opined on the delay of birth of a child. Because Islam is in favors of legitimation rather than stigmatization. The other perspective is our local law which is Ar.128 of QSO,1984 which considers the birth of a child as conclusive proof, it gives no leniency in the premature birth of a child. If the infant is born in a prescribed period that is mentioned under Ar. 128 then consider a legitimate child otherwise, the husband has a right to disown the child to get rid of the maintenance and inheritance shares. This a huge drawback in legislation that considers this provision of law irrebuttable and there is a dire to amend and made leniency on this presumption of law.

[90] 1994 PSC (Cr) 864

MEANINGS, CATEGORIES, FUNCTIONS AND STRUCTURE OF PRESUMPTIONS: A CRITICAL ANALYSIS OF PRESUMPTIONS IN QANOON-E-SHAHADAT ORDER 1984

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Abstract; The goal of the current study was to investigate the definitions, categories, purposes, and structures of presumptions in common law before using this information as a conceptual framework to examine presumptions in Qanoon e Shahadat (hereinafter QSO). After conducting a doctrinal analysis, the current study discovered that presumption in common law is seen as a legal principle that permits courts to reach particular decisions based on a set of established facts. The structure of presumptions in the common law evidence process has also been studied using a variety of categories, methods, and techniques. Similar to this, the study discovered four key roles of presumptions, four distinct techniques to Analyse the structure of presumptions in QSO, and five categories of presumptions. It is envisaged that the current study may aid in Pakistan's proper comprehension and implementation of presumptions in the legal system.

INTRODUCTION; One of the key duties that courts are expected to perform is the resolution of the conflicts before them. By establishing the facts in the cases, the courts carry out their duty. The courts can derive conclusions regarding the facts at issue thanks to these

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established facts. Also, the law of evidence study looks at how disputed facts are established in legal proceedings because facts are typically established through the use of evidence. The law of evidence discusses a number of different methods, and presumption is one of them. In common law countries, the term "presumption" refers to a conclusion that, up until the contrary is established, may or may not be inferred from a specific collection of facts. When there is minimal knowledge about particular facts or when judgements must be taken in the face of uncertainty, it is regarded as the second-best way of proving facts.[91]

Moreover, the term "presumption" refers to circumstances in which formal proof of certain facts is not necessary. It is a creation of judges that has been crystallised in the rule of law.[92] Presumptions are also considered by some researchers to be a component of substantive law. Presumptions serve three key purposes in legal proceedings: first, they cut down on the amount of proof that isn't necessary; second, they make it simpler to prove certain facts that would otherwise be difficult to establish; and third, they exempt or redistribute the burden of proof.

Despite the crucial roles that presumptions play in the proof process, many scholars believe that the word "presumption" in common law is vague because it has been used by the legal community in a variety of contexts and for a wide range of objectives. Additionally, judges, attorneys, and legislators refer to it by various names; sometimes it is considered a rule of substantive law, others

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[91] Hohmann, Hanns. "Presumption in legal argumentation: from antiquity to the middle ages." (1999).

[92] McCormick, Charles T. "Charges on Presumptions and Burden of Proof." *NCL Rev.* 5 (1926): 291.

accommodate it in procedural law, others believe that it is a component of pleadings, while others think that it is a statement of natural probability.[93] The debate over the definition of presumption is pointless because it is the result of academic confusion.

Presumption, he continued, can refer to a variety of evidentiary choices, and he urged the researcher to look into the issues raised by their use.[94] It is crucial to note that the presumption topic only pertains to factual concerns, not legal ones.

Due to its significance and inherent ambiguity, presumption has been the subject of debate in a large amount of literature. Its meaning, types, purposes, and structure are all ambiguous. These presumption dimensions have been explored by various analysts, but the literature reveals disagreements between the researchers. The QSO contains numerous clauses that address presumptions. When courts must or may make presumptions is covered by Article 2 SubArticles 7, 8, and 9. The types of papers and presumptions that the courts may or must draw are listed from article 90 to article 101. Regarding the definition, structure, kinds, and roles in the proof process, QSO is silent. Additionally, there is a dearth of study on the meaning, categories, and uses of presumption in QSO. The current research seeks to close this gap while taking all of this into consideration. The current study's research questions are as follows: How is presumption described in the literature? What varieties are there? What different roles does it play? What constitutes an assumption in a QSO, specifically, and in general? To

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[93] Subrin, Stephen N. "The Limitations of Transsubstantive Procedure: An Essay on Adjusting the One Size Fits All Assumption." *Denv. UL Rev.* 87 (2009): 377.

[94] Allen, Ronald J. "Evidence: Text, Problems, and Cases, 852, trans. Baosheng Zhang et al." (2006).

answer the research questions listed above, the authors of the current study used a doctrinal approach. The current study will provide clarification on the definition, categories, purposes, and organization of presumptions as they are used in QSO. This explanation will make it easier to employ presumptions correctly in Pakistan's proof-process.

In addition to the introduction, the current research is divided into three main Articles. The definition, types, purposes, and structure of presumption in common law nations are covered in the second part. The third part examines how presumption can be defined in terms of QSO and how different presumptions can be grouped according to their types, purposes, and structures. The conclusions of the current research are discussed in the final Article.

19. Meanings, Structure, Categories, and Functions of Presumptions

By creating a conceptual framework to examine how presumptions operate in QSO, the Pakistani law of evidence, and this Article aims to respond to the first three research questions of the current study. The main goal of this Article is to gain a deeper grasp of presumptions, their nature, types, and functioning in common law nations, particularly in the United States of America and the United Kingdom. There are four subArticles within this part. Presumptions are defined in the first part, their structure is covered in the second, categories are covered in the third, and their roles in common law are examined in the final Article.

20. What is Presumption?

This Article is dedicated to defining presumptions in law. To do this, the authoritative literature from the fields of law, artificial intelligence, and law is consulted

and studied. To start, it must be acknowledged that the extensive literature on presumptions in common law nations does not contain a generally acknowledged definition.[95] It may be because this word has been mired in misunderstandings and controversies, making it the most ambiguous term in the law of evidence.[96] The following paragraph, however, discusses a few definitions of presumptions in order to further the concept.

A legal inference or assumption regarding the presence of a fact based on other known or proven facts regarding the existence of another fact or combination of facts is described as a presumption in Black's Law Dictionary. "Presumption is a rule of law that requires courts and judges to draw a particular conclusion from a specific fact or a specific piece of evidence, unless and until the truth of such inference is proven," wrote Stephen (1876). (p. 4). In his response to Stephen's definition, making a distinction between the presumption and allowed inferences rules. He noted that a rule of presumption not only indicates that such and such is a legal and usable inference from other facts, but it also adds that this significance shall always be ascribed to them in the absence of additional facts, the speaker said.[97]

Presumption is a legal principle that is set by judges and gives an evidentiary fact a particular procedural impact. Presumptions, he continued, alter the weight of proof that parties must meet. Presumptions as a legal principle that necessitates coming to certain conclusions

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[95] He, Jiahong. *Methodology of Judicial Proof and Presumption*. Springer, 2018.

[96] McCormick, Charles T. (2013). McCormick on evidence. Ed. Kenneth S. Broun et al. 7th ed. St. Paul, Minn.: Thomson Reuters/WestLaw.

[97] Thayer, James Bradley. *A preliminary treatise on evidence at the common law*. Little, Brown,, 1898.

when certain facts are established and undisputed. The belief that presumptions are those inferences about the presence or absence of any fact that are made after some fundamental facts are established. Presumption refers to the practise of holding onto a conclusion up until evidence of the opposite is presented. He continued by saying that such inferences could be reached both when certain preliminaries facts are proven and when preliminaries are not established.

He views presumptions as legal principles that permit courts to make certain deductions when certain facts are established. presumption is a prescribed process where certain facts are thought to require uniform treatment with regard to their impact as proof of other facts. Presumptions are a collection of guidelines that govern the inferential process of proof. These guidelines are predetermined, clear, and they establish legal ties between established facts and some other facts that are presumed to be established.[98]

Presumptions, he continued, show an inferential relationship between proven and presumed truth. Presumptions have been defined by a number of academics from the fields of artificial intelligence, law, and argumentation theory, as well as by legal scholars. The presumption is a tool that shifts the weight of proof back and forth between the parties. Similar to this, believe that presumptions are non-monotonic logic's default principles. It is significant to note that the word "presumption" has not been defined in the QSO; however, presumptions are covered in article 2 sub-articles 7, 8, and

[98] Pauwelyn, Joost. "The Role of Public International Law in the WTO: How far can we go?." *American Journal of International Law* 95, no. 3 (2001): 535-578.

9. These articles merely outline the conditions under which courts may, will, and must make inferences.

The scope and nature of the thirteen definitions of presumption listed in the previous sentence differ. The following similarities between these meanings may be noted, though. First and foremost, presumptions are legal rules; second, these rules of law occasionally require or occasionally give the courts the discretion to draw particular inferences in particular circumstances; third, the inferences will be drawn when basic facts have been proven with evidence; fourth, these inferences can be rebutted except in a very few cases; and finally, presumptions is a method to adjust the burden of proof. In order to continue the debate, the presumption may be defined as a legal principle that requires courts to derive particular conclusions from specific proved facts, which may occasionally be refuted and occasionally.

21. Structure of Presumptions

This Article looks at the literature on the structure of presumptions after examining the different definitions of presumptions in common law nations.[99] Numerous researchers and analysts have suggested a variety of methods to analyse the structure of presumptions. These ideas can be divided into the four groups below.

The probability between presumption raising facts, also known as basic facts, and presumed facts can be used to analyse the structure of presumption. The term "basic facts" refers to those facts that must exist before certain other facts can be presumed, while the term "presumed facts" refers to those facts that are assumed to exist once the main facts have been established, the structure of

[99] Avelino, Flor, and Jan Rotmans. "Power in transition: an interdisciplinary framework to study power in relation to structural change." *European journal of social theory* 12, no. 4 (2009): 543-569.

presumption usually resembles that of an argument from probability. According to him, the drawing of a presumption will be justified if there is a high probability between the presumption raising facts and the assumed facts.

Generally speaking, presumptions have empirical support, he continued, but judicial presumptions can be either empirical or non-empirical. This argument makes the case that one can legitimately assume a fact in law based on another fact if there is empirical or no empirical probability to support the assumption. Second, according to a number of researchers, the structure of presumption can be examined using the premise-conclusion test and by considering whether the presumpted truth can be refuted. For instance, contends that legal presumptions are rebuttable, meaning that conclusions reached may be retracted if new information emerges that indicates the validity of those conclusions.

Thirdly, some researchers have suggested considering presumption as an inference and examining its characteristic patterns in order to examine the structure of presumption. Presumptions, are inferences that consist of three elements: presumption raising facts, presumption formula, and assumed facts. According to her, the conclusion is a statement that is assumed to be true based on (1) and (2), the presumption raising facts are those facts that provide grounds to presume certain facts (these are known as basic facts in legal terminology), and the presumption rule is a defeasible rule that allows the transit from the presumed fact to the conclusion. Fourth, numerous analysts have examined the structure of assumption by examining the connection between fundamental.

For instance, the antecedent and the consequent make up the building block of an assumption. The consequent is a statement of assumed facts that are drawn when the conditions outlined in the antecedent occur. The antecedent specifies the conditions for drawing presumptions. The circumstances stated in the antecedent must also be proven with evidence and in accordance with the necessary legal standard of proof.

To analyse the structure of presumptions, QSO provides some guidelines in article 2 sub-articles 7, 8, and 9. For instance, article 3(7) states that a court may either seek proof of the fact or may consider the fact proven until it is refuted when it is permitted to presume a fact in accordance with this order. Additionally, sub-article 8 states that whenever a fact is required to be presumed by this order, the court shall take that fact as proved unless and until it is refuted. In a similar vein, Article 9 states that the court shall take the other fact as proved upon proof of the first fact when the order (QSO) declares one fact to be conclusive proof of another.

22. Categories of Presumptions

The different categories of presumptions that can be found in the literature are described in this Article. It is significant to note that various researchers have employed various terminologies for categorising presumptions, and the following six classes have been determined based on the fundamental principle of such classification.

The opposing presumptions are the first in this list. Presumptions that contradict one another are those that could be true for both sides. Furthermore, the presumptions in such presumptions are in conflict with one another. The main fact in such hypotheses has no probability value. The courts have a variety of choices for how to handle these presumptions. The judges may select

one presumption by favouring it over another or they may erroneously believe that competing presumptions have been debunked. Some researchers have found that judges chose the latter alternative in such circumstances. However, American Federal Rules of Evidence stipulate that in these circumstances, judges will opt for the stricter presumption.[100]

In the second category of presumptions, known as conclusive presumptions, the courts must infer certain conclusions that cannot be refuted by the introduction of new proof. According to some researchers, the statutory definitions of offences are actually conclusive presumptions. It is crucial to note that some researchers do not consider these legal principles as presumptions.

The third type of presumption is the presumption of fact, which refers to inferring the presence or absence of a fact based on another fact that has been proven without using a legal standard. According to some researchers, such presumptions enable for the use of common-sense reasoning to draw conclusions, and they are not laws. Although the court has the discretion to draw such a presumption or reject it even when the main facts have been established, it is up to the court to do so.

It is crucial to emphasise that this is a contentious presumption group in the literature. According to some experts, the courts should stop using presumptions of fact because they are invalid. For instance, There are no presumptions of truth and that all presumptions are those of law. The assumption of law, also known as the mandatory presumption, belongs to the fourth category of presumptions. These presumptions mandate that the judges infer a specific conclusion from a specific fact.

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[100] Ullman-Margalit, Edna. "On presumption." *The Journal of Philosophy* 80, no. 3 (1983): 143-163.

These presumptions are artificial constructs of law that may or may not follow a specific legal rule or be rational. In most cases, presumptions of law are established in consideration of public policy, for convenience, to prevent a predicament, or to compel a litigant with easy access to more information. While bearing in mind the distinction between fundamental fact and presumed fact, scholars usually distinguish presumptions of law from presumptions of fact. For instance, notes that the presumptions of law are established legal principles that call for deducing a particular legal conclusion from a particular fact. On the other hand, presumptions of fact are logical arguments derived from the particular case's conditions that rely on their own inherent strength rather than any specific legal principle

Similar to this, some analysts contend that while presumptions of truth are based on any type of probability or experience, presumptions of law are based on legal doctrine or the rule of law. For instance, although both the presumption of law and the presumption of fact are based on the same probability, they vary in that the former is based on the law's rules or policies, while the latter is based on experience. It is significant to note that a logical link between the main facts and the presumed facts is necessary for the presumption of law to be justified.

23. Functions of Presumptions

This segment deliberates on the various capabilities which presumptions discharge in the technique of proof. Various researchers have mentioned numerous features of presumptions which may be accommodated in four subject matters: capabilities related to proof, burden of evidence, connections between facts and resolving a impasse.

As some distance because the features of presumptions concerning evidence is concerned,

presumptions may discharge capabilities. Firstly, presumptions come into play to tackle the issues of insufficient proof. When there is proof approximately a particular truth but this evidence is inadequate because of its failure to satisfy the desired general of evidence, presumptions offer an additional premise which comes over the insufficiency. Secondly, presumptions are used to deal with scenario when there may be no proof about a specific fact. It is essential to highlight that presumption is considered as a device in good judgment, philosophy and argumentation concept to fill positive gaps in know-how.

The same is the case in judicial trials wherein presumptions permit presuming the existence of specific reality about which there is no evidence. Similarly, insofar as the presumptions within the context of burden of proof are worried, it is believed that presumptions allocate and regulate the load of persuasion and production of evidence.[101] Continues that drawing presumptions supportive of 1 birthday celebration mean that the load of persuasion is shifted on different celebration. Likewise, presumptions alter the moving of the burden of persuasion. By pointing out that the presumption of legitimacy establishes that a child born for the duration of the validity of the marriage is the kid of the husband, demonstrated this argument.

This presumption makes the father who contests the paternity of a toddler born or conceived all through marriage liable for persuading the court of his innocence. On the identical line of inquiry, presumptions additionally decide the weight of manufacturing of evidence in judicial

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[101] Piotrowski, Suzanne J., and David H. Rosenbloom. "Nonmission–based values in results–oriented public management: The case of freedom of information." *Public Administration Review* 62, no. 6 (2002): 643-657.

trials. It with an example. He made observe of the truth that a letter that has been nicely addressed, stamped, and mailed is thought to had been duly introduced to the addressee unless the birthday party towards whom the presumptions function introduces evidence displaying the letter became no longer obtained. This shows that how presumptions shift the load of evidence and this moving hinge on the probability of the linking among primary facts and presumed information.

Thirdly, presumptions are used to make clear the hyperlink between records; the number one information and the presumed facts. When the fundamental information are proved according to required fashionable of legal evidence, the existence of presumed statistics is deemed to be true by an regular procedure of reasoning and presumptions makes clean the connection between them. In addition, presumptions authorize courts to deduce that presumed records exist if life of primary records has been proved. The court docket will deal with presumed information as genuine till opponent birthday party produces proof to prove the non-existence of presumed information (Morgan's analysis).

Finally, presumptions are used to cast off a deadlock. Presumption on this experience is just a rule of selections based on justice and policy. He illustrated this with the aid of bringing up an example of survivorship. He explained that once there may be a question of survivorship of someone and there's no evidence approximately existence of that person, presumption resolves this issue by way of permitting courts to anticipate life or dying of that person specially occasions.

24. Structural Analysis of Presumptions in Qanoon e Shahadat

This Article aims to examine the presumptions in QSO after creating a conceptual framework in the previous Article. It is crucial to emphasise that the fourth research question of the current study will be addressed in this part. There are seven subArticles in this part that cover different facets of QSO presumption.

25. Types of Structure of Presumptions

From structural factor of view, there are four styles of presumptions in Qanoon e Shahdat namely presumptions having fundamental truth-presumed truth structure, presumptions having operative component-simple factpresumed reality shape, presumptions having basic reality-presumed reality-restrictions structure and presumptions having no basic reality-no presumed reality-just guide strains shape. These 4 types of shape of presumptions are mentioned within the following lines.

The commonplace shape of presumptions found in QSO is "primary fact-presumed truth" structure. This shape makes it important that the primary statistics should be proved in courts before requiring them to expect the lifestyles of presumed fact. The working mechanism of such presumptions is quite simple; the basic facts have to be installed first after which the courts will draw precise inferences provided within the identical article. For instance, article 92 affords that every report purporting to be a report directed via law to be kept by using any individual and to be kept in a specific form and if it's far shown that it has been stored in the identical manners, the court docket will presume that the file is true.

In this text, primary facts include, report, prison requirement to preserve it in a selected form, and its keeping within the given form are the number one information. Similarly, the realization that it's far actual is a presumed fact. The 2d type of shape of presumptions in

QSO is “operative part-simple reality-presumed reality” shape. This kind of shape is observed inside the presumptions underneath the weight of proof. Such presumptions have three step running mechanism; the primary element affords the state of affairs when such presumptions can or can be drawn, the second one part provides primary facts and the 1/3 element gives the particular inferences that can or may be drawn.

For instance, Article 126 of the QSO states that the burden of demonstrating that a person is not the owner of something of which he is proved to be in ownership falls on the individual that makes the affirmation that he isn't the owner. In this text, “when the query is whether someone is proprietor of something” is operative element which affords that below what circumstances the presumption may be drawn. Similarly, the words “of which he is shown to be in ownership” is the element which affords the fundamental reality and the phrases “the load of proving that he isn't the owner on that individual who affirms that he isn't always the owner” is the presumed fact.

Likewise, the 0.33 type of shape of presumption is “basic fact-presumed truth-confined inferences” structure. The operating mechanism of such presumption is likewise primarily based on 3 steps; first the primary statistics must be shown, secondly, sure inferences are to be drawn and thirdly positive inferences are forbidden to be drawn from the basic facts. For example, in keeping with article 98 of QSO, the court may additionally count on that a message despatched from a telegraph office to the individual to whom it's miles meant equates with a message brought for transmission at the workplace from which it changed into despatched. However, the court docket shall not presume

something regarding the identification of the person who introduced the message for transmission.

In this text, messages sent from a telegraphic office to a particular person are the number one data. Similarly, the conclusion that message added from telegraphic office corresponds with the messages acquired is the presumed truth and the phrases "however the court shall not make any presumption as to the character via whom such message was added" is the prohibition on court now not to draw this inference. The fourth sort of structure of presumptions in QSO is "no fundamental truth-no presumed fact-simply pointers" shape.[102] The operating mechanism of this sort of presumption is quite simple; such presumption does now not provide any fundamental reality, presumed reality or restrained inferences instead it simply offer pointers to attract inferences from diverse facts. Article 129 of the QSO, as an instance, states that the court docket may presume the lifestyles of any reality that it believes is in all likelihood to have took place, contemplating the standard collection of natural occasions, human behavior, and public and personal commercial enterprise, with regards to the information of the specific case. This article only gives guidelines to make inferences as opposed to imparting any primary facts or presumed fact.

26. Categories of Presumptions

The gift observe identifies five exclusive categories of presumptions in QSO which include presumption of fact, presumption of law, combined presumption, rebuttable presumption, ir-rebuttable presumptions and conclusive presumptions. It is pertinent to highlight that the diverse studied referred to in 2d Article makes use of

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[102] Lambek, Michael. "Living as if it mattered." *Four lectures on ethics: anthropological perspectives* (2015): 5-51.

one of a kind criterion to distinguish presumption of law from presumption of fact. According to this research, the criterion to distinguish presumption of regulation and truth involves the utility of logical or felony guidelines. However, the criterion of presumption of law and truth is distinct and quite easy in QSO.

In QSO, presumptions of records are denominated by using the phrases “may presume” (article 2 (7). There are six articles in QSO which bestow discretion upon judges to attract or not to draw specific inferences from proved number one statistics. For example, Article ninety-seven states that the Court might also count on that any e-book it consults for information on subjects of public or preferred hobby and any published map or chart, the statements of which might be relevant statistics and which can be produced for its inspection, have been created and published via the character, and at the time and location, through whom or at which it purports to had been created or published. On the equal line of inquiry, presumption of regulation, in QSO, are those presumptions which QSO requires the judges to draw (article 2 (eight)).

The legal provisions containing presumptions of law use the word “court shall presume”. There are seven presumptions in QSO which require the judges to draw unique conclusion when number one information are mounted. For instance, Article ninety-two specifies that if a record is kept basically in prison shape and is constructed from proper custody, the Court will conclude that it's far a actual report. The third category of presumptions in QSO is rebuttable and irrebutable presumptions. It is crucial to point out that both types are dealt with as presumption of regulation under QSO. However, there's essential distinction among these presumptions. In case of rebuttable presumption, the opponent party can adduce the

proof but in case of ir-rebutable presumption the right to adduce evidence to dispel the realization is not allowed. In these articles, the words conclusive evidence has been used. According to Article 128 for example, a infant born all through the continuation of a valid marriage shall represent conclusive evidence of legitimacy.

This article does no longer permit adducing proof to disclaim this truth. On the opposite hand, rest of the prison presumption is rebuttable (article 2(eight). Similarly, the fourth category of presumptions in QSO is conclusive proof. There are conclusive presumptions contained in article fifty five and 128 of QSO. Conclusive presumptions have a unique effect that these presumptions do not permit to rebut the inference as discussed inside the above paragraph. Likewise, the fifth category of presumptions in QSO is mixed presumptions. Mixed presumptions are the ones presumptions which can be each presumption of regulation and fact. There is most effective one instance of combined presumption and that is determined in article 98. In this article states that the preliminary presumption is presumption of truth because the words "courts might also presume" had been used; whereas the limit to attract targeted inference is presumption of law due to the fact the phrases "courts shall now not presume" have been used.

27. Subject Matter of Presumptions

After thorough exam of all of the provisions of QSO, the existing study has recognized fifteen concern matters approximately which courts may additionally or shall draw presumptions. These subject matters include national or foreign laws, country wide or overseas judicial decisions, judicial report, certified copies, reference books, telegraphic messages, documents, strength of lawyer, certificate, expectancy of a person's existence,

dating between precise people, possession of assets, top faith in transactions among precise human beings, legitimacy of toddler, and herbal course of enterprise of the whole lot. The first theme or issue be counted of presumption is the legal guidelines of Pakistan and overseas United States.

For example, Article ninety-four states that the court shall infer the authenticity of any record containing laws of Pakistan or any other foreign U. S. That is posted with the consent of that country. Similarly, the second difficulty matter of presumption is the judicial decisions of Pakistani and overseas courts. For instance, under article fifty-five, the courts ought to draw a presumption regarding the precise juridical selections of specific Pakistani courts. Similarly, article 94 deals with the presumptions approximately foreign courts. Likewise, the 1/3 concern matter of presumptions is licensed copies. There are diverse articles in QSO which either authorizes or required courts to draw presumptions regarding certified copies and those licensed copies relate to vintage files (article 101), about any Pakistani report (article ninety), judicial report of overseas courts (article ninety six), reference e book for Pakistani courts (ninety seven), telegraphic messages (ninety eight), files which aren't produced (ninety nine), thirty years vintage files (one hundred), strength of attorneys (ninety five) and certificate (ninety). Similarly, the courts are certain to draw presumptions about a man’s life (123,124), dating between unique humans (125), ownership of belongings in a man’s ownership (126), appropriate faith in transaction among specific human beings (127), legitimacy of a baby (128), and about any two data which might be related with each other on herbal chance (129).

28. Nature of Presumed Facts

Similarly, a more in-depth examination of various provisions of QSO managing presumptions famous that there are twenty distinct difficulty topics of the presumed facts. The analysis indicates that the topics of the presumed facts are genuineness of documents or licensed copies (ninety one, ninety two, 94, ninety six), due execution of files (95, 99), due authentication of files (95), authenticity of files (96), authorship of books, date, time and place of booklet (ninety seven), transmission of telegraphic message (ninety eight), due attestation, signature and stamping (ninety nine), legit individual of attesting officer (90), and reality of occasions in which a selected report was prepared (91). In addition, the exam suggests that the problem depend of presumed facts includes compliance with the given criminal technique (ninety-one), and accuracy of certain files (ninety-three). Similarly, the courts might also or can presume the continuity of guy's life (123), his dying (124), continuation of dating among unique men and women (one hundred twenty-five), ownership of property (126), absence of good religion in transactions among specific humans (127), legitimacy of a baby (129) and conferring or eliminating criminal individual under unique jurisdiction (55).

29. Explicitly and Implicitly Presumed Fact

The structural exam of all of the provisions dealing with presumptions in QSO also indicates that a few provisions expressly offers the presumed reality and a few provisions do now not offer the records which the courts may or have to presumed. In case of later provisions, one has to pick out the presumed reality hidden inside the provisions. For instance, article ninety specifies that the court shall expect the authenticity of these files which can

be noted within the same article. In this article, the character of presumed reality is expressly supplied in the article. However, in step with Article 126, the individual that asserts that someone is not the proprietor of something over which they may be verified to be in ownership is needed to offer evidence to guide their declare. The presumption that the court will make isn't always said in this newsletter; as a substitute, it is implied that the court will assume that the man or woman is the property's owner.

30. Logic-Legal Rule behind Presumptions

Similarly, the structural evaluation of the presumptions in QSO shows that each one the presumptions, besides one, contain the software of a selected felony rule to draw presumptions. The best exception to this precept is article 129 which requires the judges to apply their personal revel in and probability to draw presumption and this liberty isn't given in other provisions of QSO dealing with presumptions.

31. Functions of Presumptions

The evaluation of various articles of QSO suggests that presumptions discharge four features in the procedure of proof and these are mentioned within the lines beneath. Firstly, presumptions are useful in organising matters that are almost not possible to show in courts due to elapse of considerable time or some other cause acceding to the specified trendy. When considerable time has been elapsed and it's miles important to establish positive records came about at some stage in that time, the courts are in a tough function as their ordinary proof is tough to accumulate. The presumptions come into motion in such situations and bring the courts out of this extraordinary situation. An illustration of this function is article one hundred. The article states that the courtroom may

additionally presume attestation, executions, signature and handwriting in such files as real, genuine and duly execution. Monir factors out that it's miles hard and occasionally not possible to prove the handwriting, execution, attestation or signature in antique documents after the elapse of a few years and this article brings the courts out of this case.

Similarly, sometimes a few records like mental state of mind are hard to prove and presumptions assist the courts in such conditions.[103] For example, Article 122 specifies that the onus of proof is with the celebration who has special expertise of the fact being in dispute. Secondly, presumptions discharge the characteristic of maintaining intact the popularity quo. For example, article 126 states that once the courtroom has to remedy the query that whether any man or woman is the owner of a particular assets or no longer, the court will count on that someone is the owner in whose ownership the property became at the time when the matter become brought earlier than the court. Thirdly, the evaluation of QSO suggests that the presumptions are used in QSO to shift the burden of evidence within the method of evidence. For instance, Article 127 stipulates that after a party to a transaction questions the other's true religion while one of became in a role of active self-assurance towards other. The birthday party who is in an lively function of confidence has the obligation of demonstrating the coolest religion of the transaction. The presumption in this text shifts the weight of proof on the birthday party who changed into in a position of active confidence. Lastly, a few presumptions in QSO paintings to offer finality to positive topics and these presumptions in QSO are called conclusive proof.

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[103] Farber, Daniel A. "The originalism debate: A guide for the perplexed." *Ohio St. LJ* 49 (1988): 1085.

For instance, when the courts draw the presumption of legitimacy underneath article 128, the opponent party will now not allowed adducing any proof to rebut this presumption. So, this presumption offers finality to the legitimacy of child.

32. CONCLUSIONS

The above dialogue leads to the following six conclusions concerning presumptions in not unusual regulation nations. Firstly, presumption in commonplace regulation countries is a rule of regulation which authorizes courts to draw certain inference when a few specific information were installed. Secondly, now and again courts are required and sometimes courts have the discretion to draw or no longer to attract such inferences. Thirdly, the celebration in opposition to whom presumptions have been drawn normally has the right to adduce proof to rebut the impact of presumptions. Fourthly, the presumptions in not unusual law nations are categorized into presumption of regulation and truth, rebuttable and irrebutable presumptions, conclusive and conflicting presumptions. Fifthly, presumptions shift and allocate burden of production of proof, and burden of persuasion. Similarly, presumption brings out the courtroom out of hard situation like when there may be no or insufficient proof or whilst positive statistics are hard to prove. Sixthly, there are 4 techniques to examine the shape of presumptions in statutes. On the same line of inquiry, the following principal conclusions can be drawn concerning presumptions in QSO. Firstly, QSO acknowledges 5 classes of presumption namely presumption of reality, presumption of law, conclusive presumptions, rebuttable and irrebutable presumptions. Secondly, presumptions in QSO discharge 4 functions particularly, allocation of burden of proof and persuasion, decision of deadlock and evidence of such records which can be not possible to set up. Thirdly, the shape of presumptions

in QSO can be analyzed through 4 methods namely by using searching into fundamental reality-presumed truth, operative element-simple fact-presumed fact, basic reality-presumed fact restrictions clause and no fundamental fact-no presumed reality-simply pointers.

AN ANALYTICAL STUDY OF PRIVILEGED COMMUNICATIONS UNDER QANUN-E-SHAHDAT ORDER 1984

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Abstract; A confidential statement that must be kept secret by the recipient for the benefit of the communicator is referred to as privileged communication. A privileged communication is not admissible as evidence in court, even if it is pertinent to the case. Privileged communications are contentious because they omit crucial information from the pursuit of the truth. The regulations that govern civil and criminal trials are typically created to permit the inclusion of pertinent evidence. In most cases, the information necessary to produce a just outcome in the case is available to the parties. Exceptions to this rule include communications that are privileged. Because society prioritises the secrecy of some interactions or their intended purpose, privileged communications are common. Wife and husband conversations, clergy communications, and patient communications with a therapist are among the established private communications.

KEY WORDS; Communication privilege, QSO 1984, Qualification for confidential interaction.

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INTRODUCTION; Evidence is crucial to a trial because it aids in drawing conclusions and delivering verdicts. Evidence may be provided orally, in writing, or electronically. Any event that a witness has seen or heard can be the subject of his testimony. A protected communication is one that cannot be used as evidence. As privileged communications, these are confidential discussions that a witness cannot be forced to reveal even if they relate to important facts are referred to as privileged legal communications. A witness cannot be compelled by the court to reveal such encounters. A privilege is a legal principle that shields communications between specific parties from being forced to be revealed in court. The attorney-client privilege is one such privilege that has been in existence for a long time and is applicable in all legal contexts. Correspondence between an attorney and a client made with the intention of receiving legal counsel may not be divulged without the client's agreement.

33. CATEGORIES OF PRIVILEGED COMMUNICATION:

Qanoon-e-Shahadat Order,1984 has apparently dissected privileged communications in two ways as communications under privileged from disclosure and communications which are prohibited to disclose at all. Confidential interactions which are privileged from disclosure are at discretion of parties and may be disclosed with their consent. However, the prohibited communication are at bar from being revealed. All such types of communications are found under article 4 through 12 of QSO,1984.

These articles manifest the necessity of protective provisions that are laid down for public purposes and for the benefit of counsel. However, they can be waived and

may not remain under privilege if they fall under exceptions enumerated by law.

Privileged communication is described as statements made by individuals within protected relationships (such as a husband and wife or an attorney and a client) that are shielded by the law from being made public during testimony. There are three main sorts of privileges:

Absolute—prevents the defendant or the court from looking into any communications or records of communications that take place between a victim and a qualifying service provider in support of psychological and emotional healing.

Absolute diluted: A privilege that was first granted as absolute but was later modified by a court to permit an in-camera (in chambers) assessment of the spoken communication or the documents. A court will typically weaken an absolute privilege out of concern that the defendant will lose their right to due process.

Qualified: A judge or administrator may decide to conduct an in-camera review to decide whether the details contained in the secret communication will be utilised as evidence in the hearing, if the privilege is applied as written.

34. QUALIFICATIONS OF PRIVILEGEDCOMMUNICATIONS:

It is crucial to remember that the following conditions must be met for any communication to qualify as a privileged communication:

A protected legal connection should exist between the parties communicating.

The discussion should be held in private.

As the privileged status terminates when the information is disclosed to a party who was not involved

in the contact, the information communicated cannot be exposed to a third party. The communication between the two parties must take place in a private venue, such a meeting room, where they have a reasonable expectation that others won't overhear them in order to maintain the relationship's confidentiality.

35. SELF RESTRAINING PRIVILEGE:

[104]A judge or magistrate may use the limited privilege set forth in Article 4 of the Qanun-e-Shahadat to speak about their own actions while serving as a judge or magistrate or to speak about anything that comes to their attention while serving in that capacity. The usual rule that a witness must tell the complete truth and produce any document in his or her possession that is pertinent to the topic at hand is disregarded by this rule. Some information is protected from disclosure due to public policy considerations, and witnesses cannot be forced or allowed to respond to inquiries about such information. Articles 121 to 131 of the Evidence Act, 1872 (formerly Articles) specify certain topics on which witnesses are exempt from questioning.Although the court will have to determine whether the communication was made in confidence, the public officer in question has been designated as the sole arbiter of whether the public interest would be jeopardised by disclosure. According to this Article, a Judge or Magistrate may not be ordered to produce a document or provide an explanation regarding: his conduct in Court as such Judge or Magistrate; or anything that he learned in Court while serving as such Judge or Magistrate, unless the Court to which he is subordinate so orders.[105]The witness, who is the Judge or Magistrate to whom the inquiry is made, is granted the privilege by this Article. He

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[104] PLD 1960 lah 1189

[105] (1881)3 AI 573J

cannot use a false statement to claim a privilege if he waives it or does not object to answering the question. A Committing Magistrate cannot be compelled to answer questions about his own actions in court as such a magistrate by a Sessions Judge while the matter is being tried.[106]Every pertinent evidence the Arbitrator can provide is legitimately admissible in cases where there is an accusation of dishonesty or partiality. Nonetheless, care must be taken to ensure that any relevant evidence permitted in response to a claim of dishonesty or bias is not exploited for an unrelated purpose.

36. THE SPOUSAL COMMUNICATION PRIVILEGE:

The rule established by this Article is based on the obvious presumption that the admission of such testimony would strongly tend to disturb family harmony, encourage domestic disputes, and deteriorate, if not completely destroy, feelings of mutual confidence, which are the most endearing comforts in married life.[107] The underlying prominent principle behind this protective shield to marital interactions is to preserve the domestic peace and conjugal confidence between spouses during coverture alliance with injunctions of Islamic teachings.[108]In case of commission of adultery ,the husband was not permitted by court to bring on record such documents like letters written to his wife by a third person to prove the offence ,in order to maintain the secrecy of the marital bond of spouses.[109]The privilege is for couples who are lawfully married to each other if the marriage is void ,no privilege can be claimed.

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[106] [AIR 1914 PC 105 (p. 108)]

[107] AIR 1970 SC 1876

[108] PLD 1962 Lah 558

[109] Woodroffe Ev.9 Ed 930

[110]As a result, when a widow testified in the case of Nawab Howladar v. Emperor that her husband had spoken to her about a murder, the court did not consider her revelation because it had not been made with the maker's consent. The following circumstances exist when the privilege under Article 5 has been waived, either by a legislator or a court of law: spouse's approval; a legal dispute between married couples;
charges brought against the spouse;

The testimony of strangers can be used to correctly prove matrimonial communication.

When there is a disagreement between the married couples or when one of them is being investigated for a crime committed against the other, this privilege is not available. Such evidence can be used as testimony in court if the party who made the communication gives consent to its disclosure by surrendering this privilege.

37. PREDOMINANCE OF PUBLIC INTEREST: STATE AFFAIRS

[111]While examining the claimed privilege, public interest is of paramount importance. It is to be noted that all records and documents related to matters of state are not confidential but only those which would cause inquiry to public interest. In case of conflict between public and private interest, public interest would get a cardinal position.

[112]It was held that the state can claim privilege for documents if they are unpublished records for the betterment of public interest despite the fact that this claim may affect the private interest of the accused. [113]When,

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[110] Nawab Howladar vs Emperor

[111] PLJ 2007 LHC 676

[112] 1975 PCr.LJ 1411

[113] 1966 Nag 385

disclosing the official documents would risk the national defence, affect diplomatic affairs and disturb the proper regulation of public services, the non-production of official documents as evidence is justified ground.

[114]Involvement of danger to the security of the state is prioritised from holding any document from the court.[115]The discretion lies in the hands of the head of the department to allow the production of documents even if there is possibility that its reveal theoretically could lead to some kind of injury to public interest. The protective provisions emphasises on principle that interest of state is the foremost priority over interest of individuals.

It is evident that only the Court has the authority to determine whether a document qualifies as a "unpublished document of state affairs" given the specific facts and circumstances of each case.

38. CLIENT-COUNSEL PRIVILEGE:

The foundation of this rule is based on the impossibility of regulating legal business without professional assistance and on the necessity in order to render the assistance effective, for securing full and unreserved interaction between the two.

The principle envisioned in Articles 9 to 12 is justified as follows:

If such communication was not protected, no man would dare to consult a professional counsel with a view to his defence or the enforcement of his right, and no man could come to court securely with a view to either enforce or defend his right.

[116]The article provides privilege to communication between client and advocate, a client is a person who is

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[114] 1972 Scrv law Rep 258

[115] 1992 S.C 492

[116] PLD 1962 Lah 558

party to proceedings, in this regard a witness's communication to counsel is not protected and obliged under this provision.

[117]Privilege initiating from relation of counsel and client is claimable even if the client is not concerned in the case.[118]When the counsel is well versed with contents of will for the performance of its professional obligations, he/she is under privilege to not disclose the contents even if called as witness.

When a right may be waived:

When a client has given permission; When a communication is made in furtherance of an illegal purpose; When fraud of some type has been committed; When a court orders the production of a document that the attorney has; When the attorney attests to the document as a witness;

When a legal adviser does not obtain its factual information through dialogue;

When both parties retain the same legal counsel; suit brought by the attorney against the client

[117] PLD 1963 Lah 141

[118] AIR 1929 Bom 414(415)(DB)

39. COMMUNICATION IN OFFICIAL CONFIDENCE:

[119]The phrase "communication in official confidence" in this article refers to all information shared between officers in the course of their duties and does not imply any specific level of confidentiality or a guarantee of its preservation.

This Article includes both official communications between public officials as well as private citizen communications made in confidence to a public official.

[120]The state can assert its right to confidentiality with relation to communications between superior authorities about the confirmation or denial of a government employee in a particular post that he holds. However, it must provide relevant information in the affidavit it submits in response to a petition filed by a government employee and make the document available for the court's inspection so that only the private portion of the correspondence is not entered into the record and the remaining information is used for the case's decision while also ensuring that the judgement is founded on accurate information.

[121]Officials of a government must always act in the public interest and within the bounds of their duties. It is also very much in the public interest for groups of officials involved in one particular area of government activity to act as a single unit, bound to one another by a certain loyalty, always, of course, within the bounds of the public interest. where there is a lack of what is appropriately referred to as esprit de corps. It is obvious that the political system must be heavily biassed. Clearly, this article's goals

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[119] AIR 1915 MAD 1113

[120] AIR 1964 All 415 (419)

[121] PLD 1958 SC 333

go beyond merely dispelling these arguments.The duty of the court is also triggered when a disclosure is anticipated that, in the court's opinion, could be detrimental to the public interest. In such a case, the court must determine whether the communication in question was made to the witness in official confidence and then notify the witness—who might not be aware of the applicable legal provisions—that it is up to him to decide whether he will disclose the matter and whether to testify.

[122]Prior to filing a claim under this article, it must be established, in the public officer's opinion, that disclosing the communication would be harmful or detrimental to the public interest. Hence, before denying any claim of privilege under this article, the court must use its judgement and carefully review each document since it may include information that cannot be divulged without harming the public interest. It is really not in the public interest to allow the production of a document that is partially privileged and partially not, so the court is neither competent nor justified in ordering its production. Except in situations when the court determines that the disclosure of the information or document's content is necessary or statement would not in any way injure or adversely affect public interest,the claim of privilege under this article can be rejected but not otherwise.

[123]Anything said to a public official in confidence is free to be revealed willingly by that person. A public official is free to reveal communications that were given to him in confidence when he is accused of dishonesty or acting in ill faith.

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[122] 1973 Cri L.J 931

[123] 1950 Pak LR lah 888

40. RULES REGARDING CRIMINAL PROCEEDINGS:

In contrast to civil procedures, where there is a greater scope, it is rather limited and imitated in criminal processes. Certain sorts of documents, such as those pertaining to the privilege in criminal procedures, are meant to be utilised in criminal cases. It is against the law to use legal professional privilege to safeguard materials that have already been disclosed. The English Courts have not allowed professional formations or documents protected by privilege on grounds of public policy or professional privilege to prevail in cases where they are relevant for establishing the defence and grounds of public policy or legal innocence of an accused. This includes information used in preparation for, in furtherance of, or as a part of any criminal design or fraud.[124]

Inshot, the view is that if the documents are relevant to establish that the accused committed a fraud crime and were not created for legitimate purposes, such as the preparation of the accused's defence, then the interests of justice may require that they be kept confidential. According to the courts, public policy then prevails over all private claims to privilege. An alternative to this criterion is whether a legitimate and tenable charge of fraud or criminality is made. According to some, allowing privilege to prevail would hinder justice and The Criminal Courts have a tendency to exclude the privilege in criminal trials when doing so directly tends to prevent an accused from disclosing information about any potentially incriminating material or when doing so indirectly prevents him from presenting evidence that may be intended to support an argument that is going to be made

[124] PLD 1992 S.C. 492

in defence of the charges. The trial can only be a farce without giving the accused a complete opportunity to defend himself, and it would suffer from an inherent vice that may taint the entire process. Justice in a criminal case cannot be sacrificed at the altar of truth, which is the foundation upon which this magnificent Islamic State of Pakistan's infrastructure is built.

41. EXCEPTIONS:

Conversations made for the aim of committing a crime are not protected.

Any fact discovered in the course of employment by the attorney, pleader, vakil or barrister to be fraud or a criminal committed since the beginning of employment is not protected

If the client offers specific approval, the message can be disclosed by an attorney, pleader, vakil or barrister. If a third party who is not the listener's agent overhears a communication, it is no longer private and hence not protected by the attorney-client privilege. Secretaries and other staff members of the listener are agents. A conversation between a psychotherapist and a patient, for instance, would be protected even if the psychotherapist's secretary overheard it. The secretary could not be compelled to testify regarding the correspondence in this situation. On the other hand, a conversation between a psychotherapist and a patient in a shared elevator with other people inside would not be confidential and may be used as evidence in court.

42. CONCLUSION:

"Private communication" refers to private or confidential exchanges between parties who are entitled to legal protection. One of these exchanges is no longer confidential once a third party finds out about it. According to the privileged communication rule, a person in this protected connection cannot be asked to reveal any information about this conversation in court.

The main goal of this principle is to safeguard the confidence that a client has in a lawyer, a patient has in a doctor, and spouses have in one another. The law also stipulates sanctions in the case it is broken. There are a few exceptions, therefore this privilege is not without restriction. It may be violated in a variety of circumstances that are either stated in the law itself or in a variety of situations manifested by the court.

A CRITICAL ANALYSIS AND EVIDENTIARY VALUE OF DYING DECLARATION

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Abstract; The maxim "Nemo moriturus praesumitur mentire" is basis for "dying declaration", which means essentially saying that "a man will not face his maker with a falsehood in his mouth." Leterm Mortem is the name for a pronouncement of death. Leterm Mortem translates to "words spoken before death."

"This study will look at the value of the deathbed statement as evidence in various nations, which is one of the most important pieces of evidence. Whether an unsupported deathbed pronouncement may be used to penalise someone, it will be further analysed using examples from previous case law studies. If they are shown to be reliable and sincere, there would be no need for more evidence; rather, it would only become necessary if a court's conscience was not pleased with the legitimacy of a deathbed pronouncement.

This study will examine the proper format for a declaration of intent to die. Which documents should be utilized to declare one's impending death? What should the aim of this proclamation be? Who is qualified to make a dying declaration on record? Which information has to be remembered before making a final statement? What last thoughts and suggestions do you have in regards to the admissibility of dying statement evidentiary values?

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Introduction; “Truth always sits on the lips of a person who is about to die”[125]
“A person, who is about to die, would not lie”[126]

In every legal procedure, hearsay testimony has no significance, but dying declarations are an exception. A dying declaration is a crucial piece of hearsay documentation. It is admissible as evidence in judicial proceedings.

Death announcements are very reliable. Because no one would dare face God's vengeance by dying with a falsehood on her lips, the conventional argument relates to believing the evidential value of deathbed declarations.

The recording of a person's declaration of death is a crucial step. If a deathbed pronouncement is properly documented while keeping in mind the necessary components, it keeps all of its meaning. If even one component of the deathbed proclamation is absent, it raises suspicions and criminals may profit from its flaws. If it is confirmed to be sincere and accurate, it can serve as a solid foundation for belief.

According to established legal precedent, it is risky to prosecute an accused person based only on a deathbed claim that lacks supporting documentation. A deathbed declaration must satisfy a reliability test before it can be used as evidence in court. As a result, the court has an obligation to carefully consider it.

A dying pronouncement is seenas a powerful piece of evidence, but it also has to be supported.

The court has the option to convict the accused on the basis of the deathbed declaration if it determines after closely reviewing it that it is truthful without any further

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[125] Matthew Arnold, 1884.
[126] Raghuvanshi, Raghvendra Singh, Dying Declaration - 'A Man Will Not Meet His Maker with a Lie in His Mouth' (February 25, 2010).

evidence. The established view on the admissibility of a deathbed declaration as evidence is that it must be authentic, factual, and carefully written by someone who was in the deceased's right mind and anticipating his demise.

43. Weightage of Hearsay Evidence in the judicial proceeding:

Hearing-only evidence is disregarded because it is not seen to be reliable enough. Hearsay evidence is rejected because it does not pass the oath and cross-examination standards that must be met for evidence to be admitted. Hearsay evidence has no significance in court proceedings since the witness who provides it does not share his own experiences but rather those of a third party who cannot be cross-examined to confirm the facts of the case. The hearsay rule does not apply in cases of death declarations.[127]

Since it is seen to be insufficiently reliable, hearsay evidence is disregarded. Due to the fact that the witness is not sharing his experiences but rather those of a third party and cannot be cross-examined to confirm the truth, these evidence types have more weight in court. When a witness's hearsay statement is not protected by subArticle (1) of Article 46 of the Evidence Act, it is not admissible as evidence. The hearsay rule is based on the idea that the test of cross-examination is the best way to uncover and reveal any potential sources of inaccuracy and reliability that may be hiding beneath a witness's naked, untested declaration, if any such sources are there. The hearsa rule has two considerations: I a situation (i) a circumstance

[127] Ranger 4. (2010). Ranger's crimes

probability of trustworthiness, (ii) a necessity for the evidence may be examined more closely.[128]

44. History of the Dying Declaration:

Non moriturus praesumitur mentiri, which literally means "a dying person is not presumed to lie," was first established by English courts in the Medieval Ages. In a 1202 case, it was discovered that a dying declaration had been submitted as evidence. The term "death statement" refers to testimony that, while ordinarily prohibited as hearsay, may nevertheless be admissible as evidence in specific circumstances because it represented the final words of a dying person.[129]

That was first firmly stated in the 1789 decision in the matter of Woodcock. This case makes reference to a 1720 ruling as well as the 1722 ruling in R v. Reason and Tranter. Nevertheless, nothing in that situation indicates that the rule has any limitations. A sequence of instances from 1678 to 1765 demonstrate that, throughout that time, declarations of deceased people' causes of death were accepted even when the declarant had reasonable expectations of recovering at the time of the declaration.[130]

Nonetheless, occasionally courts will infer the declarant's awareness of impending death from terrible medical circumstances. Modern courts particularly enjoy it when a declarant demands last rites, proclaims that she/he is about to die, or is notified of this by a medical practitioner.[131]

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[128] HP Gupta (2006). Allahabad: Dwivedi & Company, Desai's Law Pertaining to Confession and Dying Statement.

[129] M. N. Howard, "Phipson on Evidence," October 2012

[130] Benites, E. (1915).

[131] Orenstein A. Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence. U. Ill. L. Rev.. 2010:1411.

Yet, courts typically reject deathbed pronouncements today if the declarant was unaware that death was approaching.

45. Legal Maxim relating to Dying Declaration:

"Nemo Moriturus Praesumitur Mentiri" is a legal rule that governs when a deathbed declaration can be used as evidence. It implies that a man won't go to his grave telling lies. To put it another way, a person who is close to death or who is dying never tells a falsehood; instead, they always speak the truth. The adage "Nemo Moriturus Praesumitur Mentiri" serves as the foundation for the admissibility of the Dying Declaration. This adage serves as a foundation for the acceptance of a dying declaration's probative validity.[132]

The adage **"Nemo moriturus praesumitur mentire"** serves as the foundation for death declarations. The hearsay rule is broken in cases of death announcement.[133]

According to the legal theory surrounding the legitimacy of dying declarations, such declarations are made under duress when the party is close to passing away, when all traces of this world are gone, when all motivations for lying are silenced, and when the man is moved by the strongest consideration to speak only the truth.[134]

In the **Rashid Ahmed v. State case**, the dead filed an F.I.R. before passing away while still aware. The deceased passed away in a hospital the day after the incident. The dead was well aware of the accused. In his statement, the deceased not only disclosed all relevant information on the accused in advance of his passing, but he also accurately

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[132] Ranger 4. (2010). Ranger's crimes

[133] Giriraj Shah 8. (2002). Anmol publications: New Delhi, crime and criminal investigation

[134] Thakur Naveen 3. (1998). Criminal Law Journal, Vol. II, Jan.-March, pp. 77-80, "Dying Declaration-its Admissibility in law."

detailed the incident. The deceased narrated his statement regarding the occurrence, how it transpired, and the accused's role in it. The deceased also provided explanations for what happened.

According to Article 46 of the Qanun-e-Shahadat Order, 1984, the statement made by the dead before his death was not only pertinent, but it was also free from outside prodding. There was no history of animosity between the dead and the accused, and there was no justification for the deceased to have intentionally and unjustly implicated the accused. Eye witnesses who were undeniably there at the scene had no motivation to testify falsely against the accused in an effort to seriously hurt him. Crime was perpetrated by the accused after careful forethought and for a specific reason; as a result, it could not be characterized as a random act of violence.

Under the circumstances, the prosecution provided exceptionally reliable evidence that firmly backed the accusations levelled against the defendant. It was determined that the defendant had received a death sentence and that the murder case had been dropped.[135]

46. Relevant Provisions of Dying Declaration:

Article 46 of the Qanun-e-Shahadat Order is an exception to the general rule of exclusion of the hearsay evidence.

Under the conditions outlined in clause (1) to,8 a person's written or verbal statement of relevant facts made by a person who is deceased, cannot be located, has become incapable of giving evidence, or whose attendance cannot be obtained without a certain amount of delay or expense, is considered to be relevant facts .

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[135] 2003 (PCr. LJ 480 Lahore)

Article 46 clause (1), states that any written or oral declaration of pertinent facts made by a person about the reason for or any circumstances surrounding his death may be used as evidence. They are usually referred to as "death declarations." Such claims are accepted as evidence under the necessity principle.[136]

47. Statement of Need and Values Regarding Dying

The declaration of a dying person is admissible into evidence under the rule of necessity because it cannot be refuted by the accused's cross-examination.[137]

If deemed trustworthy, a deathbed declaration may serve as the foundation for a conviction. A deathbed declaration is considered to be valid evidence just like any other piece of evidence. The victim is typically the sole key eyewitness to the crime, therefore excluding the statement might interfere with the course of justice. The second reason for admittance is the victim's awareness of approaching death, which imposes a consequence equivalent to the need of an oath.

The general principle on which this species of evidence is admitted is that they are declaration made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice.[138]

In this instance, the accused's deathbed declaration served as the foundation for the conviction. When a person

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[136] Ibid Naveen.
[137] Friedman RD. Confrontation Clause Re-Rooted and Transformed. Cato Sup. Ct. Rev.. 2003:439.
[138] Ibid Naveen.

is dying, the circumstance in which they are lying on their deathbed is so serious and peaceful that the grave position in which they are put is the cause in law to recognise the authenticity of their testimony. Because of this, the requirements for an oath and a cross-examination are waived.[139]

48. Acceptance of the Dying Statement under Article 46(1) of the 1984 Qanun-e-Shahadat Order:

There is a crucial issue that must be shown in order for the statement of a deceased person to be admissible under Article 46(1) of the Qanun-e-Shahadat Ordinance, 1984

(i) The individual who made the statement is dead;
(ii) He was cognizant when he said it; and
(iii) He said it knowing he would die.

In a case the Medical Officer at the Civil Hospital in Tandlinwala sent Rqqa to the S. H. O. at the Tandlianwala Police Station to let them know that Nur Ahmad son of Nijabat was in a serious condition but was still capable of giving a statement. As a result, Jafar Hussain Shah, A. S. I., arrived at the hospital. In the presence of the doctor, Nur Ahmad, who was then in the operating room, described the incident to him and included the pertinent details. A formal F. I. R. was filed at the police station in Tandlianwala based on this statement. It was decided that there was enough evidence on file to confirm the veracity of the deathbed declaration.[140]

49. Necessity and principles regarding Dying Declaration

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[139] Gopal Chaturvedi (2008). Filed's Commentary on the Law of Evidence, Delhi Law House, New Delhi.

[140] Muhammad alias Mammi and others vs. the state P C r .LJ 1183 Lahore, 1983.

The general rule under which this type of evidence is accepted is that it must be a declaration made under duress, when the party is on the verge of death, when all hope for the world has been lost, when every motive for lying has been silenced, and when the mind has been persuaded to speak the truth by the strongest considerations. The law views such a solemn and legal circumstance as imposing an obligation equivalent to that imposed by a positive oath administered.[141]

In this instance, the accused's deathbed declaration served as the foundation for the conviction. When a person is dying, the circumstance in which they are lying on their deathbed is so serious and peaceful that the grave position in which they are put is the cause in law to recognise the authenticity of their testimony. Because of this, the requirements for an oath and a cross-examination are waived.[142]

The rule that hearsay evidence is not admissible is an exception for dying declarations. It is now a settled principle of law that the dying declaration is substantive evidence, and an order of conviction can be safely recorded even on the basis of a dying declaration if the court is fully satisfied that the so-called dying declaration made by the deceiver was true. The dying declaration is substantive evidence only because a person in acute agony is not expected to tell a lie and in all likelihood it is expected from such a person to disclose the truth.[143]

The hearsay rule has long been exempted under the dying declaration exemption. It accepts out-of-court declarations as true where the declarant is unavailable, the

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[141] Ibid Naveen.
[142] Gopal Chaturvedi (2008). Filed's Commentary on the Law of Evidence, Delhi Law House, New Delhi.
[143] Ibid Naveen.

declaration involves the cause of the declarant's impending death, and the declaration is made while the declarant feels his death is close at hand.[144]

50. Objects of Dying Declaration:

Objects of a statement by a dying person may be of following:

1. It is assumed that a person who is going to pass away wouldn't lie.
2. It is also claimed that a person who is ready to pass away has the truth on their lips.
3. Because the victim is the only eyewitness, such evidence should not be disregarded.[145]

51. Competency of Person:

A deathbed pronouncement needs to come from a witness who is qualified to provide testimony. Hence, the final testaments of insane people or young children who are unable to give a testimony are not accepted.[146]

In a situation where the statement of a child—who at the age of four was too young to comprehend the theory of a future state—was not accepted In another instance, a boy's ten-year-old declaration was deemed valid.

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[144] Gopal Chaturvedi (2008). Filed's Commentary on the Law of Evidence, Delhi Law House, New Delhi.

[145] Hackmann J. Defending the “good name” of the Polish nation: politics of history as a battlefield in Poland, 2015–18. Journal of Genocide Research. 2018 Oct 2;20(4):587-606.

[146] Ibid Naveen.

52. Evidentiary Value of Dying Declaration made in Presence of Relatives of Declarant:

Most of the time, a deathbed statement is suspicious if the declarant's family were there when he made his final declaration before passing away. In some circumstances, the presence of the declarant's family does not raise suspicions about the deathbed statement. Thus, in

Most of the time, when the declarant's family are present when the dying statement is being recorded, this raises questions about the validity of the document.[147]

In the case of Waheeduddin vs. Allah Ditta and 5 others, it was held by the Court, dying statement which is recorded at police station in presence of deceased's relatives always becomes suspicious and less worthy of credence than one recorded by a Magistrate after excluding relatives.[148]

In the case of Nazim Khan and 2 others vs. The State, it was held by the Court that dying declaration which is recorded at Police Station in presence of relatives of deceased is not worthy of credence.[149]

53. Evidentiary Value of Dying Declaration which is Recorded by a Magistrate:

According to the legislation, a Magistrate is not required to record a dying declaration. That will always rely on a number of different things. A police officer's recorded deathbed declaration is likewise admissible, and a conviction may be based on it. A dying statement that is correctly recorded after satisfying many requirements that must be kept in mind at the time of recording a dying declaration keeps its complete admissibility as evidence

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[147] Mehmood Ethsam (2008). Order of Qanun-e-Shahadat, Lahore: Mansoor Book House, 1984

[148] PLD 1977SC 72

[149] 1984 SCMR 1092

and can be used to support an accused person's conviction.[150]

A dying declaration that the magistrate has recorded after concluding that the declarant is expecting to die and is both mentally and physically fit to make the declaration is admissible in court as evidence. As a result, a Magistrate's recording of a deathbed declaration has great probative significance.

54. Evidentiary Value of Dying Declaration which is Recorded by a Police Officer:

There is no legal necessity that police officer record a pronouncement of someone's impending death. That will always rely on a number of different things. A police officer's recorded deathbed declaration is likewise admissible, and a conviction may be based on it. A dying statement that is correctly recorded after satisfying many requirements that must be kept in mind at the time of recording a dying declaration keeps its complete admissibility as evidence and can be used to support an accused person's conviction.[151]

55. Evidentiary Value of a Dying Declaration Recorded by a Private Person:

There is no legal necessity that police officer record a pronouncement of someone's impending death. That will always rely on a number of different things. If a judge or police officer are unable to be there, a private individual may record the dying pronouncement. A private officer's recorded deathbed declaration is likewise admissible, and a conviction may be based on it. A dying statement that is correctly recorded after satisfying many requirements that

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[150] Cheema SA, Khan SU. Dying Declarations in Pakistan and India: A Case Law Study of their Evidentiary Value. Pakistan Journal of Social Sciences (PJSS) Vol. 2013 Dec 31;33:97-108.

[151] Gopal Chaturvedi (2008). Filed's Commentary on the Law of Evidence, Delhi Law House, New Delhi.

must be kept in mind at the time of recording a dying declaration keeps its complete admissibility as evidence and can be used to support an accused person's conviction.[152]

A deathbed declaration made before a private person that is free from any outside influence qualifies as a substantial piece of evidence and is accepted.[153]

56. Conclusion:

The majority of judicial rulings now consider a deathbed declaration to be reasonably unambiguous as evidence. With an increase in cases where a dying statement served as the basis for a prosecution, the significance of a dying declaration as a piece of strong evidence is growing. Even while there might not be any obvious physical proof of a crime, a deathbed declaration can speak for itself and demonstrate far more than might be shown by eyewitness testimony. Men may lie, but circumstances do not, it is said in truth. It is sacred and equally reliable as any other piece of evidence.

57. Recommendations and Suggestions:

There are some suggestions that a deathbed declaration is a significant piece of evidence that can be utilized to support an accused person's conviction. A deathbed declaration's importance as evidence cannot thus be discounted.

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[152] Orenstein A. Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence. U. Ill. L. Rev.. 2010:1411.

[153] Article 46 of the Qanun-e-Shahadat of 1984

AN ANALYTICAL STUDY OF COMPETENCY OF WITNESS AND ITS ADMISSIBILITY IN EVIDENCE UNDER THE QANOON-E-SHAHADAT ORDER 1984

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ABSTRACT; Evidence is like a backbone for any trial procedure. Islamic law of evidence has a complete and fruit full mechanism for admission of Oral Testimony. It ensures authentic and reliable oral testimony in all respects. Qanoon-e-Shahadat Order on the other hand follows evidence Act 1872 except few articles that were changed during the process of Islamization. Purpose of this research is to highlight the lacunas in Qanun-e-Shahadat Order regarding authentication of Oral Testimony in Shariah. Islamic law of evidence stipulates strict conditions regarding number, character, screening, and rejection of witnesses, which are not taken seriously by Qanun-e-Shahadat Order and need to be analyzed and compared in detail to have a better picture of lacunas present in Qanun-e-Shadat Order. The detailed conditions imposed by Islamic law regarding authentication of women's testimony, hearsay rule and purgation process are also not legislated in QSO according to the spirit of Islamic law. These areas need to be explored, highlighted and discussed due to increased importance and are overlooked by Qanun-e-Shahadat Order, which is a matter of serious concern. Being a Muslim country law of evidence of Pakistan must abide by the rules of Quran and Sunnah.

Keywords: Qanun-e-Shahadat Order (QSO), Evidence, Authentication, Oral Testimony, Purgation.

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Introduction; Islam introduced a very compact and universally applicable law of evidence. The in-depth wisdom under these rules is still being discovered by the Jurists and legal experts. Their effectiveness in Islamic legal history can be witnessed by the courts prevalent at that time, like Ottoman and Abbasid courts etc. The speedy trial procedure prevalent in classical Muslim Empires is the clear evidence. There is no legal aspect that is not covered by the Islamic law of evidence. It is a well-versed system. Evidence Law in English legal system is based on man-made rationale. It is different from Islamic law in many ways, for instance, it does not possess a system of purgation of witnesses. Another major difference is that Islamic law of evidence classifies different nature of cases and crimes and fix different number of witnesses for each. In English law there are no such compulsions regarding number of witnesses. Another difference is limitation of blood and close relations for testification in each other's favour, as who can testify for whom. Like, in Islamic law, a wife cannot testify for her husband. A brother and father cannot testify for brother or son. These are just a few examples. English law does not put any such conditions. There are many more differences between both. In fact, their base is different. One is God made law and other is man-made law. Unfortunately, Pakistan has adopted Evidence Act 1872, which was English law (man-made law). This law prevailed in Pakistan till 1984.

After that Qanun-e-Shahadat 1984 (Q.S.O) Order was enforced, repealing previous Evidence Act 1872. But Q.S.O is a mere repetition of Evidence Act 1872 except article 3, 4 to 6 (with reference to Hudud), adding article 44 and addition of a proviso to art 42.

This research is going to make a detailed shariah analysis of provisions of Qanun-e- Shahadat Order that are related to authentication techniques of oral evidence. There are many un-Islamic provisions in Qanun-e-Shahadat Order. This article shall focus on validity of provisions that are particularly related to Oral Testimony. Law of evidence is the backbone of all the procedural laws. So, this area is quite important and must not be neglected. A lot of research has been done in the area of Islamic law of Evidence. But very less work is done to highlight the lacunas in QSO from Sharaiah perspective. Islamic ideology council proposed a draft of QSO Which was presented before promulgation of QSO 1984.

58. General Principles of Evidence in Islamic Law

In judicial procedures, the judge plays a crucial role in establishing both the Lord's (public rights) and the individual's (private law) rights to dispute resolution through the collection of reliable evidence. There are three methods the judge can learn information;

1. By confession
2. By oath
3. By evidence

The matter can be resolved speedily if the accused confess the facts. If he does not accuse does not confess, then the plaintiff is supposed to produce evidence. In case the plaintiff fails to produce evidence, the defendant shall be required to take an oath in favour of denial.

Oral testimony (*Shahādah*) is a major type of evidence in Shar'īah. Other evidences include written documents, circumstantial evidence and scientific evidence. The word used for Evidence in Arabic is "*bayīnah*".

The literal meaning of this term is "visible or glowing". It is derived from the word "tibyān" which means an act of explaining and showing how something works or is

done or emphasizing; publishing; making evident. It means visible or strong evidence.[154] Technically, it denotes the strong argument, or evidence. It means a very strong proof. The technical definition of this word is *bayīnah* is very well defined by *Ibn Qayyim.*[155]

It is worth mentioning here that similar kinds of proofs are mentioned under the English legal system, other than Oath and ‘Ilm al Qāḍī (knowledge of a judge), as modes of authentication for physical There is not much difference in the law of evidence in English law and Sharī‘ah law. Both the legal systems require that the evidence must be reliable, authentic, and must not be hearsay. But the techniques of authentication of evidence, especially oral testimony are not similar.[156]

59. Shahādāh – Oral Testimony

This mean of proof is dealt in Islamic law as the oral testimony (*Shahādah*) which is equally important in the western legal systems. It plays an important role in proving facts before the court. When someone is accused of a crime and he denies it, the burden of proof lies on the plaintiff. Thus, the judge asks the plaintiff to bring his witnesses or any other evidence to support his claim.[157]

General rules of testimony in Islamic law are discussed in the books of *fiqh,* under "*kitāb-al-shahādāt*". These fiqh books have categorized this topic under the following headings; rules of admissibility of testimony, conditions for the admissibility of testimony; the reasons of rejection of testimony; disagreement of witnesses in their testimony, etc.

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[154] *Book 18, Number 4244, The Book Pertaining to Judicial Decisions, Sahih Muslim.*
[155] Ibn Qayyim al-Jawziyya (1292–1350 CE / 691 AH–751 AH)
[156] Al-Yamīn (Oath), al-Iqrār
[157] Kāsāni, vol.7, 287

Testimony in court is dealt as a religious duty.[158] It is an important obligation upon all Muslims. Messenger of Allah (PBUH) is reported to have said:

"Should I not tell you of the best witnesses? They are the ones who produce their evidence before they are asked for it"[159]

Quran states that witness cannot refuse to give testimony once they are demanded. In Islamic law, it is a sin to conceal facts in front of the court. The reason behind it is that it affects the rights of mankind. A verse of *Qura'n* regarding this matter is;

وَلَا تَكْتُمُوا الشَّهَادَةَ ۚ وَمَن يَكْتُمْهَا فَإِنَّهُ آثِمٌ قَلْبُهُ[160]

"And do not conceal testimony, for whoever conceals it - his heart is indeed sinful"

This verse denotes that *shahādah* is a religious duty and it must be treated as Amānah. Returning of Amānah is obligatory on a Muslim.

60. Categories of Shahādah

There are different classifications of testimonies. Islamic Law deals with different crimes requiring different number of witnesses for each. For instance, some Hudud crimes require four witnesses and some require two. Similar is the case with other crimes.

Marghīnānī states in his book that there are two broad categories of testimony in Islamic law;[161]

1. Testimony in the matters related to right of Allah Almighty

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[158] Burhān al-din Abu al-Ḥassan 'Ali ibn Abī Bakr Farghāni Marghīnānī, Al*Hidāyah*
, vol. 3)Beirut: Dar ahya turas al-arabi, n.d), 116.

[159] Reported by Muslim in his Saheeh, Book of Judgments, hadeeth no. 4494; and at Tirmidhee in his Al-jaami', Book of Testimonies, hadeeth no. 2295.)

[160] Al- *Qur'an* [2:283]

[161] Al-Hidāyah, vol. 3, 116.

2. Testimony in the matters related to right of man

In the two prior instances, there were varying numbers of witnesses. In actuality, the Qur'an regulates it on a case-by-case basis. The right of Allah Almighty is at stake when people testify for 'udd' offences. The right of man is in jeopardy in issues involving private rights and money.[162]

The guidelines for testimony are stricter in udd instances. Women are explicitly prohibited from testifying in these cases as witnesses.

However, witnesses have the option of testifying or not in the instances of Hudd and Qia. In these situations, it is better to conceal the testimony.[163] When someone testified, the Prophet (peace be upon him) remarked, "Truly, it would have been best for you if you had hidden it."[164] Yet this When testimony is not urged to be withheld in cases of theft, this rule does not apply. Rather it is an obligation to give testimony. The reason of excluding theft from this rule principle is that otherwise the right of proprietor will be compromised which is against the rules of justice.[165]

Discussing the rationale of preference to conceal testimony in case of ḥudūd and qiṣāṣ, *Marghīnāni* says that it protects from two harms; first is, defamation of character of offender and secondly the *ḥadd* punishment itself.[166]

Witness in ḥudūd and qiṣaṣ must be male and thus the evidence of a woman is not admissible in these instances.

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[162] Ibid

[163] Ibid

[164] Burhān al-din Abu al-Ḥassan ‘Ali ibn Abī Bakr Farghāni Marghīnānī, A*lHidāyah*
, vol. 3)Beirut: Dar ahya turas al-arabi, n.d), 116.

[165] Ibid

[166] *Al-Hidāyah*, vol. 3, 116.

This opinion is unanimously agreed upon by pre-modern jurists, including Imām *Mālik*, Abū Ḥanīfa, Shāfi'ī, and Aḥmad bin Ḥambal.[167]

The numerical strength of witness varies according to the nature of the matter. Matters related to Ḥudūd involve right of Allah Almighty while financial and private matters include right of man.[168] In Ḥudūd offences where Right of Allah Almighty is involved, are the once which affect the society. Punishments of these offences are harsher and deterrent as compared to personal rights.

Essentially, there are four categories of testimony;

1. Testimony requiring four witnesses
2. Testimony requiring two witnesses
3. Testimony of one man and two women
4. Testimony of woman alone

Four males must testify under Islamic law in cases of fornication and slander. The penalty of Qi and all other "udd" offences call for two male witnesses. In instances of business transactions, two men must testify. In the absence of two male witnesses, the evidence of two women and one man is acceptable. When the presence of a man is extremely rare, a lady may testify alone.

It is pertinent to mention here that the rules regarding number of witnesses in English law are not fixed like Islamic law. However, QSO stipulates in art 17 about competence and number of witnesses. It says that in financial matters two men will testify. In case of a woman two women will testify instead of one man. But all conditions regarding number of witnesses are not applicable for Hudood cases.

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[167] Abu Ḥussain Yaḥyah bin 'Abī al-Khaīr al-'Imranī al-*Shafi'ī*, "*Al- Bīyān fiMazhab Imam Shāfaī*", vol. 13

[168] Al-*Qur'an* [4:15], Al-*Qur'an* [2:282]

It is further stated, that in all matters (other than Hudood and financial matters), testimony of one man or one woman shall be admissible. Here no specification is made for family matters. Islamic law deal with every matter separately. As far as matter of single women's testimony is concerned, there are no separate rules regarding in QSO. Although narrations of Prophet (PBUH) guide in detail about it. Most important matter of Hudood laws is neglected by QSO as if it does not exist. It vaguly states that all other matters other than financial matters would be testified by one male or one female testimony. Without differentiating between family matters or custody etc. in all other matters there is no way one women's testimony is equal to the testimony of one man.

61. Conditions of Testimony in Islamic law

As far as the conditions for carrying or bearing of testimony (Shurūt at-taḥammul) are concerned, they are broadly categorized into two categories:

1. General or basic Qualifications
2. Special Qualifications

The Muslims jurists are of the view that admissible and competent testimony arises out of three main qualifications. These are sound mind, majority and sightedness (i.e., witness must have observed the event directly). As Holy Prophet (PBUH) said, "If you know like the sun, then bear witness otherwise do not".[169] Imām Sarakhsī states in al-Mabsūt, that hearsay by mean of widely circulated information is not allowed in the cases of property. He further added about the cases of marriage that as a general principal hearsay should not be allowed

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[169] Muḥammad bin Aḥmad bin abī Sahl shams al-'Āa'ema al- Sarakhsī, *Al-Mabsūt,*
Vol. 16. (Beirut: Dār al-Ma'rafa, 1993), 112.

in cases of marriage. The reason behind it is the sensitivity of the cases. But it is permissible by way of Istihsan in matters related to kinship, appointment of judges, marriage and death.[170] There are special qualifications for testimony in Islamic law are related to the number of witnesses, their gender as discuss.

62. شروط ألداء *Condition Performance*

The conditions of performance of testimony include, Al-'Aqal(the intelligence), Al- Bulugh (puberty), al_Hurriyah (Freedom), al-Nutq(the ability to speak), al-Basirah (ability to see), Good memory, legal responsibility (Takleef), Justice (Adalah), and Islam. Last two are elaborated further in order to analyse them from the perspective of QSO.

63. Justice ('Adālah)

Muslim jurists have unanimously agreed that a witness whose testimony entails a judgement must have the quality of being '*adil* (that is, observing '*adālah*). This condition is essential for distinguishing truth from falsehood. Allah Almighty ordains the Muslims, "take for witness two persons from among you, *endured with justice*".[171] The insistence here is on the witness's devoutness and uprightness. It follows that the testimony given by a fāsiq is not acceptable in court of law.[172]

Testimony of 'Ādil is a compulsory. Mālīk defined '*Adālah* as 'the one who avoids major sins *(*al-kābai'r*)*, returns deposits and has good dealing with people. His good deeds are more prominent than the bad ones.

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[170] Sarakhsi, *Al-Mabsūt*, vol. 6, 266-267. Also in, Kāsānī, *"Badā'i' Al-Ṣanā'i'"*, vol. 6, 266.

[171] Al- Qur'ān [65:2].

[172] Yaḥyah bin 'Imranī al- *Shafi'ī*", "*Al- Bīyān fi-Mazhab Imam Shafi'ī*", vol. 13, 278

Testimony of such a person is admissible.[173] Hunbalis consider Adil the one: who fulfils his duties (farāīḍ), avoids major sins (al-kabāi'r), and he does not insist upon minor sins. He has the quality of generosity and graciousness. *Shafi'ī* considers graciousness as a necessary condition.[174] Imām Kāsānī states that a just person is the one who is not known as a wicked person. While the other scholars say that a just person is the one whose good deeds are not more than his bad deeds.

In Islamic law the evidence is authenticated by way of receiving it from a pure channel

i.e Shahid Adil Witnesses with sound character (Ādil). The probity and just characters ('adl) of witness makes the evidence reliable. These just witnesses act like a right hand of a judge to solve the case.

64. Testimony of a non-Muslim

The majority of scholars, including Shāfī, Mālīk, and Abū Thaūr,[175] opine that a non-Muslim cannot testify. This ruling is the same irrespective of whether he is testifying for a Muslim or a non-Muslim. They rely largely on the commandment of Allah Almighty. Allah Almighty says, "And take for witness two persons *from among you*, *endued with justice*, and establish the evidence as before Allah."[176]

However, an exception that is recognised by some of the jurists relates to giving testimony regarding wills during a journey. The exception is such that, the testimony of a non-Muslim will be admissible in places where there were no Muslims who could have testified. Proponents of this view have relied on the verse of Qur'ān

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[173] Al- Kasani, 7/268.

[174] AL-Sharbīnī al-Shāfi'ī, *Mughnī al-Muḥtāj,* vol.6/391.

[175] Ṭārāblisi al-M*ālikī*, *Mūāhib al-Jalīl*, 150/6, Sharbīnī, *Mughnī al-Muhtāj* 427/4.

[176] Al- Qur'ān [65:2].

where Allah Almighty says: “O you who believe! Let there be witnesses between you when death approaches one of you, at the time of bequest, two witnesses, just men from among you, *or two others from outside, in case you are travelling in the land and the disaster of death should strike you*.[177]

The "anaf" jurists also hold the view that a dhimm's evidence is completely admissible in cases involving the union of a Muslim man and a dhimm woman. They believe that non-Muslim testimony is valid if it is given by another non-Muslim, regardless of whether they both practise the same religion or two distinct ones.[178] His testimony is only admissible if both of them are citizens of the same nation, according to another rule that the "anaf" jurists have imposed on him. The statement made by one of them in support of the other is not admissible if it is not.[179]

QSO stipulates in Article 17 that courts will accept testimony of witness that fulfill conditions stipulated in Quran and Sunnah. But the same article stipulates in proviso that is such person are not available they would take testimony from anyone who is available.

There is no doubt that the conditions stipulated in Islamic law are not easily available in witnesses nowadays. But it should not be overlooked completely. At least, the qualities that are available in today’s time period must be ensured. There must be some principles for taking the testimony.

65. Conditions for Rejection of Evidence

There are a number of sins which if committed by a person, will result in the loss of Justice in a witness. Imām

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[177] Al- Qur’ān [5:106,].
[178] Ibn Nujaīm, *Al-Baḥr ar-Rā’iq,* Vol. 3, p. 97.
[179] Al-Maūsūah al-Qūītīah al-Fiqhīah, vol.26/223.

Kāsānī states that if a person is addicted to alcohol and singing loses the title of a just witness. Similarly, if people gather around singer for intoxication and he provokes people of decadence then he is not just in character. Or a person who keeps pigeons or plays chess is not just in character. In case of chess, it is allowed in some school of thoughts but *Ḥanafī* jurist disallow chess because it is a game.[180] May be, it shows irresponsible behaviour of a person. But according to these conditions many of people shall not be apply. But there must be some restrictions at least. Because testification is a religious duty according to Islamic law.

There are certain other reasons due to which the testimony of an otherwise eligible witness might be rejected. For example, the testimony of someone who has grudges against another person, whether he is a Muslim or not, his testimony has to be rejected. The Holy Prophet (PBUH) has said, "the testimony a deceitful man or woman, of an adulterer and adulteress, and of one who harbours rancour against his brother is not allowable."[181]

The same rule goes for testimony of a person who would testify for himself. His testimony will not be accepted if he is also the litigant, the reason being, he may prioritize his interest over cause of justice. It is stated by the early learned jurists that testimony of a partner is not admissible where he has a share. Testimony of a *Mudhārib* (dormant partner) is also not admissible where he has a share. Testimony of a lawyer in a case which he is going to plead is not admissible too.[182] In all these cases testimony of a person means he is testifying for himself.

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[180] Al- Kāsānī, 6: 268-270.

[181] *Abū Dā'ūd Sulaīmān al-'Ash'th, Sunan Abī Dā'ūd, vol.3 (Beīrūt: Al-Maktabah al- 'Aṣrīah*, n.d), 306.

[182] Abū Muḥammad Maūfiq al-Dīn 'Abdullah 'Aḥmad bin Qudāmah al-Ḥamblī, *Al-Mughnī li- 'Ibn-Qudāmah*, vol. 10

Testimony of a master for slave is not admissible because money of slave belongs to the master and it is considered as testimony for one's own self.[183] It is also agreed by few jurists that spouses are not allowed to testify for each other. This is the opinion of Sha'bī, Nakh'ī, *Mālik*, and Abū Ḥanīfah. On the contrary, *Shafi'ī*, Ḥassan, permitted testimony of a spouses for each other because they consider this contract, a contract of benefit *(manfa'ah)*.[184] Same is the case of parents and their off springs. Neither of them can testify for each other.[185]

There is no such restriction in English law regarding the conditions of witnesses testify for their close relations. Spouses can testify for each other; sons can testify for their parents. The child's testimony is admissible. Qanūn-e-Shahādat does not specify any such condition. In fact, Article 3 stipulates such conditions but unfortunately makes it ineffective by itself.

If a witness is not present, the Tribunal may take a statement from another witness who might be available, provided that the Court decides the witness's competence in accordance with the requirements outlined by Islamic law as found in the Holy Quran and Sunnah for a witness. So, the last line of the above proviso of article 3 "who may be available" makes the provision ineffective. There is no system of any screening of witnesses. That is why the whole fabric of judicial system is torn. The witnesses take oath in court and lie in front of judge in the court room. Buying of witness on rental basis, for giving false evidence is a common practice in present courts of Pakistan.

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[183] *Al-Mughnī li-'Ibn-Qudāmah* 10/174

[184] Ibid. Abū al-walīd Muḥammad bin Aḥmad Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",n* vol. 4. (Cairo: Dār al-Ḥadith, 2004), 247.

[185] Sharbīnī, *"Mughnī al-Muḥtāj"*, 6/390.

66. Women's Testimony

The testimony of women in cases of 'udd and Qia' is not admissible, according to all four schools of thought, unlike in instances of 'ahl-Zhir'.[186] However, in financial matters, both a man and two women's testimony is admissible, so this is not the situation.[187] Women's testimony is acceptable in all circumstances, including financial ones, according to Imam Abanfa, with the exception of udd and Qia.[188] These issues include "Iddah," "ul," "Nika," divorce, and the release of captives. Two female testimonies will be accepted if a woman testifies in lieu of a man.[189]

The situation is different in cases involving property. The woman's testimony is allowed in property cases.[190] In contrast, there is disagreement among lawyers regarding issues involving parenting, marriage, divorce, and other related topics. The Anafi legal scholars believe that women can testify, whereas the Shfai legal scholars hold the opposite view.[191] Shafi'i disagree with this viewpoint and claim that women's testimony is only admissible in cases involving money. They claim that the women's testimony is unreliable because of their cognitive impairment, incapacity for leadership, and memory loss.[192]

Al-Marghnn believes that women can testify initially because they are capable of managing everything needed

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[186] Abū Muḥammad 'Ali bin 'Aḥmad bin Saee'd ibn Ḥazam, "*al-Muḥalā bil Āthār",vol. 8 (Beirut: Dā*r al-fikr, n.d), 478.
[187] Al-*Qur'an* [2:282]
[188] Marghīnānī, *al-Hidāyah*, vol3/ 116. Also, in Ibn Rushd, "*Bidāyat al-Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.
[189] Ibid
[190] Al Quran [2:282]
[191] Marghīnānī, *al-Hidāyah*, vol. 3/ 116. Also in Ibn Rushd, "*Bidāyat al-Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.
[192] Al-Shīrāzī, "Al-*Muhazab fī al-fīqh al-Imām Shafi'ī*", vol. 3/437.

for testifying, that is, after witnessing the event, remembering it, and relaying the pertinent information to the judge. Al-Marghunn said it makes no difference if they lack 'aql. He claims that although women's memories are generally not as good as men's, the anafs do allow women to testify because they can gather the essential elements of a testimony. According to him, this issue of being unable to accurately recall the events is solved by requiring two female witnesses for every male witness.[193]

a. Single Woman's Testimony

In matters that are not exposed to males, the testimony of women only is generally accepted by schools of thought. These are the situations in which it is typically impossible for men to testify and be present because there has been no male examination. Menstruation, childbirth, the explanation of female sexual abnormalities, etc. are a few examples. Only one woman's testimony is admissible in these instances.[194]

Similarly, evidence of one woman is sufficient regarding virginity defects in private parts which cannot be exposed to men. This principle is derived from saying of Prophet (PBUH).

18 ال يستطيع الرجل النظر الي هشهادة النساء جائزة فيما[195]

"The evidence of women is valid with respect to such things as is not fitting for man to behold".[196]

In matters of child weaning (al-Radhā'h) *Abū Hanīfah* is of the view that testimony of women alone is not admissible because this is the matter which is disclosed

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[193] Marghīnānī, *al-Hidāyah*, vol3/ 116 *Translated by* Karen Bauer, "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law", 7.

[194] Sarakhsī, *Al- Mabsūt*, vol.5/10`1. Also, in 'Ibn Rushd, *Bidāyatu'l-Mujtahid*, 4/248.

[195] Sarakhsī, *Al- Mabsūt*, vol.5/101.

[196] The Hidayah or Guide: A commentary on the Mussalman Laws, Trans. Charles Hamilton, vol. 2 (London: T. Benslay, n.d),668.

to men.[197] The rule regarding virginity is such that when a man buys a female slave on condition of her being a virgin and afterwards he wants to return her because she is not. Another woman would examine her and give testimony. If she is not virgin, the buyer will have the option to rescind the contract.[198]

However, there is a difference of opinion among the jurists about the number of women to testify for these matters in which men cannot participate. Imām Abū Ḥanīfa is of the view that one woman is enough to testify. Imām Malik requires testimony of at least two women. Imām
Shāfi'ī requires testimony of four women in these matters because Allah Almighty has made two just women equivalent to one just man. So, for that purpose two just men can only be replaced by testimony of four just women.[199] ("If there are not two male witnesses, then a man and two women from among those witnesses who please you; so if one of the two women errs, the other will remind her").[200]

Imām Sarakhsī says that it is a fact that the basis for not allowing women to testify alone is their lack of rationale ('aql) and religion (dīn), which the Prophet of Allah (peace be upon him) described as "deficiency," thus creating doubts about its complete absence.
Forgetfulness and errors are common in women, they make relatively more mistakes then men, and the inclination towards pleasure is usually higher in them. These are the serious problems with respect to testimony. So, by analogy women alone should not be allowed to

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[197] Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.
[198] Sarkhsī, "*Al – Mabsūt"*, Vol. 13/111.
[199] Ibn Rushd, "*Bidāyat al- Mujtahid wa nihāyat al-Muqtaṣid",* 4/ 247.
[200] Al- Qur'ān [2:282]

testify alone. But this analogy is not always used because of the saying of the prophet (PBUH) which allows women to testify alone in matters which men cannot see.[201] No such specification is present in QSO, which are mentioned in Islamic law and saying of Prophet (PBUH).

Authentication of evidence in Islamic law as mentioned above is conducted through firstly, through ensuring specific number of witnesses and secondly, by checking character of witnesses.

67. Hearsay Rule and Exceptions:

Other than rumours in their true meaning, very few situations are allowed under Islamic law for rumours. In some well-known instances, Islamic law permits rumours. For instance, many people are familiar with instances of birth or death. Or related situations.[202] In article 1688 of Al-Majellah, it is stated that "the witness must directly know what he is declaring in order to give his testimony. They are not permitted to testify that they only have "hearsay," or "words from individuals."[203]

However, if a witness states: "I have heard of a trustworthy individual" in reference to being waqf compliant or the fact that a person is deceased, his testimony is taken to be reliable. It is acceptable for someone to speak based on hearsay in cases involving vilat, death, and parentage.[204] In other words, a person may give a testimony based on facts that are generally known. It is acceptable to do this without actually seeing the occurrence or act that is the subject of the testimony. Al-Shahdah bi-Tasmay is how Islamic law refers to it. As a result, information about a person's ancestry, marital status, or death can be provided

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[201] Sarkhsi, *Al – Mabsūt*, Vol. 16, 114.

[202] Encyclopaedia if Islam, "Shahid", vol. 9 (Leiden: Brill, 1997), 208.

[203] *Majallah al-Aḥkām al-ʻAdalīah*, (Karachi: Kārkhāna Tijārat Kutub, n.d), art: 1688.

[204] Ibid.

without that person being seen or noticed at the moment of his birth, his marriage, or his death.[205]
In these four situations, it is acceptable to testify based on hearsay (Al-Tasmay'). To prevent difficulties, these cases are permitted (araj). The cases mentioned above are those that are immediately observed by few people but quickly gain notoriety in society. For instance, because so few people are present when someone passes away, the word of their death suffices to attest to it. However, the news that such a person passed away spreads rapidly. He is permitted to speak about it in accordance with the news reports.[206]

If someone sees that a person is sitting in a court room and a lot of people are coming to him for decisions. He is allowed to testify that he is a judge on the basis of hearsay.[207] In Islamic legal system judge has the discretionary power to admit or reject any exceptions to the hearsay rule on the basis of credibility of hearsay. Marghīnanī says that analogically or as a matter of general rule, it is not lawful to give evidence on the basis of hearsay. The reason is that the foundation of testimony is entirely based on sight and direct observation. That is the only way of deriving knowledge. These exceptions are permitted on the basis of istiḥsān.[208] That means adhering strictly to the rule of hearsay creates hardship for the general public.

The above mentioned four cases, in which hearsay is permissible, are the ones which are seen or observed by a few people. These cases usually carry element of privacy. It will cause a great hardship for people at large if it is

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[205] Encyclopedia of Islam, s.v. "Shāhid", (Leiden: Brill, 1997) vol.9, 208.
[206] Sarakhsi, *Al-Mabsūt*, Vol.16, 150. Maghīnāni, *Al – Hidāyah*, vol. 3, 120-121. Also in Kāsānī, Badā'i' al-Ṣanā'i, vol.6, 266.
[207] Ibid 371
[208] Maghīnāni, *Al – Hidāyah*, vol. 3, 121.

expected to have a direct testimony on these cases. That is why they are permitted by way of hearsay. For instance, birth is an event for which none is present but midwife. Marriages and deaths are seen by few and cohabitation is seen by none. From all these events a number of consequences arise. For instance, consequence of birth is inheritance, marriage is dower and maintenance etc. So, a credible hearsay testimony is permitted to solve this problem.[209]

As compared to western law, Islamic law is very strict in hearsay testimony. There are a large number of hearsay exceptions which are permitted in western law. For instance, *Present Sense Impression, Excited Utterance, Existing Mental, Emotional, or Physical Conditions etc. There are almost 30 hearsay exceptions present in US law of Evidence.*[210]

But in Islamic law only these four cases are allowed. In other words, western law is broad in allowing hearsay and Islamic law is very cautious and limited. It permits hearsay in only those cases which are already known by way of public knowledge. So, these cases are not hearsay in the strict sense. Qanun-e-Sahadat Order, stipulates in article 17 that every witness giving testimony must have directly seen, heard and observed directly. It gives two exceptions to the hearsay rule. First is expert testimony, second is inspection of real evidence by the court.

68. Secondary Testimony

Islamic law of evidence offers secondary witness *(Shahādah 'ala Shahādah)*. It is different from hearsay evidence *(Al-Shahādah biTasāmay')*. In this kind of

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[209] Ibid

[210] See Federal Rules of Evidence of USA. Rule number 803 "Hearsay Exceptions"

testimony if the primary witness is either too far or is unable to attend the court for testimony due to any reason. He transfers his testimony to another just witness. He makes him his representative. This kind of testimony is permissible in Islamic law. In other words, if a witness has a legal excuse for not being able to attend the court session, he can transfer his testimony to other two just witnesses. It is called *Shahādah bi-Tasāmay'*in Islamic law. However, secondary testimony is inadmissible in Ḥudūd offences or Qiṣāṣ.[211]

Imām *Abū Hanīfah* says that one secondary witness is enough for one primary witness. Two witnesses will testify in place of two.[212] But Imām *Shafi'ī* opines that two secondary witnesses will take the testimony of one primary witness and four secondary witnesses will testify in front of the judge for two witnesses.[213] Imām Sarakhsī says this kind of testimony is allowed in all cases except Ḥudūd and Qiṣāṣ.[214]

Qanun-e-Shahadat Order stipulates that if a person is ill or dead or unable to come to court then he can transfer his testimony to someone else that is shahadah ala shahadah

69. Comparison in English and Islamic Law:

The above-mentioned facts made it clear that the general principles of Islamic law of evidence are different from the English law. There are some major differences in English and Islamic law on oral testimony when purgation, hearsay and just characteristic of the witness comes under discussion. Secondly, the detailed conditions

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[211] Encyclopedia of Islam, "Shāhid", (Leiden: Brill, 1997) vol.9, 208.
[212] Al-'Aīnī, "*al-Bināyah Sharh al-Hidāyah",* vol. 9/127.
[213] Sarakhsi, "*Al-Mabsūt"*, Vol.16, 138.
[214] Ibid 138

specified for the witness in Islamic law are not discussed in similar detail in the English law. The standards of admissibility are somewhat similar in both the English and Islamic Law.[215]

70. Conclusion

Oral testimony is the first and the most important means of proof in both the Islamic and Western law, but with a lot of differences. For instance, Islamic law does not accept testimony of a person who is not just in character (Ādil).. A witness who has a doubtful character cannot lead to truth. There is a long discussion of Muslim jurists explaining the attributes of a just witness. Although the standards of the Muslim Jurists regarding these characteristics relaxed with the passage of time, there is still a criteria to meet. QSO does not stipulate any such condition on witnesses. Islamic law also introduces a highly effective mechanism of purgation of witnesses. It developed a complete system of accredited witnesses who subsequently became the helpers of the judge. QSO on the other hand does not have any such procedures which involve purgation of witnesses. The law of Pakistan on oral testimony is influenced by one fact. That is the Qanun-e-Shahadat order 1984 was previously called Evidence Act 1872, which is an English law. QSO 1984 is a mererepetition of Evidence Ac 1872. The standard applied for oral testimony are those which are followed in western law. So, the standards applied for oral testimony in QSO 1984, are those which are in English law. These standards have nothing to do with Islamic laws. Although Pakistan is a Muslim country but the laws being followed by them are western. Witnesses who

[215] These standards include the evidence must be relevant, authentic, direct and best evidence rule.

come for testimony for e-evidence are the ones which qualify through English law.
The qualification for admissibility of oral testimony, in Pakistan, must be based on Sharī‘ah.

Different classifications in terms of number of witnesses also adds in to the differences between Western and Islamic law. At least, four witnesses are necessary for testifying in case of Hudūd offences such as slandering and fornication. Other crimes and financial matters require at least two witnesses. QSO stipulates such conditions on financial matters only. If ignores Hudood. There is no classification such as *Ḥadd* offences and other offences. Pakistani law is completely silent on these matters, which means it follows English law.

Unlike English Law, the Islamic law differentiates in women testimony. Women are not allowed to testify in cases of *Ḥudūd* and *Qisās.* It is proven by the *Sunnah* of Prophet (PBUH) and *’Ijma‘*. It is allowed only in cases other than *Ḥudūd* and *Qiṣāṣ*, financial matters, property, marriage, divorce, freeing of slave, *‘Iddah* and s*ulḥ*, etc. Opinion of scholars is different regarding admissibility of women’s testimony, which would be equally applicable to electronic evidence. The biggest among them is she cannot testify in case of Hudūd and Qisās. Another one of them is that in case her testimony is admitted, two women would replace one male testimony. QSO equates two women with one man in financial matters only and no other case. This is repugnant to Islamic law.