LAW OF EVIDENCE

In view of the proposed changes in the legal structure of the Country, introduction of Islamic Laws, particularly with regards to Hadood, and contemplated changes in the composition of Courts, the Pakistan Law Commission felt it necessary that the Law of Evidence should be examined de novo critically from the view point of its suitability to our present day requirements and its conformity or otherwise to the tenets of Islam, as laid down in the Holy Quran and Sunnah.

2. The Commission undertook this task on a top priority basis. Since the time at the disposal of the Commission was short and it was not possible to hold day to day sessions of the Commission, the report was drafted in the Secretariat, examined by a Special Committee constituted by the Chairman for this purpose and was circulated among the Members for their consideration.

3. The most important question that attracted the attention of the Commission in connection with the revision of the Law of Evidence from the view point of Islamic Jurisprudence was whether:-

(i) the present Evidence Act should be replaced in its entirety by a new statute of Islamic Evidence based on the injunctions of Quran and Sunnah and suited to our present day requirements, or

(ii) the present Evidence Act, which has stood the test of the time for more than a century and is fully known to the Members of the Judiciary, the Bar and the common public, may be examined thoroughly, section by section and clause by clause, and only those provisions thereof which are contrary to the tenets of Islam, as laid down in the Holy Quran and Sunnah, be either eliminated or suitably amended so as to bring them into accord therewith.

The Commission is of the opinion that scraping of the Law of Evidence, in its entirety, would create a vacuum which would not easily be filled in the near future, and might lead to chaos in the Courts of the Country as admissibility of evidence etc., would become subject to the whims of the individual presiding officers of the Courts, and interpretation of the principles of Islamic Law of Evidence might vary from Court to Court. The Commission, therefore, considered it desirable to examine the existing Evidence Act from the view point of:-

(a) finding out those provisions of the Act which are contrary to the tenets of Islam and suggesting amendments to them in order to make them in conformity therewith, and

(b) making the provisions of the Act suitable to our present day requirements, particularly, with the object of eliminating delays in the disposal of judicial cases in the courts of the country at all levels.

4. The Commission has consequently gone through the Evidence Act carefully, section by section and clause by clause, to find out whether, and if so how far, the provisions contained therein are repugnant to the Injunctions of Quran and Sunnah. The Commission has not only taken into consideration the possible objections to the validity of the provisions of Evidence

Act, which struck the Commission but also the comments and criticism of other writers on the subject including Dr. Munir Ahmad Mughal of the Lahore High Court and Maulana Muhammad Matin Hashmi.

5. The Commission also received very valuable assistance from Mr Justice Aftab Hussain and Mr Justice Malik Ghulam Ali, Chairman and Member, respectively, of the Federal Shariat Court in this respect. The Commission is in full agreement with most of their views. A copy of their note is appended to this Report.

6. The Commission's report in this respect is as follows:-

CHAPTER - I
INTRODUCTORY

From times immemorial, in every society, whether large or small, rich or poor, advanced or backward, there have always been disputes between man and man which required determination and decision by a third person after weighing and examining the claims of the contesting parties. This exercise on the part of the third person can be considered as the most elementary stage of administration of justice. Since the creation of man-kind the concept of administration of justice, of which evidence is an integral part, has always been intimately connected with the social aspect of human life and which, by a process of evolution, has developed into the present complex and intricate system of administration of civil and criminal justice.

2. We find a reference to the elementary rules of evidence in the Holy Quran also, which were followed by the ancient generations, e.g., in Sura-i-Yusaf, it has been stated that when Prophet Yusaf was falsely accused by Zulaikha of immodest overtures and no direct evidence was available except the contradictory assertions of the two parties, it was suggested that Yusaf's shirt may be examined and in case it was torn in front, Zulaikha's allegation was correct but if the shirt was torn on the back then Yusaf was innocent and Zulaikha was telling a lie. Similarly Jesus Christ, when a child in the cradle, was given the power of speech by God to testify to his mother's innocence, when after his birth Holy Mary brought him to her clan and was accused of an unchaste conduct by the elders of the clan.

3. Elementary rules of evidence were also in force in the Roman Society, particularly, while determining the status of the Roman Citizens i.e. whether sui juris or alieni juris. In the same way the provision in Roman Law, that if a slave mother was a free citizen even for a day

during the period of actual conception and delivery of the child, the child was a free born citizen, irrespective of the status of the mother, did require evidence so as to prove freedom of the mother during the period of pregnancy. In the early period of Islamic History also the major part of the Law of Evidence which is now included in the books of Fiqah was based mostly on the usages and customs of the then Arabian Society which fully suited the requirements of those people and their educational level even after the advent of Islam. In those days there was no police to investigate the commission of offences nor was there the medical jurisprudence in its existing scientific form. In the Courts of those days the evidence and arguments were not so thoroughly sifted nor was documentary evidence given any importance or preference over the oral evidence on account of absence of literacy, as is the procedure of the Courts at the present times.

4. The present day Law of Evidence may aptly be described as law of the jury system, which was born during the time of the Roman Empire and developed side by side with the evolution of the ancient Anglo Saxon Law. Most of the rules relating to admissibility, presumption, impeachment and confirmation as to credibility of witnesses have considerably been influenced in their evolution by the system of associating other persons also with the judges, preferably laymen, in the task of administration of justice. The Law of Evidence may be defined as "a collection of rules for ascertaining the truth in controverted questions of fact in judicial inquiries". It bears the same relation to a judicial investigation as logic to reasoning. The object of judicial proceedings is to determine and enforce either a right or a liability which invariably depends on certain facts, and in order to determine the existence or non-existence of such facts the rules of evidence determine the procedure to be followed in conducting an inquiry about those facts. The task of ascertaining the facts which are the essential elements of a right or

a liability is, in fact, the most important function of a Court or a tribunal. This function is regulated by a set of rules and principles which constitute the Law of Evidence.

5. The scheme of the Evidence Act is to narrow down the field of judicial inquiry so as to bring it within the prescribed legal limits. The rules with regard to relevancy contained in the Act are based on logical common sense and the connection found between certain facts, but those facts which have only a remote bearing on the fact in issue or which on the ground of public policy, or for the sake of speedy disposal of cases, or due to certain other reasons, should not be brought before the court have, deliberately, been left out from the purviews of relevancy. Thus the Evidence Act, in the interest of speedy administration of justice, tries to restrict the otherwise unlimited scope of enquiry. The Act, therefore, helps in quicker disposal of cases which, in case the logical relevancy was applied to them, would take a much longer time to be disposed of.

6. In the Indo-Pakistan Sub-Continent prior to 1872, there was no single exhaustive Code containing the rules of evidence of uniform application in the Country. The first concrete step in this direction was taken in 1855 in the form of Act II of that year. Prior to that some half hearted attempts were made by the enactment of Acts, X of 1835, XIX of 1837, IX of 1840, VII of 1844 and XV of 1852. Out of all these enactments the Act of 1855 is most important. Finally, however, the legislature passed the existing Evidence Act, I of 1872.

CHAPTER - II

A. EXAMINATION OF THE EVIDENCE ACT FROM THE VIEW POINT OF ISLAMIC JURISPRUDENCE

7. The Commission is of the view that there are only a few provisions of the Act to which an exception can be taken on the ground of their repugnancy to Islam. The accuracy of this view will be evident from the fact that a major part of the Act deals with relevancy of evidence in respect of which there is not much difference of opinion between the Evidence Act, 1872, and the Islamic Principles of evidence. This view point is supported by those who have studied the present Evidence Act as well as the principles of evidence laid down by the Muslim Jurists of eminence. In the opinion of the Commission, the following sections of the Evidence Act require amendment from the view point of Islamic Jurisprudence:-

a. SECTION 29

8. According to Section 29, "if such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him." It is clear that the promise of secrecy, deception, intoxication or putting questions to an accused which he need not have answered and without warning him to that effect are the methods which are generally used to make an accused to confess to his guilt. Since the standard and quality of evidence required in the trial of cases under the Laws of Hadood, as laid down in the Holy Quran, is not in accordance with the provisions of this Section which can otherwise safely be applied to the cases of Taazir, the Commission is of the view that the provisions of this Section should not be

applicable to trials under the Hadood Ordinances. It is, therefore, suggested that the following Proviso may be added to this Section, namely:-

> "Provided that the provisions of this Section shall not apply to the trial of cases under the Laws relating to Hadood."

SECTION 112

9. According to Section 112, birth during the marriage is a conclusive proof of legitimacy of a child. It lays down that "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

10. The provisions of this Section are definitely contrary to the tenets of Islam, as Sharia lays down that a child born during the continuance of a marriage, but after six months of the date of marriage, is legitimate. Consequently, a child born before the period of six months cannot be considered legitimate according to Sharia. According to the existing Law of Evidence, however, a child born even on the day next to the day of marriage will be considered legitimate. It is laid down in Quran ( ) "And the bearing of him and the weaning of him is thirty months" (Al-Ahqaf 46,16). Again it is said ( ) "and his weaning takes two years" (Luqman 31, 14). So, if out of a total period of thirty months, two years of weaning are deducted the minimum period of legitimate pregnancy according to the Holy Quran comes down to six months. Section 112 of the Evidence Act, therefore, needs

suitable amendment in order to bring it in conformity with the above mentioned provisions of the Islamic Law. The revised Section 112 should, therefore, read as follows:-

> "112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, but not before the expiry of six lunar months from the date of marriage, or within two hundred and eighty days after its dissolution, the mother remaining un-married, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

SECTION 118

11. According to Section 118 of the Evidence Act, "all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old-age, disease whether of body or mind, or any other cause of the same kind". It has further been explained in the Section that a lunatic is competent to testify, unless he is prevented by his lunancy from understanding the questions put to him and giving rational answers to them. In this Section, except the above mentioned few exceptions every one is competent to give evidence and, at the same time, it has not prescribed any fixed number of witnesses. This provision is not strictly in accordance with the Quran or Sunnah of the Holy Prophet (P.B.U.H) for instance it is mentioned in the Quran:

> "and call to witness two just ones from among you and give upright testimony for Allah (Talaq-65-2)."

Again it is said

> "You who believe, call to witness between you when death draws nigh to one of you, at the time of making the will, two just persons among you or two others than among you (Almaida-5-106)."

This would mean that the witnesses must be Adil i.e. the just ones as laid down in the Quran. The Sharia does not make admissible the evidence of persons convicted of any moral offence or persons having reputation of immoral character or persons who have any bias for or against the persons about whom the evidence is to be given. As regards lunatics the explanation contained in Section 118 is sufficient to explain the position. According to Sharia also there is no bar against a lunatic giving evidence at a time when he is not under the influence of lunancy and can understand the questions and give rational answers to them (Fatawa-i-Alamgiri Arabic, Volume 3, Page 465).

12. As regards minors, the juristic opinion is that at least in cases in which the minor can be the only witness, e.g. when the offence is committed in a play-ground his evidence is valid. There appears to be no reason according to the principles of Quran and Sunnah to confine the evidence of minors only to such matters. If a minor can be a good witness in one case he can

also be a satisfactory witness in other cases. The law, in any case, lays down certain safeguards. Before putting the minor to oath it would be necessary for the Court to judge whether he understands the consequences of a statement on oath and whether he can understand the questions and answer them. This Section does not, however, provide that the evidence of all such persons should, as a matter of course, be believed. According to the principles adopted by the courts since the time immemorial, the courts always try to judge the evidence of a witness in the light of his propensity to tell lies or his bias for or against the other party as well as his moral character, so far as it is relevant to the case. Besides, there are a number of dis-qualifications which have been added by the Jurists, but if all those are included in this Act it would not, we are afraid, be possible to find our any witness in our present day society in respect of any crime, right or claim, however genuine it may be.

13. It is for this reason that the Jurists had also held several hundred years ago that even the evidence of a Fasiq in such a society would be admissible. In his famous book "Moeenul Hukkam" (Pages 117 and 118) Allama Alauddin Trablasi writes that, "some Jurists have related that if people of a village give evidence about a woman, or some one else, and none is Adil among them, decision may be taken on their evidence". Again this is an established principle of law that a judgment recorded by a Qazi on the basis of evidence of a Fasiq is correct, (Durrul-Mukhtar, Kitabul-Qaza, Volume 2, Urdu, Page 208). It may be stated that Fasiq is a person who commits major sins and insists on the commission of minor sins (Durrul-Mukhtar). Section 118 should, therefore, be amended in such a way that the condition with regard to Adil witnesses should invariably be applicable to trials under the Hadood Laws, but in view of our existing circumstances it may not be a condition precedent to a conviction under Taazir cases. According to the doctrine of necessity in certain cases even the evidence of non-Adil witnesses can be accepted. (Moeenul Hukkam, Alauddin Trablasi Page 145).

14. It is, therefore, suggested that a proviso may be added to section 118 to the effect that the provisions of this section shall not apply to the trials of cases under the laws relating to Hadood. The revised section 118 should, therefore, read as follows:-

> "118. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind:
>
> Provided that the provisions of this section shall not apply to trial of cases under the Laws relating to Hadood.
>
> EXPLANATION
>
> A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

SECTION 119

15. Section 119 provides that "a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence". According to Islamic Law, however, the evidence of a dumb person is considered to be doubtful in matters relating to Hadood only. In other matters his evidence is acceptable by means of signs or writing. In the case of Hadood, the evidence of a dumb person by means of signs being doubtful cannot form the basis of enforcement of Hadood. There is a saying of the Holy Prophet:

Avoid the Hadd if the matter is doubtful -(Dairatul-Muaarif by Allama Farid Wajdi).

16. Since the laws about Hadood contain specific provisions about the qualifications of witnesses in those cases, it is not necessary to make any provision to that effect in the Evidence Act, except addition of a proviso to the effect that the provisions of this section shall not apply to cases or trials under laws relating to Hadood.

17. The revised section 119, should, therefore, read as follows:-

> "119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written, and the signs made in open court. Evidence so given shall be deemed to be oral evidence:
>
> Provided that the provisions of this section shall not apply to the trial of cases under the Laws relating to Hadood."

SECTION 126

18. According to this section of the Evidence Act:-

> "No Barrister, Attorney, Pleader or Vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such Barrister, Pleader, Attorney or Vakil, by or on behalf or his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his

professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:-

(i) any such communication made in furtherance of any illegal purpose;

(ii) any fact observed by any Barrister, Pleader, Attorney or Vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such Barrister, Pleader, Attorney or Vakil was not directed to such fact by or on behalf of his client.

EXPLANATION

The obligation stated in this section continues after the employment has ceased."

19. There can be no objection from the view point of Islamic jurisprudence either to the main section or its proviso. There are, however, three different illustrations, namely, (a), (b) and (c) appended to this section in the statute book. According to the contents of Illustration (a), the defence of a man known to be guilty is not a criminal purpose. Hence an admission of guilt by a criminal before his lawyer is protected from disclosure. This provision militates against the concept of Islamic Justice as it amounts to encouraging the members of the legal profession to defend a client who admits to have committed the offence. The Commission is, therefore, of the

view that Illustration (a) should be deleted from this section and the remaining two Illustrations renumbered as (a) and (b).

SECTION 134

20. According to section 134 of the Act, no particular number of witnesses has been fixed for the proof of any fact. The provision of this section is, in certain respects, contrary to the tenets of Islam. In cases of Hadood, the number of witnesses as well as their qualifications are prescribed and no departure therefrom is possible, for instance

> "And as for those of your women who are guilty of an indecency, call to witness against them four from among you" (Al-Nisa-4-15).

Again about divorce it is ordained:-

> "And call to witness two just ones from among you, and give upright testimony for Allah. (Al-Talaq-65-2)

> "When death draws nigh to one of you at the time of making the will the two just persons from among you shall be your witnesses."(Almaida-5-106)

So, for the purposes of will, two witnesses are required. However, in cases of a dire necessity a case can be proved even on the evidence of one person as held by the Lahore High Court in Fida Hussain vs Nasim Akhtar, (P.L.D. 1979, Lahore 328). This view has also the support of Imam Ibne-Qayyim. (Elam-ul-Muwaqqaeen, Pages 77-86).

21. Since the provisions with regard to mode of proof and receiving evidence etc., have already been included in the Hadood Ordinances it is not necessary to include those provisions in this section of Evidence Act. The provisions of section 134 should, in the opinion of the Commission, be amended as follows:-

> "134. No particular number of witnesses shall, except in cases for which such a number has been fixed by any law, for the time being in force in Pakistan, be required for the proof of any fact."

CHAPTER - II
B. EXAMINATION OF THE EVIDENCE ACT FROM THE VIEW POINT OF ELIMINATION OF DELAYS IN THE DISPOSAL OF JUDICIAL CASES.

22. Since the Law of Evidence has not been amended for quite some time, it does need certain changes from the view point of avoiding delays in the disposal of cases in the Courts of the country at all levels. The Law Reform Commissions of 1958-59 and 1967-70 had made certain recommendations, some of which were implemented, while other still remain un-noticed. The Commission has taken into consideration those recommendations also. Consequently, the Commission suggests the following amendments in the Act which are technical in nature and do not require any detailed comments for this purpose:-

(a) SECTION 65

It is noted from several instances that where an original document, forming part of a judicial record, is not available, its certified copy is admissible but a certified copy of the certified copy is not admissible, thus causing complications and delay in the disposal of judicial cases. This section should, therefore, be suitably amended, so as to make a certified copy of a certified copy of a document admissible as secondary evidence. Consequently, after clause (g) in this section, a new clause (h) may be added, namely:-

> "(h) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, further certified copies of that certified copy shall also be admissible as secondary evidence."

(b) SECTION 69

In section 69, relating to proof where no attesting witness is found, the provision making it necessary for the handwriting of an attesting witness to be proved if none of the attesting witnesses can be found, should be deleted from this section as it is responsible for causing substantial delay in the disposal of cases. It should be sufficient for a party to establish that the witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so. The amended section 69 should read as follows:-

> "69. If no such attesting witness can be found, it shall be sufficient for a party to establish that the witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so."

(c) SECTIONS 123 and 124

Sections 123 and 124 relate to evidence as to affairs of State and official communications, respectively. The former section provides that "no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. The latter Section provides that, "no public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure". These two sections, consequently, relate to the privileged documents. However, in cases where the Government carries on industrial or commercial activities, whether through statutory bodies or otherwise, the documents concerning those activities should not be regarded as privileged documents; as some time they are taken an undue advantage of by the Government bodies in their industrial and commercial disputes with other firms or individuals and thus causing inordinate delay in disposal of judicial cases. The Commission is, therefore of the view that these two Sections should be suitably amended so as to clarify that the documents concerning the industrial or commercial activities of the Government shall not be treated as privileged documents. This object can be achieved by adding suitable provisos to each of the two Section, viz 123 and 124. The revised Sections 123 and 124 shall, consequently, ready as follows:-

> "123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit:

Provided that the provisions of this section shall not apply to the documents concerning industrial or commercial activities of the Federal or a Provincial Government or any Statutory Body thereunder, whether carried on through a Statutory Body or otherwise."

"124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure:

Provided that the provisions of this section shall not apply to the communications concerning industrial or commercial activities of the Federal or a Provincial Government or any Statutory Body thereunder, whether carried on through a Statutory Body or otherwise."

CHAPTER - III
SECTIONS OF THE EVIDENCE ACT
WITH PROPOSED AMENDMENTS.

1. "29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him:

Provided that the provisions of this section shall not apply to the trial of cases under the Laws relating to Hadood"

2. "65. Secondary evidence may be given of existence, condition or contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court;

or

of any person legally bound to produce it;

and when, after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in Pakistan, to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection, and

(h) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, further certified copies of that certified copy shall also be admissible as secondary evidence.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the documents, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

In case (h), a certified photostat copy of a certified copy is also admissible.

3. "69. If no such attesting witness can be found it shall be sufficient for a party to establish that the witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so."

4. "112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, but not before the expiry of six lunar months from the date of marriage, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be

shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

5. "118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind:

Provided that the provisions of this section shall not apply to trial of cases under the Laws relating to Hadood.

EXPLANATION

A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

6. "119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court. Evidence so given shall be treated as oral evidence:

Provided that the provisions of this section shall not apply to the trial of cases under the laws relating to Hadood."

7. "123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit:

Provided that the provisions of this section shall not apply to the documents concerning the industrial and commercial activities of the Federal or a Provincial Government or any Statutory Body thereunder, whether carried on through a Statutory Body or otherwise."

8. 124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure:

Provided that the provisions of this section shall not apply to the communications concerning the industrial and commercial activities of the Federal or a Provincial Government or any Statutory Body thereunder, whether carried on through a Statutory Body or otherwise."

9. "126. No Barrister, Attorney, pleader or Vakil shall, at any time, be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such Barrister, Pleader, Attorney or Vakil, by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:-

(1) any such communication made in furtherance of any illegal purpose:

(2) any fact observed by any Barrister, Pleader, Attorney or Vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such Barrister, Pleader, Attorney or Vakil was or was not directed to such fact by or on behalf of his client.

EXPLANATION

The obligation stated in this section continues after the employment has ceased."

ILLUSTRATIONS

(a) A, a client says to B, an Attorney "I wish to obtain possession of property by the use of a forged deed on which I request you to sue".

The communication being made in furtherance of a criminal purpose is not protected from disclosure.

(b) A, being charged with embezzlement retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure."

10. "134. No particular number of witnesses shall, except in cases in which such a number has been fixed by any law, for the time being in force in Pakistan, be required for the proof of any fact."

NOTE FROM FEDERAL SHARIAT COURT
WITH ANNEXTURES A & B

We have gone through the Evidence Act carefully to find out whether, and if so, how far its provisions are repugnant to the Holy Quran and the Sunnah. We have not only taken into consideration possible objections to the validity of this law which strike us but also the comments and criticism of Mr. Irfani which have been dealt with by him in his book Islami Qanun-i-Shahadat which is a compendium of Islamic Juristic law on the subject.

It is generally conceded by those who have studied the Evidence Act as well as the principles of evidence laid down by the Muslim Jurists that there are only a few provisions of the Act to which any exception can be taken on ground of repugnancy with Islam. The correctness of this concession will be evident from the fact that much of the Act deals with relevancy of evidence on which there cannot be much difference of opinion. We shall deal with only those provisions which are or can be the subject matter of any criticism.

SECTION 20

Mr. Irfani (Islami Qanun-i-Shahadat at P.296) states in regard to section 20 that a statement made by a person other than the parties on a reference made by a party cannot be treated as an admission of that party. In his view such a reference is in the nature of Tahkeem (arbitration).

We do not agree that there is anything in Section 20 to which objection may be taken on ground of repugnance. Even if it is considered valid as a piece of arbitration, it is clear that its validity as such is not questionable.

SECTION 26

Mr. Irfani has raised an objection against the provision of Section 26 (P.298) that the accused cannot be free from the effect of threats or third degree treatment administered to him by the Police if he is produced before a Magistrate direct from Police custody. This objection appears to be based on misconception about the confession made before a Magistrate which is recorded in the manners provided by sections 164 & 364 Cr. P.C. The Magistrate has to give time to the accused to collect his ideas and to reconsider the matter. He is then given a warning that if he makes a confession it might be used against him during the criminal trial. He is also given an assurance that there is no likelihood of his going back to Police custody and that he would be sent to Jail after his confession is recorded. It is also worth mentioning that at the time of recording the confession no Police man is allowed to remain in Court. These are sufficient safe-guards in regard to the voluntary nature of the confession.

SECTION 29

Mr Irfani has taken objection to this Section, but we are of the opinion that if truth can be found out without resort to any inducement, threat or promise proceeding from a person in authority, no objection can be taken to it. In our view, however, the confession made by a person when he is drunk should not be relevant under Section 29 since the possibility cannot be eliminated that in order to get confession from the accused, the person trying to obtain it may serve him with drinks.

The words "or when he was drunk" in Section 29 may, therefore, be deleted. It may be considered that though drinking itself is a culpable offence and any offence committed during intoxication cannot be condoned in law provision which may be misused by any person for

obtaining the confession and thus obtaining it by commission of an offence should not be allowed to remain on the Statute Book.

SECTION 30

Prima facie it appears that this provision may be open to exception in view of the principle of evidence in Islam. But we find that a confession of a co-accused is not treated to be a proof of commission of offence against the non-confessing accused. It has only a corroborative value. In this view of the matter no objection can be taken to this provision.

Mr Irfani has also tried to justify this provision (P.299). We do not, however, agree with his view that such a confession can be considered as evidence of the confessing accused against the non-confessing accused since the confessing accused is neither given an oath or can be subjected to cross-examination.

SECTION 31

In the view of Mr Irfani (P.300) an admission should be made conclusive as well as operative as estoppel and Section 31 may be suitably amended. He is of the opinion that Shariah does not allow a person making an admission to withdraw it. The correct view is that though in Hudood cases the accused can withdraw his confession ( ) but this is not permissible in matters pertaining to the rights of men ( ). The principle of withdrawal of confession ( ) has its roots in Hadees of the Prophet (PBUH) but the principle of non-permissibility in other cases is based upon juristic opinions. The principle may generally be unexceptionable but there may be cases, however rare, where, as in right in rem, the Court may consider it necessary to decide a matter after recording evidence. Section 31 caters to such a situation and no objection against it is valid.

SECTION 43

We are not in agreement with the views of Mr Irfani (P.302) that all judgments should be made relevant. This means that even those which are not relevant should be allowed to be admitted in evidence. Practically all relevant judgments have been made admissible by Sections 40, 41 and 42 as well as by the exception created in Section 43 in regard to judgments, orders or decrees, existence of which is a fact in issue or is relevant under some other provisions of the Act.

SECTION 57

Though the point is not of repugnancy with Shariah but the advisability of deletion from this section of provisions relating to the Parliament of United Kingdom etc. may be considered. Another alteration necessary is to make the proceedings of Parliament of other countries also subject to the provision of that section.

Mr Irfani (P.306) has made certain suggestions for inclusion in section 57 of the Shariah Law Quran, Sunnah as well as the Fiqah and books written on those subjects but the section as it stands at present does not require formal proof of any such book. Anyhow there is no harm in adding a sub-clause to that effect.

SECTION 69

This section is also open to the same objection as above in so far as it deals with the documents purported to have been executed in the United Kingdom.

SECTION 78 (1 & 3)

This provision is also open to the same objection.

SECTION 81-82

These provisions are also open to the same objection.

SECTION 108

The view of Mr Irfani (P.313) is that the period of seven years should be reduced to four years in accordance with the opinion of the Muslim Jurists. But the opinions of the Jurists on this point differ. According to Imam Malik the period is four years as regard the wife's right to remarry. The Hanafis hold different views on the question of opening of inheritance. The period fixed by them is 120 years, 90 years as well as 60 years but on this point some of the Jurists are of the view that the age of the person who is missing should be 60, 90 or 120 years when he is treated to be non-existent and not that he should remain missing during all this period. They also leave it to the Qazi to give a different version in view of the circumstances of the case. However, according to Ameer Ali (Mahommedan Law by Ameer Ali Vol.2,P.87):-

> "In the Bazazia it is stated that "in our times", the Fatwa is according to the rule of Imam Malik. And the author of the Radd-ul-Mukhtar, following Mufti Abu S'aud, adds "where there is no Maliki Kazi, the Hanafi Kazi is authorised to pronounce the Fatwa according to the exigencies of the times in conformity with the rule of Imam Malik."

> "Imam Malik's rule is based upon a decision of the Caliph 'Omar' in accordance with the opinion of the Caliph 'Ali'"

Amir Ali has also given the view of Sha'fi at P.88 that according to them the recognized period is seven years.

According to these views, therefore, the period can be four years as well as seven years. This provision cannot, therefor, be treated to be repugnant to the Shariah.

However, there is an other point also. While dealing with section 112, Evidence Act, the Supreme Court of Pakistan held that the question of paternity of a child has to be decided in accordance with Shariah and not in accordance with Section 112 since the provision of Section 2 of the Evidence Act which overruled similar provision of Shariah has now been deleted and the Shariah principles have, therefore, become effective as a result of repeal of Section 2. (Hamida Begum Vs Murad Begum, PLD 1975, Supreme Court 624). The same principle will apply to section 108 also in regard to marriage, dissolution of marriage, dower and inheritance etc. because Muslims in such matters are governed by their personal law.

SECTION 112

Although as stated above according to the Supreme Court's view the paternity of a child is governed by the Muslim Personal Law but there appears to be no reason why Section 112 which is repugnant to Shariah should be maintained on the Statute Book in its present form. The principle of Shariah is that a child born during the continuance of marriage but after 6 months of the marriage is legitimate. Consequently a child born before the period of 6 months cannot be considered legitimate. The provision of Section 112, may, therefore, be suitably amended.

SECTIONS 118 & 120

The objection of Mr Irfani on these sections is that they make admissible the evidence of minors, extremely old persons and very sick persons including Lunatics. These sections do not provide for the moral qualification of the witness since Islamic Shariah does not make admissible the evidence of convict convicted for an immoral crime or persons having reputation

of immorality or those persons who have any bias for or against the person against whom the evidence is being given or against a person who would be benefitted or suffer any loss on account of that evidence.

This objection does not appear to be valid. As regard the Lunatics, the explanation of Section 118 is sufficient answer to the objection. According to Shariah also there is no prohibition against a Lunatic giving evidence at a time when he is not under the influence of lunacy and can understand the question and give rational answers to them. (Fatawa Alamgiri Arabic Vol.3 P.465).

As regards minor, the juristic opinion is that at least in cases in which a minor can be the only witness e.g. when the offence is committed in a play ground, his evidence is valid. There appears to be no reason either on principles of Quran or of Sunnah to confine the evidence of minors only to such matters. If they can be good witnesses in one case they can also be considered satisfactory witnesses in other cases. However, there is difference of opinion as to the age of majority, According to Shia School of thought a person is presumed to have attained majority at the age of nine years only. In any case the law lays down certain safeguards. Before putting the minor to oath it is necessary for the Court to judge whether he understand the consequences of a statement on oath and he can understand the questions and answer them.

Old age by itself is no disqualification.

These sections do not provide that the evidence of all persons should as a matter of course be believed. According to the principle adopted by the court since time immemorial, the courts always try to judge the evidence of a witness in the light of his propensity to tell lies or

his bias for or against the other party as well as his moral character so far as it is relevant to the case.

There are a number of dis-qualifications which have been added by the Jurists but if all those dis-qualifications are added, we are afraid that it will not possible to find out witnesses in our present society in support of any crime, right or claim, however genuine it may be. It is for this reason that the Jurists have also held several hundred years ago that even the evidence of a Fasiq in such a society would be admissible. Allama Alauddin Tarablasi writes in his famous book Moeenul Hukkam (PP.117-118)

> "Some Jurists have related that if people of a village give evidence about a woman or some one else and none is Adil ( ) among them, decision may be taken on their evidence."

He further writes.

> "if a written statement of a Qazi is taken to another Qazi by two persons who give evidence (about the authenticity of the writing) and the Qazi blesses them (and considers them reliable) though not in the way of Ta'dil or he made Tazkia of one and did not make Tazkia of the other or he acted on their evidence and the letter and the stamp were reliable in the view of the person to whom it is written, in my view this is permissible because of the difficulty in finding an Adil (witness) and this was the practice in regard to stamps in the early period also."

"And Qarafi said in the Chapter about Siyasat: Some of the Ulema say that when we find in any case only Ghair Adil then we do not find in any case a witness except those who are not Adil. We accept their evidence of those who are better among them and not all of them. It is necessary for the Qazis to do so in order that the rights of the people are not destroyed. He said there is no difference of opinion on this question for the order of Allah is based on the possibility of existence (of Adil witnesses). This is on account of the principle of necessity so that the rights of the people may not be destroyed. Some say that: when except for a few people all others are Fussaq (bad character) their evidence about one another shall be accepted and decision shall be given on their evidence. This is the correct way on which is founded the practice. And Asbagh bin ul Faraj among the Malikis said: When a Fasiq gave evidence before a Qazi it is his duty to consider it. And Ibn Qayyam al Jaozia Hanbli said: The basic thing is the acceptance or rejection of the evidence on ground of its truthfulness or unreliability. The fact is that Adalat has many facets. A man may be Adil in one respect and Fasiq in another. If it appears to the Qazi that a man is Adil in his evidence, he should accept it. He has no concern with his Fisq in other matters. This principle is obtained as mentioned in Mohit and Quniya, when a man drinks wine secretly and he is otherwise respectable, his evidence should be accepted by the Qazi".

This is an established principle now that judgment rendered by the Qazi on the basis of evidence of a Fasiq is correct. Al Bahrurraiq, Vol. VII, P.77, Durrul Mukhtar, Vol.III (Kitab ul Qaza, Urdu, P.208).

It may be stated that Fasiq is a person who commits major sins and insists on the commission of minor sins (Durrul Mukhtar Ibid).

This is sufficient answer to the objection of Mr Irfani or any other person.

It is agreed upon that relatives can appear against their relatives as witnesses and Quran also enjoins upon all to come forth for evidence when ever required even if though the evidence be against one's parents or near kith and kin (K.5:135). But the better view appears to be that even if the relatives appear to give evidence in favour of a relative there should be no objection to it. In support of this the relevant paragraph from Elamul Mawaqqeen by Ibne-e-Qayyam Jaozi, Vol.I (Urdu) pages 94-100. These pages are annexed as Annexure `A' to this report.

One of us (Mr Justice Aftab Hussain) has considered this point in Fida Hussain Vs Naseem Akhtar (PLD 1977 Lah 328) and held that the Shariah Law is not against the production of the relatives in evidence.

SECTION 119

The objection of Mr Irfani (P.315) is to the evidence of Deaf and Dumb persons in Hudood matters only. The laws about Hudood make a specific provision about the qualification of the witnesses and it is not necessary to make any provision to that effect in the Evidence Act. The evidence of such a person whether in writing or by use of signs language is admissible according to Imam Malik. Same view is expressed in Al Mujalle (vide Paras 70, 174, 1586, 1752).

SECTION 126

There is no objection to the provisions of the main section but in our view illustration (a) requires to be deleted since it amounts to encouraging the members of the legal profession to defend a person who admits to have committed the offence.

SECTION 132

Mr. Irfani (P.316) has taken exception to the proviso to this section which gives immunity to a witness against arrest or criminal prosecution if he is compelled to answer a question which criminates him.

In our opinion there appears to be no objection to this since except in matters of actual trial of Hudood cases, it is open to the State or in cases of Qisas even to the heirs of the victim to pardon an accused person.

SECTION 133

We agree with Mr. Irfani (P.316) that an accomplice is not recognized as such as a competent witness in Islamic Jurisprudence. Mr. Irfani is of the opinion that the Jurists should consider the advisability of the evidence of an accomplice on the principle of necessity.

According to the procedure as provided in section 337 Criminal Procedure Code (and as it actually happens) an accomplice is given pardon only in cases of grave nature which are likely to fail on account of paucity of evidence. In such cases it may not be possible to obtain the conviction of accused who have really committed offences of grave nature. As stated above the principle of giving pardon in certain cases to the accused is not unknown to Islam. Islam on the other hand allows the State to grant pardon in cases except those of Hudood (meaning in all

Tazir cases). In Qisas cases also Shariah allows the pardon of an accused person by the heirs of the victim. There appears to be no reason why in order to obtain the conviction of persons who have committed grave offence, it may not be open to the State at least to pardon a person out of more than one accused person in Tazir cases and make him a witness. It has already been seen that according to the juristic opinion even a Fasiq can be produced as a witness. There can, therefore, be no objection to the production of a co-accused in the above noted special circumstances to appear as a prosecution witness, particularly when according to the authorities on the subject as well as illustration (b) of section 114 the evidence of such a person can be worthy of credit only when he is corroborated in material particulars. We would, therefore, suggest that the provision, of illustration (b) of section 114 should be added to section 133 and the provision about the legality of conviction based on the uncorroborated testimony of the accomplice, may be deleted from that section.

SECTION 134

In cases of Hudood the number of witnesses as well as their qualifications are fixed and no digression is possible from them. In other cases it has been held by one of us (Mr.Justice Aftab Hussain) in Fida Hussain Vs. Naseem Akhtar (PLD 1977 LHR 329) that a case can be proved even on the evidence of one person. This view is fully supported by what is written in Elam ul Muwaqqeen by Imam Ibne Qayyim. The necessary excerpt is added as Annexure 'B'.

The provision of section 134 should therefore, be amended in the light of the above observation. We propose that the wording of section 134 may be as follows :

"no particular number of witnesses shall except in cases in which such a number is fixed by any law for the time being in force, be required for the proof of any fact."

Another objection which we have to meet is that the evidence of a party to the suit or claim is not admissible. This is based upon the distinction drawn by the Jurists between evidence and oath of a party.

The Holy Prophet (PBUH) gave a verdict of Khula on the basis of complaint of a woman against her husband without requiring her to produce evidence. Moreover originally a difference was made between a witness on the one hand and a party liable to take oath on the other. The evidence of the witness was not on specific oath, it used to start with the word ' which was considered to include an oath also.

Allama Ibn-e-Nujaim writes in his famous book Al-Bahrurraiq, Vol.VII page 63:

"And in Tahzib of Qalansi (it has been mentioned) that when tazkia ( ) became difficult in our time due to abundance of fisq ( ), the Qazis started taking oath from the witnesses. Ibn-e-Abi Lyla adopted this procedure apprehending the witness to be a liar. I say! it is not in contradiction to what is stated in the reliable books of Fiqh that there is no oath on the witness because that (principle) was based on the truthfulness ( ) of the witness. But the adalat is concealed particularly in our age and the witnesses at present are not reliable. The same is the position of those from whom inquiry in the adalat of the witness can be made."

For this very reason the witnesses were also subjected to cross examination as will be clear from P.63 of Al-Bahurraiq by Ibn-e-Nujaim Vol. VII.

From this it becomes clear that the difference between a witness and a party was eliminated since oath could be given to the witness also. In view of the prevailing untruthfulness of the parties it will be a step towards advancement of justice if a person taking an oath except on a compromise between the parties or when the plaintiff is unable to prove the case by evidence or to discharge burden, is cross-examined to find out the truthfulness of his statement.

SECTION 143

Mr. Irfani (P.318) has taken objection to the provision about permission to put a leading question to the witness in cross examination. We have not been able to follow the objection which has nothing to do with repugnancy with the Holy Quran and the Sunnah. On the other hand if any witness is asked a leading question which is ambiguous, it becomes the duty of the Judge to direct the party to put a question which may be followed by the witness. The Court is also competent to disallow any question which is otherwise indecent.

SECTION 155

There is nothing in section 155 which may be contrary to the Islamic Injunctions. However Mr. Irfani (P.319) has raised an objection about sub-section 4 that if a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. His argument is that the immoral character of the prosecutrix cannot benefit the accused since adultery or fornication even with an immoral person is an offence.

Mr. Irfani has not taken into consideration the point that in Tazir cases the offence of Zina with the consent of the party is punishable for a much lesser period. The provision is therefore, salutary.

NOTE OF DISSENT
By
DR. TANZIL-UR-RAHMAN,
MEMBER,
PAKISTAN LAW COMMISSION

I am thankful to the learned Chairman, Pakistan Law Commission, for sending me a copy of the Commission's Report on the Law of Evidence (D.O.No.F (6)/80-PLC-Leg, dated 12th January, 1982) enabling me to write my dissenting note thereon.

2. With all respect to the learned Chairman and other members of the Law Commission, I beg to differ with the view of the Law Commission that the Evidence Act, 1872, with its proposed amendments, will be conformable to the Injunctions of Islam as laid down in the Quran and Sunnah. In my humble view, it will not be so. I am, therefore, of the opinion that the present Evidence Act should be replaced by a new Islamic Law of Evidence based on the Injunctions of the Quran and Sunnah.

3. In view of this basic difference of opinion between me and the Commission, it will, perhaps, be a futile attempt on my part to discuss the proposed amendments, as in my opinion mere patch-work in the Evidence Act, 1872, as proposed, will not articulate it to the requirements of Shariah. It will retain its Anglo-Saxon character. I will, therefore, in all humility stress it once again that a new Islamic Law of Evidence be framed.

4. It may not, perhaps, be improper to add here that the provisions of the Evidence Act, 1872, have been derived from the English Law of Evidence. Much of the Evidence Act deals

with the relevancy of evidence whereas it is silent on a number of important subjects relating to the Law of Evidence based on the Quran and Sunnah, which can be found easily by looking into any standard work on fiqh. The Muslim jurists and theologians have, in the words of H.A.R. Gibb, "elaborated a structure of law that is, from the point of view of logical perfection, one of the most brilliant essays of human reasoning" (Mohammadanism, 1959, P.90).

5. One can easily find that there are certain basic differences between the concept of the present Evidence Act based on English Common law and the Islamic Law of Evidence based on the Quran and Sunnah, for example, -

i) According to the English Common Law, any person just or unjust is qualified to be a witness whereas the Islamic Law lays down specific qualifications for a witness with regard to his credibility, whether he be a witness in a case involving hadd punishment or qisas or ta'zir, or he is a witness in a civil case relating to pecuniary matters or otherwise. Reference may be made to the following:-

(Tr)" Two persons from among you, Endued with justice."

ii) English Common Law does not fix any number of witnesses for any particular type of cases whereas the Islamic Law of Evidence prescribes the minimum number of witnesses in almost all types of cases whether criminal or civil. Reference may be made to the following:-

a)

(Tr) "If any of your women are guilty of lewdness, take the evidence of four (Reliable) witnesses from amongst you."

b)

(Tr) "O' ye who believe, when ye deal with each other in transactions involving future obligations in a fixed period of time ..... and get two witnesses out of your own men, and if there are not two men, then a man and two women, such as ye choose for witnesses, so that if one of them errs, the other can remind her."

iii) The English Common Law makes no distinction between male and female in any type of cases whereas the Islamic Law of Evidence recognizes the said distinction in certain types of cases such as Hudud and Qisas. Reference may be made to the following:-

a)

(Tr) "And get two witnesses, out of your own men"

b)

(Tr) "There has been the sunnah of the Prophet and after him of the two caliphs (Abu Bakr and Umar) that there is no evidence for women in the cases of Hudud and Qisas (This has been stated by Ibn Abi Shaybah in his Musannaf)".

iv) As regards credibility of a witness, the proof of his past conduct, in certain cases, is very relevant under the Islamic Law, such as a witness convicted of hadd-i-qazf, is not a competent witness, whereas there is no such restriction in Common Law. Reference may be made to the following:-

(Tr) "And those who launch a charge against chaste women and produce not four witnesses (to support their allegation), flog them with eighty stripes and reject their evidence everafter".

v) There is a golden rule as enunciated in the Hadith

that is,

"the proof is on the person who asserts a claim in his favour and the oath is on the person who repudiates the said claim." This rule is applicable to both civil and criminal cases. But this principle does not find any place in the Evidence Act, 1872.

vi) There are certain rules in Islamic Law of Evidence regarding resilience by a witness from his testimony during trial, after trial, before judgement and after judgement, which entails material repercussions in the case of a witness as well as parties to the proceeding which does not find place in the present Act.

vii) There are settled rules under the Islamic Law about confession and admission called "Iqrar". By itself "Iqrar" is a conclusive proof (Hujjat al Qata'i) of a fact in issue, whereas under the Evidence Act it is merely relevant.

viii There are provisions of the Islamic Law of Evidence regarding Tazkiyah al-Shuhud. With certain modifications suited to the needs of our time these principles can be adopted by our law courts with respect to which necessary provisions are to be made in the Law of Evidence. Reference may be made to Al-Mabsut, Al-Sarakhsi, vol. 16 pp.88-93.

ix) There is a misunderstanding, perhaps out of ignorance, in certain quarters that Islamic Law does not recognize circumstantial evidence, documentary evidence and medical evidence. In fact, there are ample rules in the Islamic Law of

Evidence providing for the same. Reference may be made to Al-Mabsut, al-Sarakhsi, Vol.16, pp. (154-155).

x) There is no privilege to withhold from giving evidence in a Court of law when a witness is asked either by a party or the court to give evidence :

a)

(Tr) "Conceal not evidence; for whoever conceals it, his heart is tainted with sin."

b)

(Tr) "The witnesses should not refuse when they are called on (for evidence)."

c)

(Tr) "So be not (used) as an advocate by those who betray their trust."

d)

(Tr) "Stand out firmly for justice as witnesses to Allah."

The option, according to a Hadith, to withhold evidence, however, lasts in cases of Hudud till the witness is summoned by a party or the court.

(xi) In the Evidence Act there is no effective check on giving false evidence, whereas Islam deals perjurer with stern hand. The Court before whom false evidence is led is itself empowered to punish the perjurer under the Islamic system, whereas under present system, the Court may file a complaint before a magistrate.

6. My learned brother members, probably, conscious of some of these lacunas in the Evidence Act, 1872, have recommended that the present Act be not made applicable to the cases of Hudud. This recommendation, I would say with utmost respect, will entail the framing of different rules of procedure regarding evidence for the trial of cases falling under different laws, which will not only be cumbersome but will also be against the principles of legislation. The rule of Evidence as incorporated in the Hudud Laws was only a matter of exigency. It should not be followed as a matter of practice for different types of legislation. In principle, there should be only one compact and composite Islamic Law of Evidence applicable to all types of proceedings whether criminal, civil or revenue, because, firstly, the Islamic Law of Evidence governs all judicial proceedings conducted in a court of law which makes no exception even to arbitration matters, if the case is to be decided by the Arbitrator on the basis of evidence, particularly when he is appointed by a court of law; and secondly, it is in conformity with the principles of framing legislative enactment on a particular subject e.g. the law of evidence as is the case here. J. Bartley in his book "Commentary on General Clauses Act, 1897" says:

"When numerous amendments are proposed to be made in an Act, it is always well to consider where it is not better to repeal the original Act and re-enact it with the proposed amendments. This course diminishes the bulk of statute book and makes the law easier for those who have to administer it, for they have only one document to consult instead of two. There is also this further advantage, that the whole Act speaks from one and the same time".

In my opinion, therefore, after the Islamic Law of Evidence is framed, the provisions relating to evidence in the Hudud Laws shall have to be repealed.

7. It seems that my learned colleagues in the Commission were impressed by the consideration of the convenience of lawyers and the judges and the fact that the Evidence Act has stood test of time for over 100 years and sufficient case law has developed in the meantime, but, in my humble view, it should not be the weighing consideration against the enforcement of the Islamic provisions in Pakistan or for that matter in any other Muslim country. Islamic Law of Evidence has stood test of about thirteen hundred years. It has remained in force during the entire period of Muslim rule in various parts of the civilised world. In the words of a Western orientalist, "After thirteen centuries of accomplishment during which the Shariah, or sacred law of Islam has governed the lives of myriads of Muslims in successive generations, that great system of law is still the object of careful study by scholars and jurists in the East and the West". (Dr Saba Habachy in his Introduction to Andersons' book, "Islamic Law and the Modern World" p.ix). Even today it is in force in Saudi Arabia, Jordon, Iraq, the Arab Emirates and several other parts of the Muslim world.

8. It is only in the 20th century that the colonial powers, during their rule over various Muslim countries replaced the Islamic Law of Evidence and enforced their Law of Evidence based on western notions of equity, justice and good conscience. In Indo-Pak sub-continent it is the legacy of our old British masters. Our judges and lawyers who are trained in Anglo-Saxon system will naturally like to stick to Evidence Act, 1872, to avoid the labour of studying and grasping the provisions of Islamic Law of Evidence, but this should not stop the Government, from enforcing Islamic Law of Evidence, which stands committed to the enforcement of Shariah in the country.

9. In fine, I can do no better than to quote from a lecture delivered by late Justice Hamoodur Rehman, former Chief Justice of Pakistan, and Chairman, Council of Islamic Ideology. While advocating for changes in the present system to bring it in accordance with Shariah, he stated:

> "The main change required is to find a way for ending the course of false evidence. The present procedure for the punishment of perjury is so cumbersome and dilatory that courts do not usually resort to it. I suggest that to put a stop to this the Islamic rule should be adopted and a person who gives false evidence should be declared to be incompetent to give evidence in any other case and a register should be maintained of such witnesses. The Courts before which false evidence is given should also have the power to punish the perjurer and not, as under the present law, only file a complaint. If this is done we shall get rid of stock witnesses and such witnesses should also be administered the oath on the Quran instead of the present practice of making only a solemn affirmation. The defendant in a civil case and an accused in a criminal case should also be required to take the oath. The office of Muzakki should be re-introduced

for keeping a record of the witnesses called before Courts and to make local enquiries as to their character and reputation. This will enable judges to make proper appreciation of their evidence. The accused should be cross-examined as is the practice even in the United Kingdom. The law of evidence will also be required to be brought in line with the Islamic rules of evidence. With these changes our existing court system will be able to satisfactorily administer Shariat Law if the judges make themselves familiar with the Fiqah and Usul-ul-Fiqah or Islamic Jurisprudence".

(Ref: Address by Syed Sharifuddin Pirzada, Attorney General of Pakistan at the Full Court Reference held on 10.1.1982 in the Supreme Court of Pakistan Karachi on the sad demise of Mr Justice Hamoodur Rehman).

10. For the foregoing reasons, I am of the firm view that no useful purpose will be served by incorporating the proposed amendments in the Evidence Act, 1872. The best course, in the circumstances, would be to codify Islamic Law of Evidence.