LAW OF EVIDENCE

Re: The Proposed Draft "Law of Evidence Ordinance" Prepared by the Council of Islamic Ideology.

We have examined the provisions contained in the proposed "Law of Evidence Ordinance, 1982", and our views in respect thereof are contained in the paragraphs that follow.

2. In the first Constitution of the Country i.e., the 1956 Constitution, the following fundamental principles were enunciated:-

(a) that no law repugnant to "Islam" (injunctions of Quran and Sunnah) shall be passed in Pakistan; and

(b) that the existing laws in the Country shall be brought into conformity with the Injunctions of Islam, (Quran and Sunnah). (Article 198)

3. The above principles continued to find place in all the subsequent Constitutions. In the Constitution of 1973, they are embodied in Articles 227 and 230. All the subsequent legislations were enacted in accordance with this principle, i.e., their conformity to the Injunctions of Quran and Sunnah.

4. So far as the injunctions of Quran and Sunnah are concerned there cannot be two opinions, but in the absence of any specific command in Quran and Sunnah, the legislative field

is open and laws can be enacted to suit the requirements of our Society subject, of course, to the condition that no part thereof should militate against the Injunctions of Quran and Sunnah.

5. The main task before the Government at present, is to see that all laws and Statutes in the country are brought into accord with the tenets of Quran and Sunnah. The important question, at present, requiring close and objective consideration is, whether the present Law of Evidence should be replaced, in its entirety, by a new Islamic Law of Evidence based on the Injunctions of Quran and Sunnah or the existing 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, in any manner, in conflict with the tenets of Quran and Sunnah be either eliminated or suitably amended, so as to bring the law into accord therewith. The Council of Islamic Ideology preferring the first alternative has drafted the proposed Evidence Ordinance, while the Pakistan Law Commission, supporting the second alternative, suggested certain amendments in the existing Evidence Act so as to bring it into accord with the tenets of Quran and Sunnah and to improve it from the view point of utility also.

6. While assessing the merits and demerits of any proposed legislation, we have to keep both the aspects in view, i.e., it should be in accord with the tenets of Islam and should also be applicable to all kinds of litigations, both civil and criminal, and should help in avoiding inordinate delay in the administration of justice.

7. Before undertaking an examination of the various provisions contained in the draft "Law of Evidence Ordinance", it will be useful to make a few observations in respect of the scope and nature of the Law of Evidence. The object of all legal proceedings is to determine the rights

and liabilities of the parties under some substantive law, which are based on certain facts relevant thereto. The principal aim of the Law of Evidence is to prescribe legal principles to be followed by the Courts while ascertaining the proof of such facts and applying the provisions of substantive laws in order to decide the cases before them correctly. The Rules of Evidence are, therefore, procedural in nature and apply practically to all kinds of judicial proceedings. These rules can roughly be divided into two parts; one part comprises rules for the measurement or determination of the probative force of evidence and the other includes rules determining the modes and conditions of production of evidence. The former deals with the effect of evidence when produced and the latter with the manner in which it is to be produced. In order to assess the merits of the proposed draft "Evidence Ordinance" it is absolutely necessary to examine it in comparison with the existing Evidence Act of 1872.

Evidence Act 1872

8. Briefly speaking, Evidence Act, 1872, consists of three parts. Part-I, consisting of Chapters 1 and 2, deals with definitions and relevancy of facts. Part-2, consisting of Chapters 3 to 6, relates to the proof of facts by oral and documentary evidence. Part-3 embodying Chapters 7 to 11, contains rules with regard to production of evidence and the duty of the Court while assessing such evidence. In short, the Evidence Act,1872, provides guide-lines for the Courts to assess and weigh the value of evidence produced before them and for the want of which the trial of cases may be mis-directed and may lead to miscarriage of justice. In fact, while the proceedings are going on, the Court is quite often required simultaneously to dispose of objections regarding admissibility and relevancy of evidence in a summary manner.

PROPOSED ORDINANCE

9. The draft "Evidence Ordinance" contains 17 Chapters, which provide for certain subjects, which have not been mentioned in the existing Statute of 1872, but the draft does not deal with certain other equally important matters which are provided for in the Act of 1872. The provisions of the Act of 1872 not included in the draft are of such a material bearing on the subject itself that their omission is bound to adversely affect the proposed law in achieving the object in view i.e., besides being Islamic in nature, it should provide speedy and inexpensive justice to the litigant public. It, therefore, needs additions of a large number of supplementary provisions in order to make the Ordinance self-contained.

10. It may be stated that, while the draft Ordinance recognises the importance of relevancy of facts to be proved in a given case, it has omitted altogether the guide-lines contained in Sections 5 to 55 of the existing Evidence Act in this regard without even saying that the said provisions in the existing Act are repugnant to Islamic injunctions in any manner whatsoever.

11. In the foreword of the Council of Islamic Ideology it has been stated:-

> "It would not be out of place to mention here that although certain provisions of the existing Evidence Act are not contrary to Sharia, but it is not necessary to include them in the Islamic Law of Evidence, simply because they are not in conflict with Islam, because a matter, in spite of being non-conflicting in nature, may be unimportant".

From the above it is clear that the Council has discarded certain provisions of the Evidence Act in spite of their not being in conflict with the Injunctions of Islam, on account of their lack of importance without mentioning any reason for this opinion. The proposed Ordinance will, therefore, have to be examined from the view point of utility or otherwise of those provisions of the Evidence Act which, although not in conflict with the Islamic injunctions, have been left out in the proposed draft.

12. It may not be out of place to mention here that the previous Law Commissions/Committees and the present Pakistan Law Commission have not found anything wrong with this part of the Evidence Act, 1872, from the view point of Islamic jurisprudence except Section 29, relating to confessions made under promise of secrecy, or in consequence of a deception practised on the accused person for obtaining it or when he was drunk, or because it was made in answer to a question which he need not have answered, or because he was not warned that he was not bound to make such a confession and that evidence of it might be given against him. The Commission, consequently, recommended that the provisions of this section should not apply to the trial of cases under the laws relating to Hadood. Similarly there are other provisions in the Act pertaining to documentary evidence and aimed at helping the Courts in assessing the evidential value of the facts brought on record in a case, e.g., Sections 61 to 100 of the Evidence Act, 1872, contain useful provisions as to proof of documents and out of these Sections 91 to 100 relate to exclusion of oral evidence by documentary evidence. Likewise, Section 108 of the existing Law of Evidence relates to presumption of death in respect of a person, who has not been heard of for seven years. Section 112 relates to the question of legitimacy of a child born during marriage. These are useful provisions and should have been retained except a few sections e.g., Section 112 relating to legitimacy. Pakistan Law Commission has recommended its amendment by introducing the phrase "but not before the

expiry of six luner months from the date of marriage" in order to bring it into accord with the Injunctions of Quran and Sunnah. The Law Commission recommended, in consultation with the Federal Shariat Court, amendments to Sections 29, 112, 118, 119, 126, and 134 of the Evidence Act as they contain provisions which militate against the tenets of Islam, and suggested amendments of Sections 65, 69, 123 and 124 of the Act in order to make them suitable for our present requirements. The draft Ordinance has, unfortunately, not made any provisions relating to these matters, in conformity with the Injunctions of Islam.

13. Whenever it is intended to replace a particular law by a new statute, the framers of the new law should see that the proposed law does not, in any way, defeat the very object of its legislation, i.e., the purpose for which it is being enacted and also that it is equally self-contained and well-knit, if not better, as the previous law which is sought to be replaced by the proposed legislation. The object of the proposed legislation is, as stated earlier, that the law should be in accord with the Injunctions of Islam, but we fail to understand in what manner the existing Law of Evidence is against those Injunctions so as to require entire replacement, keeping in view the aim of speedy and inexpensive administration of justice. It may be mentioned at the onset that the provisions contained in the proposed Ordinance relating to Law of Evidence are such that they will multiply the Courts' proceedings manifold, requiring separate judicial enquiries in a number of issues during the trial of cases and will thus cause immense delay in the disposal of the main cases defeating the very object for which the new law is proposed to be framed. The existing Law of Evidence, on the other hand, contains useful provisions to test the veracity of a witness during the course of his examination and there is nothing in this Act which could lead to prolongation of proceedings or delay the trial of cases in the Law Courts. On the other hand, there are provisions in the Act which limit the scope of judicial enquiry in matters which

come before the Courts by excluding reambling enquiries and receiption of inadmissible or irrelevant evidence. They are thus condusive to saving of time.

14. Our observations in respect of different provisions in the proposed Evidence Ordinance are as follows:-

(a) Section 2

(i) In the proposed Ordinance in Section 2 (major), has been defined as a person, in whom the signs of puberty are visible or who, being a male person is 18 years' old and being a female 16 years of age, whichever is earlier.

The words "whichever is earlier" have made the whole provision dilatory because in order to determine the criminal liability of each accused and veracity of a witness a regular enquiry will have to be made in order to find out whether or not the signs of puberty ( ) had appeared in the person concerned before his or her attaining the age prescribed for this purpose, as determination of signs of puberty is a matter more of medical observation than that by a lay man and is always disputable. *According to Fiqah-i-Hanafi the age of ( ) is 18 years and 17 years for a boy and a girl, respectively.

(ii) According to the provisions of the proposed Ordinance, (Section 2) a witness must be Adil and the term Adil has been defined as, "a muslim who apparently performs Fraiz and Wajibat and shuns Kabair'.

In accordance with this definition, any person having a saving bank account in a bank or who has purchased Defence Saving Certificates or other interests bearing Government securities would be guilty of Kabeera, considered as Fasiq and thus stand disqualified as a witness. Consequently, in cases of murder or other heinous offences, if there is a solitary eye witness, who does not fulfil these conditions, the offence shall go unpunished because this principle will also apply to offences punishable by Taazir.

In order to determine these qualities in a witness, a regular Court enquiry, other than Tazkia, may, on a number of occasions, be required, particularly when the existence of these qualities in a witness are disputed by the parties to the main proceedings.

(b) Section 4

In Chapter-3, relating to Nisab-i-Shahadat, according to Section 4, in order to prove the offence of rape, evidence of four sane, major, male muslims is absolutely necessary about whom the Court should be satisfied, keeping in view the rules relating to Tazkiat-ul-Shahood, that they are Adil persons and have seen the act, even to the extent of penetration, with their own eyes.

This would mean that a muslim committing this offence in the house of a non-muslim or in a house where only female witnesses are available will escape punishment by Hadd and shall be liable to Taazir

only. Again specific provisions relating to number and qualifications of witnesses who may be required to give evidence in respect of offences punishable by Taazir only are conspicuous by their absence except by means of an inference drawn from the provisions of Section 6.

Section 5

(ii) According to Section 5, in cases of Surqa, Haraba, Qazaf, drinking liable to Hadd, evidence of two sane major, male muslims is necessary, about whom the Court should be satisfied that they are Adil and that they had seen commission of the offence with their own eyes.

Section 6

According to Section 6, in all cases, other than Hadood and Qisas, and few exceptions mentioned in the Ordinance, (Sections 7 & 8), whether fiscal or non-fiscal, evidence of two sane major, Adil and male, or one sane major, Adil and male and two sane, major, Adil women is indispensable.

It would, however, again mean that unless and until, in a given case, the prescribed number of witnesses, with requisite qualifications, are available, it will not be possible for any Court to convict an accused and in a number of cases offences, whether minor or major, will go unpunished.

Section 7

According to Section 7, in the matters relating to birth, virginity and other matters relating to women, which are usually not seen by men, the evidence of one Aqil, Baligh and Adil Muslim woman will be acceptable. If, however, the defendant or the accused is a non-muslim, then evidence can be given by a non-muslim woman as well. This would mean that in the case of rape, if the accused is a muslim, the evidence of a non-muslim lady doctor would be acceptable. The proposition cannot be supported from any moral or logical point of view.

(d) According to Section 8, opinion of one sane, major and Adil person would be acceptable for the purposes of:-

(i) assessment of compensation for any loss;
(ii) for acting as an interpreter for a party or a witness in the Court;
(iii) assessment of compensation for injuries on account of infliction of wounds etc., etc.

Since this provision relates only to the matter of expert's opinion and not to evidence, the exclusion of women from its ambit is not understandable. It also remains to be seen whether an Adil person can legitimately give his opinion on a matter of which he has no knowledge. Since the matter relates to opinion and not to evidence, it is not clear as to why this should remain confined to Adil persons only.

(e) Section 9

According to Exception to Section 9, in civil cases, in the event of defendant not attending the Court in spite of service of summons on him, it will be sufficient for the plaintiff to produce documentary evidence to the satisfaction of Court and take an oath in support of his claim to get an ex parte order in his favour. For this purpose the condition precedent is that the defendant should have been served with a summons thrice and he should have remained absent without any "Shari" excuse.

The provisions relating to three times service of summons on the respondent will delay the Courts' proceedings, and determination of a "Shari Excuse", (which term has not been defined), for the respondent's absence, would need a separate judicial enquiry requiring a good deal of time of the Court with the result that disposal of the main case would be delayed further and the object of speedy administration of justice defeated.

(f) Section 12

(i) According to Section 12, in order to give evidence the witness must be major, sane (Aqil), with sight, Natiq i.e. capable of speech Adil and Muslim.

It is not difficult to imagine here that according to the prescribed qualifications very few persons would be considered as trust-worthy witnesses, and a major part of the time of the Court will be spent in determining whether a particular witness is qualified or not to give evidence rather than in the disposal of the case in hand itself.

Similarly, in Exception No-1 to this Section, evidence of a minor in the matters relating to brawls and physical fights will be acceptable, provided that:-

(i) it relates to a minor;

(ii) it is concerned with causing of injuries or murder and not relating to any fiscal matter;

(iii) the minor witness should be muslim, sensible and not a known lier;

(iv) there should be more than one minor witnesses and there should also be no enmity between the witness and the person against whom the evidence is being given, nor between their respective parents, and

v) the minor witnesses should have before leaving the place of occurrence made two sane major, Adil and male persons as witnesses about the subject matter of their evidence.

The provisions of this Section are neither easy to support nor can conveniently be enforced. It is not understandable as to how the credibility of evidence has been linked with the minority or otherwise of the victim. If the evidence of a minor, who fulfills the conditions laid down in Exception No. 1 to Section 12, is acceptable and trust-worthy in case the injured person is a minor, it should be equally admissible even though the victim is a major. Again the conditions laid down for the acceptance of minor's evidence are such that in majority of cases of this type the evidence would not be available for one reason or the other, particularly due to

the clause relating to minor's not leaving the place of occurrence without making two sane major, Adil and male persons as witnesses about the subject matter of their evidence. These are unnecessary provisions and will lead to miscarriage of justice as, in majority of cases, the crimes would go unpunished for want of suitable witnesses. This would further cause despondency among the common public and shake their confidence in the administration of justice.

(ii) According to Exception No.2 to Section 12 it may not be necessary for a witness to be with sight if he is testifying in respect of matters about which hearsay evidence is permissible, or in respect of matters relating to lineage, death, marriage, penetration (cohabition with wife), jurisdiction of the Qazi etc.

(iii) According to Exception No.3, the evidence of a dumb person, in cases other than Hadood and Qisas, will be acceptable only if he writes it down in his own hand in the Court. This provision excludes evidence given by a dumb person by signs. We feel that there is absolutely no reason why a dumb person should not be permitted to give evidence by signs also as there is no bar to that effect in Quran and Sunnah.

(iv) According to Exception No.4, evidence of a non-muslim against a muslim will be acceptable only during the course of a journey if no muslim witness is available, and in the matters of will only. A question arises here that if in the matters of will the evidence of a non-muslim is acceptable, then why it should not, in similar circumstance, be admissible in other matters also, for instance, in the matters of monetary transactions or criminal offences other than those liable to Hadood and Qisas.

(g) Section 14

According to Section 14, negative evidence simpliciter ( ), is not admissible. The word ( ) has neither been defined nor explained in the Ordinance, which is likely to create difficulties at the time of trial of cases. According to Exception I, however, it is admissible if it is based on Tawatar i.e., testified to by a large number of persons, who are so placed that it cannot reasonably be presumed that they can join together to support a false-hood. Again Exception No.2 makes negative evidence admissible, if it is connected with a condition.

In view of the fact that the burden of proof lies on a person who makes an assertion and not on one who denies it, the provisions of this Section are unnecessary.

(h) Sections 15-20

According to Section 15, the evidence of father, mother, grand-father, grand-mother, how high so ever, in favour of son, daughter, grand-son, grand-daughter, how low so ever and vice-versa, is not admissible, except when it is necessary, and possibility of partiality on the part of the witness can be eliminated altogether and the disputes relate to marriage, divorce and Qisas.

In this section only paternal side is covered, but nothing has been mentioned about the mother's side, e.g., maternal grand-father, maternal grand-mother, daughter's children etc., because possibility of partiality cannot totally be excluded in their cases also, but the proposed law is silent in this respect. Again it will not be conveniently possible to prove non-partiality of

such a witness without some sort of judicial enquiry which, itself, would lead to prolongation of the proceedings.

Similarly testimony of wife in favour of husband and vice versa is not acceptable (Section 16). The evidence of a friend in favour of another friend, both of whom are so intimately connected that they use each others property freely, is not admissible (Section 18).

In these cases elimination of possibility of partiality on the part of a witness, determination of every case of free access of friends to each others property etc., will need regular enquiries, consuming a good deal of the Courts' time and ultimately delaying the disposal of the main cases and thus one of the main objects in view, i.e., speedy disposal of cases will be defeated.

The above mentioned provisions are not in consonance with the injunctions of Holy Quran in this respect, as for example, it is said in the Holy Quran:-

> "Conceal not evidence; For whoever conceals it; his heart is tainted with sin. And Allah knows all that you do".(2/283)

"O'ye who believe; Stand out firmly for justice, as witnesses to Allah; even as against yourself or your parents or your kin; and whether it be (against) rich or poor for Allah can best protect both".(4/135)

"Whenever you speak speak justly even if a near relative is concerned; and fulfil the Covenant of Allah: thus doth He command you; That you may remember".(6/152)

"And cover not truth with false-hood- Nor conceal the Truth, when ye know" (2/42).

These sections are in conflict with the tenets of Quran. No legislation can be allowed to infringe any injunction which are contained in the Ayats mentioned above.

(i) Chapter 6,
Sections 21 to 28

According to Section 21 proceedings regarding Tazkiat-ul-Shahud will be taken in hand by the Court after recording the evidence of the witnesses concerned and according to Sections 22 and 23, Tazkiat-ul-Shahud will be indispensable in cases relating to Hadood and Qisas, but in all other matters, whether civil or criminal, it will be resorted to only when the opposite party demands it, i.e., the defendant in a civil case or the accused in a criminal case.

The stage for Tazkiat-ul-Shahud, i.e., after recording the evidence of the witnesses concerned, does not seem to be a very appropriate one because in the event of a particular witness being reported as non-Adil, the Courts' time spent in recording his evidence previously would have been wasted.

It is also not difficult to imagine that a respondent in a civil case or an accused person in a criminal case would invariably insist on Tazkiat-ul-Shahud particularly in the event of a witness deposing against him or with the sole purpose of prolonging the proceedings, if not for any other reason. For the purposes of Tazkia the Court will have to hold enquiries in respect of the witnesses from the Muzakkis and in certain cases even in respect of Muzakkis also, (Section 28).

According to Sections 26 and 27 Tazkia can be done in two ways, i.e.,(a) Alania Tazkiat-ul-Shahud and (b) Khufia Tazkiat-ul-Shahud.In the former case the Court will send for two persons known as Muzakki, in its discretion, and will enquire from them whether the witness is Adil or non-Adil, in the presence of the parties, while in the latter

case the enquiry will be secret and Muzakki will express his opinion about the reliability or otherwise of the witness without mentioning any instance in support of his opinion.

Chapter VI on Tazkiat-ul-Shahud has no *sanction either in the Holy Quran or in the Sunnah of the Holy Prophet (P.B.U.H). There is no instance during the life time of the Holy Prophet that Tazkiat-ul-Shahud was ever done either before or after the testimony of a witness. Even Imam Azam disapproved such a practice. The provisions of this Chapter will also delay the disposal of cases as it tends to provide for an enquiry within an enquiry both with regard to the witnesses as well Muzakkis.

In the present Evidence Act the provisions of cross-examination of the witness provide sufficient means to exclude the testimony of a witness on grounds mentioned in this Chapter. The enquiry as to credibility of a witness is taken simultaneously by the Court during the trial of cases before it.

(j) Chapter-7,
Sections 29 and 30

These sections relate to evaluation, and appraisal of evidence in case of difference between the witnesses. This is essentially a matter for the judge to decide as proof, in the last analysis, is the impression created on the mind of the judge as a result of evaluation of evidence. In our view, therefore, these sections will unnecessarily over reach the powers of the Court in the matter of the appraisal of evidence.

(k) Chapter-8,
Sections 31 to 34, Raju-Ani-Shahadah

Section 31

This Chapter contains provisions with regard to retraction of his evidence by a witness. According to Section 31, after the recording of the evidence and before the announcement of the judgment, a witness may resile from his statement before the Court and,

Section 32

(1) according to his evidence will be excluded from the record of the case but under Sub-Section (2), ibid, in the event of retraction, the Court may award to such a witness a sentence of imprisonment for two years, or 79 stripes, or announcement in the media about his being a liar, which includes making him ride an ass and taking him around in the locality of his residence and the place of business: or an announcement to that effect on the television and radio. He can be awarded all the three proposed sentences together or one or two of them, as the Court deems fit. The illustration of this Sub-section about making such a witness ride an ass to take him around, declaring him to be a liar, is insupportable.

Section 33

According to Section 33, if a witness retracts his statement after the announcement of judgment, it will not affect the decision of the Court but the witness will be liable to certain penalties in addition to punishment prescribed in Section 30(2),e.g.:-

(i) payment of Daman (Compensation) to the person who suffered on account of his evidence,

(ii) in the event of execution of Qisas or Hadd Sarqa the witness will be liable to pay Diyat or Ursh and in case of Hadd Sarqa, the market price of the stolen goods also, and

(iii) in the cases of Qatl-e-Shubhul-Amad, Qatl-e-Khata or Qatl Bil-Sabub he will be liable to pay Diyat etc.

Diyat or Ursh will be payable within a maximum period of three years and the witness will not be liable to any other penalty.

The provisions of Section 33(1), that retraction of evidence by a witness after the judgment will not affect the Courts' decision is in conflict with the substantive law as enunciated in Hadood Ordinance where the Hadd falls in all cases of retraction of evidence if the remaining witnesses fall short of the required number.

The provisions of this Chapter indicate the intention that, whosoever gives false evidence should be properly punished. Suitable provisions with regard to punishment for false evidence have been included in the substantive Penal Act, and if the Government intend to amend those provisions, it will be open to them to do so, but we see no justification for having such a provision in the draft Ordinance relating to Evidence. The penalties mentioned in these sections have not been provided for either in the Holy Quran or Sunnah but were enforced subsequently.

(l) Chapter 9,
Sections 35-37.

This Chapter relates to Tawatur, according to which evidence would be admissible if it is testified to by a very large number of persons, who are so placed that it cannot reasonably be presumed that they have joined together to support a false-hood. No evidence will be admissible against Tawatur nor will Tazkia be necessary in these cases.

This Chapter obviously relates to the proof of custom i.e., riwaj, usage or tenets and not to any particular kind of disputes or to a lis between the parties. Sections 48 and 49 of the existing Evidence Act sufficiently provide for such matters. These provisions, therefore, appear to be unnecessary.

(m) Chapter-10,
Sections 38 to 44

Shahadat-ala-Shahadat, i.e., evidence by proxy. According to the provisions of this Chapter, evidence by proxy or through an agent or representative is admissible except in the cases of Hadood and Qisas (Section 39). According to Section 40, for each original witness, there shall be two male or one male and two female proxy witnesses.

These sections introduce the principle of agency in the matter of giving evidence. A person who is dead, or unable to attend the Court because of illness or is a prisoner in a foreign Country can be represented by two witnesses to convey his oral evidence to the Court. This is a category of hearsay evidence which will create problems and difficulties for the Court in the matter of evaluation of evidence. Besides, in the absence of the real witnesses, cross-examination of the witnesses will not be possible and thus falsehood is likely to creep in. As against this, sections 32 and 33 of the Evidence Act, 1872, are very comprehensive and

exhaustive and are hedged in with conditions which minimise the chances of false evidence being brought before the Court, and fully meet the objective desired to be achieved in this Chapter. The provisions of those Sections do not, in any manner, militate against the injunctions of Quran and Sunnah.

(n) Chapter 11,
Sections 45 to 53

This Chapter relates to the production of documentary evidence. According to Section 48, at least two witnesses out of those whose signatures purport to have been made in the margin of a particular document will be required to testify to the genuineness of that document. In the absence of marginal witnesses the evidence of two persons, who recognise the writing and signatures on the document, will be required and, alternatively, the document shall be examined by two experts for this purpose. In the event of the document being declared to be genuine the executant of the document shall be bound to discharge the liability created therein, even though he denies its genuineness.

If the genuineness of the document is not proved by the above mentioned methods the person denying the writing and execution of the document shall be given oath and, in the event of his refusal to do so, shall be bound by the terms of the document.

The provisions of the existing Evidence Act provide a much better and comprehensive mode to prove the execution, production and proof of documents.It provides for primary and secondary evidence in this respect, about exclusion of oral evidence by documentary evidence and presumptions as to the genuineness of certain documents. The proposed provisions in the draft Ordinance are neither comprehensive nor exhaustive.

(o) Chapter-12,
Sections 54-65 other means &
methods of proof.

Section 54

According to Section 54 the methods of proof are Qrain-e-Qatia, oath or refusal to take oath and Iqrar. According to Section 55, Qrain-e-Qatia mean, those clear and apparent circumstances which attain the degree of certainty.

The illustration appended to this section, however, does not clearly indicate the intention behind this provision, i.e., whether it amounts to existence of a strong piece of circumstantial evidence or a conclusive proof against the accused.It is possible that circumstances might have existed for raising the plea of self-defence as in Safdar Ali's case. [PLD 1953 F.C. 93].

Section 56

According to Sub-Section (2) of Section 56, a person taking oath will have to do so in the name of Allah or other names based on His different manifestations. It has been further explained that the manner of oath will be the same in case of muslims as well as non-muslims.

Here an omission has been made in respect of administration of oath to atheists about whom the provision of "solemn affirmation" exists in the relevant law.

Sections 61-63

In this Chapter (Sections 61 to 63) administration of oath to the defendant or the accused has been made conditional with adam-i-Saboot i.e., lack of proof.

It is not,however, clear whether an oath is to be administered in those cases where no evidence at all is forthcoming or where the plaintiff or the prosecution fails to establish the case against the defendant or the accused beyond all reasonable doubts. This point needs clarification.

According to Section 61(2),in the case of an intentional murder, ( ), if the accused refuses to take oath, he will not be subjected to Qisas, but will remain in prison till either he takes the oath or admits having committed the offence, while in other cases of murder, e.g., Qatle Khata etc.(Section 61(3), he will be required to pay Diyat but, in similar circumstances, in the event of chopping of a limb subject to Qisas, according to Section 62(2), the accused will be liable to Qisas.

These two provisions are not uniform though circumstances in both cases are identical and no reason has been mentioned for this lack of uniformity in the two provisions.

Section 63

In Section 63, in cases of Taazir, the accused will be liable to punishment if he refuses to take oath but in the case of Taazir on the ground of Haq Allah, i.e., rights of Allah, the accused will not be administered any oath. The term "Haq-Allah" has neither been defined nor explained, but probably it means Hadood.

Section 64

According to Section 64, Iqrar has been defined as an admission on the part of a person that he owes an obligation to another person.

It is not, however, clear whether the term Iqrar would include a confession, either judicial or extra-judicial. This point needs clarification.

Section 65

Again according to Section 65, an Iqrar made under coercion will not be admissible nor an admission made in the state of intoxication be acceptable in cases relating to Hadood.

This provision is neither self-contained nor exhaustive as it does not mention about the confessions or admissions made to Police Officers, while the accused is in their custody, or made under a promise of secrecy, or in consequence of a deception practised on the accused, or made in answer to questions which he need not have answered, or because he was not warned that he was not bound to make such confession. All confessions of this kind should be inadmissible in the case of Hadood.It has been recommended by the Pakistan Law Commission that the provisions of Section 29 of the Evidence Act, according to which confessions otherwise relevant, would not become irrelevant on the above mentioned grounds, should not be applicable to the trial of cases under the laws relating to Hadood.

(p) Chapter 13,
Section 66.

This section lays down certain principles with regard to decision of disputes in respect of ownership of immovable property.

It drastically curtails the Courts' jurisdiction to arrive at a decision after examining the whole case and appraising the evidence produced by both sides. It lays down certain binding principles which, if strictly adhered to, are bound to lead to a miscarriage of justice in majority of cases. This Chapter should either be deleted from the draft Ordinance or thoroughly re-examined and redrafted.

(q) Chapter 14
Preference among
the Bayyana.

Section 67

The same objection as to the preceding Chapter, applies with greater force to this Chapter also, e.g., Section 67(1) says that if two parties are jointly in possession of any movable or immovable property and one claims to be a solitary owner thereof and the other alleges joint ownership and both have Bayyana, also; the Bayyana of the former will be preferred.

It is extremely difficult to find any support for the guide line laid down in this section.

Section 68

Similarly provisions of Section 68 relating to Milk-i-Mutliq wherein the Bayyana of a person not in possession will be preferred to that of one who is in possession and a similar provision in respect of Milk-i-Muqayyad in Section 69 is not understandable and its illustration has made it all the more complicated and difficult to enforce.

(r) Chapter-16,
Section 79

Experts' Evidence

According to Section 79,Sub-Section(2) it is necessary that there should be at least two experts to give evidence in respect of a particular matter but, in the event of their non-availability one would also do.

This provision will lead to complications as in each and every case relating to rape, murder and other bodily injuries etc., the Court will have to seek opinion of, and call upon, at least two experts to give evidence in the Court. Again, in the event of difference between the two experts, evidence of the third expert will be required. These provisions will definitely, unnecessarily and unduly prolong the Courts' proceedings causing delay in the final disposal of cases.

(s) Chapter-17,
Sections 80 to 84

According to Section 80, the Court will decide, in its discretion, whether or not a particular piece of evidence is admissible. The Court will also have the power to call upon the person producing the evidence to explain how that piece of evidence would be relevant to the matter in dispute. The state of the trial at which such a decision is to be taken by the Court has not, however, been indicated in this Section.

Section 82

According to Exception to Section 82, if there are two women witnesses, their statements shall be recorded simultaneously. This provision is impracticable as two female

witnesses cannot be examined simultaneously. Accordingly Dr Justice Tanzil-ur-Rahman suggested that the Exception to Section 82 should have been worded as under:-

Section 83

According to Section 83, while interpreting and applying the provisions of the proposed Ordinance, the Court shall seek guidance from Quran, Sunnah and other "standard sources of Sharia". Similarly those matters to which any provision of this Ordinance does not apply, shall be decided according to Sharia.

These terms are very wide and in the absence of any specific guide line in that regard, the interpretation and decision according to Sharia may differ from Court to Court according to the capacity and understanding of each Presiding Officer. Again, there may be different decisions in respect of a similar matter in identical circumstances according to interpretation made by the Courts in the light of different Fiqahs.

15. From the above examination it would be clear that the draft law is not exhaustive or self-contained and does not cover many matters which relate to our every day life and which cannot, without serious detriment, be lost sight of. This Commission is of the view that while enacting a new law or amending any existing law, besides complying with the injunctions of the Holy Quran and Sunnah, the principles laid down by the old jurists should also be kept in view taking maximum advantage thereof, but the economic and the social conditions of the Society, the people's habits and behaviour too, should be carefully considered and catered for.

16. The proposed draft Ordinance is mainly based on the provisions of Fiqah-i-Hanafi which was in vogue some centuries ago and it is now intended to be applied to the existing Muslim Society without taking into consideration the changed circumstances. It also contains a large number of provisions with regard to ancillary proceedings which are bound to cause inordinate delay in the disposal of main cases and ultimately frustrate the object of the Government, i.e., speedy administration of justice. Again there are a number of provisions relating to matters which should have been left to the discretion of the Court, without prescribing rigid guidelines for that purpose, thus giving the Qazis opportunity of examining the evidence, as a whole, and arriving at a well considered decision after taking into account all the pros and cons of the case before them. Similarly, there are a number of principles laid down in the draft which would be difficult to follow during the present times. This is evident from the notes of dissent appended to the draft Ordinance.

17. According to Sh. Ghias Muhammad, a Member of the Council of Islamic Ideology, promulgation of the proposed Law of Evidence would create complications and difficulties in the trial of cases. He suggests that suitable additions and amendments may be made in the Evidence Act, 1872, in order to make it suitable for the existing legal requirements of our Society as well as to bring it in accord with the injunctions of Quran and Sunnah. Another Member of the Council, Mr Abdul Malik Irfani, is of the view that evidence of women is admissible in all cases including Hadood and Qisas. According to Allama Talib Jauhari, a Member of the Council, the evidence of women is inadmissible, besides the cases relating to Hadood and Qisas, in the matters of divorce, khula, inheritance etc., also. Again, according to Allama Jauhari, the proposed Islamic Law of Evidence contains provisions which are against the views expressed in Figah-i-Jafria and he suggests that to each and every section of the

proposed law, the view point of Fiqah-i-Jafria should be added. Again, as stated earlier, the exclusion of the evidence of minors, who may otherwise be mentally mature and capable of being truthful witnesses, will lead to mis-carriage of justice in a large number of cases, both civil and criminal.

18. In order to avoid all controversy on the basic issues the Commission is of the view that:-

(a) The proposed draft Ordinance should not be enforced, in its present form, as after the existing Evidence Act is repealed the proposed Ordinance will not be able to cater for all the legal requirements of the Country and, besides inordinately delaying the Courts proceedings, will bring about a stage of stand still in the Law Courts. It will undoubtedly defeat the objective of the Government with regard to inexpensive and speedy administration of justice and add to the existing heavy load of judicial work in the Courts of the Country at all levels, thus causing frustration to the public at large.

(b) The existing Evidence Act, 1872, should, after carrying out the amendments proposed by this Commission in its report dated the 3rd January, 1982, remain in force.

(c) The provisions in the proposed draft Ordinance relating to the cases of Hadood and Qisas and Nisab-i-Shahadat in civil cases, as laid down in the Holy Quran and Sunnah, should be incorporated in the substantive laws concerned. Pakistan Law Commission has already recommended a suitable amendment in Section 134 of the Evidence Act, 1872, for this purpose.