بسم اللہ الرحمن الرحیم
نحمدہ و نصلی علیٰ رسولہ الکریم

MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

Ch. XXV [Ss. 353 to 365] of the Cr. P. C. 1898

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Introduction

The Code of Criminal Procedure, 1898 (Cr. P. C. 1898) is the general[1] law of

[1] Laws are general as well as special. Pakistan Penal Code, 1860 (XLV of 1860) and the Code of Criminal Procedure, 1898 (V of 1898) are the general criminal laws, former is substantive while the later is adjective or procedural. The Code of Criminal Procedure, 1898 lays down the procedure to be followed in every investigation, inquiry into, or trial for every offence whether under the Pakistan Penal Code, 1860 or under any other law. It would, therefore, follow

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criminal procedure in Pakistan. The Procedure is an adjective law[2]. The general substantive law of crime[3] is contained in the Pakistan Penal Code, 1860. There are also special laws of both kinds and the rule is that where a general and special law is in conflict with each other the special law is to prevail. Where there is no provision in a special law concerning any matter the general law may be applied for the ends of justice. It brings consistency in the administration

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that where a special Act is all-embracing, the Cr. P. C. would apply. [1980 Pakistan Criminal Law Journal 170]. Joint reading of the provisions of Ss. 1(2)& 5(2), Cr. P. C. indicates that the Code of Criminal Procedure is not applicable to the matters governed by any special or local law unless expressly provided making it applicable to such special or local law wholly or to any extant.[2003 YLR 1185].

[2] An adjective criminal law provides machinery for the punishment of the offenders against substantive criminal law.

[3] A substantive criminal law defines crimes and prescribes punishments for offences.

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and application of law. Inquiries and trials are not one and the same thing. An inquiry is prior to trial while a trial is after an inquiry and it starts from the framing of the charge and ends at pronouncement of judgment. In this paper mode of taking and recording evidence in inquiries and trials is discussed, analysed and commented upon in the light of the judicial precedents available on the subject. Chapter 25 is devoted by the Code for this subject. It contains twelve operative sections (ss. 353 to 361 and 363 to 365).[4]

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[4] Section 362 was omitted in1949).It was on the topic of "Record of Presidency Magistrate's Court". It was mentioned in the Schedule of the
A. O. 1949. Who were the Presidency Magistrates? This is now a question of historical aspect of criminal law of procedure as we do not find in Pakistan any such office of a Magistrate. The history of law of Pakistan shows that before coming into existence of Pakistan on 14th August, 1947, India was under the British rule since 1857. Bombay,

Key Words:

1. Mode of taking of evidence,
2. Mode of recording of evidence,
3. What is an inquiry,
4. What is a trial,
5. General rule of recording evidence in a criminal case,
6. Exceptions to the general rule of recording evidence in a criminal case,

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Madras and Calcutta were the Presidency Towns and the Magistrates appointed there were termed as Presidency Magistrates. No uniform law of Criminal Procedure existed previous to 1882. There were separate Acts to guide criminal courts in the erstwhile provinces and the Presidency towns. The Acts of procedure applying to the provinces were replaced by the General procedure Code (Act XXV of 1861). This was replaced by Act X of 1872. A Uniform law of procedure for the whole of the subcontinent came unto force for the first time in 1882 by Act X of 1882 which was supplemented by a new Code in 1898. It went drastic changes in 1923 by two Acts namely, the Criminal Law Amendment Act XII of 1923 and the Criminal Law Amendment Act XVII of 1923.

7. Absconsion of the accused,
8. Presence of the accused,
9. Absence of the accused,
10. Prospect of arrest,
11. Competence for trial,
12. Sending for trial,
13. Deposition,
14. Examination,
15. Cross examination,
16. Re-examination of a witness,
17. When delay, expense, inconvenience becomes unreasonable,
18. What is the standard to judge this standard,
19. Remark by a court concerning demeanour of a witness,
20. What is the object of remark by a court concerning demeanour of a witness,

21. What is Full and true account of statement of accused,
22. Irregularity and illegality,
23. Memorandum, language in which an accused is examined,
24. Language of the court,
25. English language,
26. Constitution and the law on the subject of language,
27. High Court Rules and Orders on the subject.

The legal text of Chapter XXV of the Cr. P. C.

S. 353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under Chapters XX, […][5], XXII and XXII-A shall be taken in

[5] Chapter XXI comprised sections 251 to 259 of the Cr. P. C. and was on the subject of the trial of Warrant Cases by

the presence of the accused, or when his personal attendance is dispensed with, in presence of his pleader.

This provision of law begins with the words: “Except as otherwise provided”. This means that the general rule with respect to the taking of evidence under chapters 20, 22 and 22-A is that it shall be taken,-

(i) in the presence of the accused, or
(ii) where his personal attendance is dispensed with, in the presence of his pleader.
(iii) The word “shall” used in section 353 shows that this provision is mandatory. The word evidence includes both the evidence of the

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Magistrate. The same was omitted from the Cr. P. C. by the Law Reforms Ordinance, 1972. Item No. 99.

prosecution as well as the evidence of the defence.

(iv) Article 133 of the Qanun Shahadat Order 1984 provides the accused a valuable right of cross examination of the prosecution witness, and the same could not be denied on the anxiety of speedy disposal of case.[6]

(v) Where PWs evidence was recorded in the absence of the accused, whereas he (the accused) was neither declared an absconder nor his presence was exempted, it is obligatory for the court to record examination in chief and then ask the accused to cross examine them. It is not allowable to by-pass or

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[6] 1988 MLD 167.

ignore the mandatory provision of law. [7]

(vi) Distinction of cross examination by the Accused and cross examination by his Counsel (Advocate or pleader) must be realized by the Courts on the ground that fair trial is for the ends of justice. The concept of right of Counsel though not explicitly enshrined in the Constitution as a fundamental right but it is recognized by the Superior Courts. The right exists under the principles of natural justice.[8]

(vii) The Supreme Court of Pakistan has depreciated the practice of trial court to accept unrebutted

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[7] 2000 YLR 2330.

[8] PLD 1983 Lahore 206.

testimonies of PWs in cases of represented accused.[9]

(viii) It becomes the duty of the court itself to make an attempt in cases where the accused is unrepresented and does not conduct a cross examination to expect the truth from the material available. Since the right of counsel is recognized its alleged violation becomes a justifiable issue over which the Court can exercise judicial review.[10]

(ix) Cross examination by the accused cannot be a substitute for a cross examination by the Counsel.[11]

(x) Conviction of an accused was set aside where accused was not given opportunity to cross examine the

[9] PLD 1987 SC 250; 1993 SCMR 550.

[10] 1943 PLC (CS) 498; 1995 MLD 15; 1994 SCMR 2232.

[11] 1997 MLD 1632.

PWs, no certificate as laid down under section 364 Cr. P. C. was given and the judgment of the trial court was not conforming to the provisions of section 367 Cr. P. C.[12]

(xi) S. 353 Cr. P. C. makes it obligatory that evidence for the prosecution and defence shall be taken in the presence of the accused. When the presence of the accused is dispensed with, the evidence should be recorded in the presence of his pleader. A trial is vitiated by failure to record evidence in derogation of the provisions of this section.[13]

(xii) Where statements of PWs had been recorded by trial court in absence of the accused person and

[12] 1994 MLD 1493.

[13] 1990 Criminal Law Journal 397 (Ori).

at a place other than notified place of his jail trial. It was done by presiding officer in violation of mandatory provision of section 353 Cr. P. C. the conviction and sentence were set aside[14]

MODE OF TAKING EVIDENCE WITH REFERENCE TO VIDEO-TAPES

By the advent of science and technology new techniques have come to light to find out the truth. The law is to remain organic, fresh and effective as otherwise stagnation will come in causing erosion and decreasing the impact and usefulness. As a new things come to light the law of depreciation comes with it. There is an appointed time for every thing to come to an end as fixed by the

[14] PLJ 2005 Criminal Cases (Lahore) 1147.

Supreme Creator of the entire universe. None can deny it. What is the role of law is that of keeping vigilance and maintaining healthy elements in it. New bacteria, viruses, diseases will not stop coming. New anti bacteria, anti viruses and cures and prevention modes should also not stop coming. It is a matter of common sense that the desired result does not come or comes much less than it should have come is due to the element of falsity at any point. If the data is correct, it is carried correctly, delivered on ward correctly, received and analysed correctly, the application based on it will give correct results. In all examinations correctness, propriety and legitimacy are seen and these words are not mere words of art; these are meaningful and purposeful words. The soul of all

scientific research is its correct basis, and remaining correct throughout.
Video tapes, Audio techniques, are really very useful and helpful inventions concerning which much education is required to be imparted to legal and judicial fraternity to avail its fruits. Our law schools and universities should arrange special diplomas on the subject and create awareness among the law students and our legal and judicial academies and even NGOs should arrange at private and public level to make the arena of justice scientific as much and as soon possible.
A beautiful explanation has been given in the case cited as PLD 2006 Karachi 629. The care and caution to be taken in this behalf is that an eye is to be kept on those elements of the society who help abusing even the good instrumentalities.

Manner of recording evidence

The relevant provision of the Code of Criminal Procedure, 1898 on this subject is section 354.

The language of the section or the text of this provision reads as under:

“ **354. Manner of recording evidence.-** In inquiries and trials (other than summary trials) under this Code by or before a Magistrate or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.”

The above text shows:

- This section relates to inquiries and trials.
- Such inquiries and trials are those which are other than summary trials.

- Such inquires and trials are those which are conducted under this Code, that the Cr. Procedure Code, 1898.
- Such inquires and trials are by or before a Magistrate or Sessions Judge. It means an inquiry by any person who is not a Magistrate or Sessions Judge is not covered by this section.
- This section concerns with the evidence of the witnesses.
- This section makes it mandatory that such evidence shall be recorded in the following manner. It means in the manner that is given in the next sections of the Cr. P. C.

Judicial precedents show that Prosecution is not bound to examine each and every witness shown in the calendar, discretion lies with it to examine any number of witnesses and

to drop any who does not support the prosecution case.[15] However, recording of statement of witnesses in one case and treating the same as evidence in other case is illegal and in clear violation of the procedure and rule laid down in the Qanun-e-Shahadat Order, 1984.[16]

RECORD IN TRIAL OF CERTAIN CASES BY FIRST AND SECOND CLASS MAGISTRATES

The law on this subject is contained in section 355 Cr. P. C.
The language of the section or the text of this provision reads as under:

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[15] PLD 1986 Quetta 26.
[16] PLJ 1875 Cr.C. (Karachi) 507.

“ *355.* ***RECORD IN TRIAL OF CERTAIN CASES BY FIRST AND SECOND CLASS MAGISTRATES.-***

(1) In cases tried under Chapter XX or Chapter XXII Magistrate of the first or second class and in all proceedings under section 514(if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open court, and shall sign

the same, and such memorandum shall form part of the record."

DISTINCTION BETWEEN THE PHRASES " RECORD THE REASONS" AND "SHALL FORM PART OF THE RECORD"

"To record the reasons" means to write down on paper, to jot down in black and white.

"Shall form part of the record" means shall form part of the judicial file containing all the documents and proceedings on the basis of which a decision is given.

HOW THE COURTS HAVE INTERPRETED S. 355 CR. P. C.?

Section 355 enjoins upon a Magistrate of the first and second class to make a substance of the evidence of a witness,-

(i) in summons cases i.e. under section 260, clauses (b) to (m) both inclusive;
(ii) in all proceedings under section 514 regarding forfeiture of a bond.

The Magistrate is required to take down the evidence of each witness in the language of the Court. However, if he is unable to make such memorandum himself, he can cause such memorandum to be made in writing or from his dictation in open Court. Obviously such memorandum must be signed by the Magistrate and shall form part of the

record. An exception to this rule is section 263 Cr. P. C. which provides that in case where no appeal lies evidence need not be recorded.[17]

Reader of Court is not competent to record evidence or to write/announce the judgement.[18]

Mere fact that Magistrate omitted to record reasons for not writing statements himself by itself would not invalidate prosecution evidence.[19]

RECORD IN OTHER CASES

The law on this subject is contained in section 356 Cr. P. C.

The language of the section or the text of this provision reads as under:

[17] 48 Calcutta 280.

[18] 1998 P. Cr. Law Journal 344.

[19] 2000 P. Cr. Law Journal 1527.

“ **356. Record in other cases,-** (1) In trials before Courts of Session and in inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

(2) Evidence given in English,- When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.”

(2-A) When the evidence of such witness is given in any other language not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

(3) Memorandum when evidence not taken down by the Magistrate or judge himself,- In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall , as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes, and such memorandum shall be written

and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.
(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record reason of his inability to make it."

Status of State Case and Complaint Case

A state case is that which is on the basis of the FIR and comes to the Court after investigation by means of a final Report under section 173 Cr. P. C. while a Complaint case is that which is on the basis of a direct complaint made to the Magistrate and comes to the Court after inquiry. Both these case are totally independent of each other, they proceed on the basis of their own record. Record

or evidence of one case or trial could not be read in another case or trial. [20]

What should be the form of evidence, narrative or question answer form?

Section 356 Cr. P. C. gives the manner in which evidence is to be recorded in trials before the Courts of Sessions and in inquires under Chapter XII, Cr. P. C. i.e. disputes as to immovable property (ss. 145 to 148 Cr. P. C.). The Presiding officer of the court is required to take down evidence of each witness in writing in the language of the Court. The evidence should be in the form of a narrative but discretion is given to him to record the evidence in the form of question and answers. Where a Magistrate does not comply with

[20] 2008 P. Cr. Law Journal 523.

provisions of section 356, proceedings are liable to be set aside.[21]

Is section 356 Cr. P. C. applicable to examination of complainant under section 200 Cr. P. C.?

Section 356 Cr. P. C. has used the words "In trials before Courts of Session and in inquires under Chapter XII. The word trial has been used to cover proceedings which take place in presence of accused. Hence section 356 is not applicable to examination of complainant u/s. 200 Cr. P. C. [22]

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[21] PLD 1950 Lahore 274; PLD 1950 Baghdad-ul-Jadid 96.
[22] PLD 1959 Lahore 186.

Empowerment of Sessions Judges in Sessions Trial to record evidence in English in NWFP

By virtue of Notification No. 3174-L.D. dated 26-1-1937 Sessions Judges in NWFP were empowered to record evidence in sessions trial in English. [23]

What is meant by the words "taking down of evidence" as envisaged by section 356 (1) Cr. P. C.?

"Taking down of evidence" means taking down statement of witness in full in each case. As such the record of the deposition of each witness in the trial court must be a faithful account of what a witness states in each case before the

[23] PLD 1957 Peshawar 122; PLD 1958 Supreme Court 353.

Court. Copying of statement of a witness from the other case in any manner would constitute a serious and grave infringement of the provisions of section 356 (1) Cr. P. C.[24]

Where a court does so he commits departure from the usual and proper course. It is an irregularity which is gross illegality and not curable.[25]

Recording of statement of witnesses in one case and treating the same as evidence in another case is illegal and in clear violation of the procedure and rule laid down in the Qanun-e-Shahadat Order, 1984[26]

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[24] 1996 P. Cr. Law Journal 1264.

[25] 1996 P. Cr. Law Journal 1264.

[26] Order X of 1984. It repealed the Evidence Act, 1872 by virtue of its Article

What is the difference between National Language and language of the Court?

National language is the language declared as “the National language of Pakistan” by the Constitution of Pakistan.[27]

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[27] The modern concept of state defines a state as an entity having four essential elements, namely, territory, population, government and sovereignty. As an entity it is called a nation. Every person who is a member of such society is called its citizen irrespective of being in minority or majority, belonging to any age or gender, colour or faith. All citizens being so united are called a nation and the legal status so gained is called a nationality. Whatever faith they profess is called their religion. Whatever distinction they have on account of descent is called their caste. The place they opt to live is called their domicile. Internationally a person born on the territory of a state gains citizenship of that state. He or she may becoming of the age of majority may opt citizenship of another state as well, if the law of that state so permits. The instrument that declares the rights of the State and the citizens is called its Constitution. The body that makes law is called its legislature, the body that interprets such laws and even the Constitution is called its judiciary and the body that executes or implements the laws is called its executive. The language prescribed for the

official and other purposes for the whole state is called as the National language. The mother tongue may be different but the national language is one and the same. The adjective "national" is added before many things in the Constitution of Pakistan to make their identity and legal status clear and unambiguous. For example the various articles of the Constitution have this adjective before certain items as (Article 152-A National Security Council, Article 156 National Economic Council, Article 160 National Finance Commission, Article 161, National Gas and Hydro-electric Power, Article 251National Language).

Historically speaking, Pakistan came into existence by virtue of Indian Independence Act, 1947. The salient features of the Indian Independence Act, 1947 were: I Partitioned India and established two dominions to be called India and Pakistan with legislative supremacy, cessation of British rule and control over Indian affairs from August 1947, establishment of two constitutional assemblies vesting them with all powers over the respective dominion, gave full right to each dominion to remain with or t come out of the British Commonwealth, to be governed by the Government of India Act, 1935, with such modifications as were adopted by the Constituent Assembly of Pakistan till the framing of respective constitution by the said dominions, ended the right of King to veto laws or to reserve laws for his pleasure, dropped the title of "Emperor of India from royal style and titles of the king of England, gave full option to all civil and army servants to join either dominion, provided for termination of suzerainty of the crown over the Indian States. And that

all treaties, agreements, exercisable by his majesty with regards to the states and their rulers were to lapse from 15th August, 1947, and abolished the office of the Secretary of States for India and his work was to be taken over by the Secretary of the State for common wealth affairs. It provided that for each dominion there shall be a Governor-General who shall be appointed by his Majesty and shall represent his majesty for the purpose of the Government of the Dominions. The rulers of the Dominion states were given option to join either of the dominion keeping in view the majority of the population. Each dominion was authorized to amend the Government of India Act, 1935; agreements with the tribes of the North West Frontier of India were to be negotiated by successor dominion. Quad-i-Azam Muhammad Ali Jinnah was appointed the first Governor-General of Pakistan. He died on 11 September, 1948 and Khawaja Nazimuddin was appointed the next Governor-General of Pakistan.

The Constituent Assembly passed on 12 March 1949 by majority the resolution presented by Liaquat Ali Khan, the first Prime Minister of Pakistan. This Resolution was called the Objectives Resolution. Salient features of the Objectives Resolution were:

"Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which he has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan;

Wherein the State shall exercise it powers and authority through the chosen representative of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the Sunnah;

Wherein adequate provision shall be made for the minorities to profess and practice their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed Fundamental Rights including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith worship and association, subject to law and public morality;

Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein independence of judiciary shall be fully secure;

Wherein integrity of the territories of the Federation, its Independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place among the nations of the World and make their full contribution towards international peace and progress and happiness of humanity. [This was inserted in the Constitution by Presidential order No. 14 of 1985 w.e.f. 2 March 1985 as Annexure (Article 2A).

The Objectives Resolution provided basic principles for constitution making in accordance with the spirit of Islam.

The first republic came into existence by the enforcement of the Constitution of 1956. The salient features of the 1956 Constitution were that it was British in nature, having unicameral legislature (i.e. having one house called National Assembly), introducing Federal system and provided Parliamentary form of Government wherein the Prime Minister enjoyed more powers than the President, it was a written Constitution in form (having 13 Chapters and 234 articles and 5 schedules). It recognized the Independence of Judiciary (the Supreme Court was entitled to explain and interpret the Constitution), it guaranteed the fundamental rights, it protected the rights of minorities and they were free to perform their religious obligations. It declared Sharī`ah/شريعة as basis for all legislation. It laid down the directive principles of State Policy for the

guidance of the government. The directive principles were to serve simply as ideals which the State should strive to achieve. To declare emergency was left to the discretion of the President. Urdu and Bangla were made official language of Pakistan and English was to remain as Office language for a maximum of 25 years (1947+25=1972). The country was named: Islamic Republic of Pakistan". Objectives Resolution was made the preamble of the Constitution and Islam was declared the State Religion. It adopted the method of Direct Election. There was only single citizenship in the Country. It was enforced on 23 March, 1956. It was abrogated on 8 October 1958.
The first republic came into existence by the enforcement of the Constitution of 1956. The salient features of the 1956 Constitution were that it was a written constitution. The State was named Democratic Islamic Republic, Council of Islamic Ideology was established. State was federal republic, Presidential form of government was adopted, preamble was added to the Constitution, Uni-cameral legislature was adopted, system of basic democracies was introduced, independence of judiciary was assured, rights of minorities were provided, Islamic way of life was mentioned, principles of Policy were described, Urdu was declared the national language but English was to continue till full replacement by it, elimination of non-Islamic practices (like gambling, prostitution, intimidation and adultery was promised, the Constitution was rigid, fundamental rights were guaranteed, a provision was made for referendum, System of Indirect Election was introduced.

The Third Republic came into existence by the enforcement of the Constitution of 1973. The salient features of the 1973 Constitution are:

- Pakistan is an Islamic Republic.
- Islam is the State religion. Article 2
- No law can be passed against the injunctions of Islam as enunciated in the Holy Qur'an and Sunnah. Article 227
- Objectives Resolution enshrined as Article 2A, Council of Islamic Ideology, and Federal Shari`at Court established. Article 2A.
- Bicameral legislature (Senate is the upper house and National Assembly is the lower house) and the form of government is Federal Parliamentary. Articles 50 and 51
- Fundamental Rights are guaranteed. Articles 8 to 28.
- Method of direct election has been adopted. Articles 213 to 221.

- Independence of Judiciary has been provided. Articles 175 to 212-B.
- Directive Principles of Policy have been provided for the guidance of the state. Articles 29 to 40.
- Rights of minorities have been protected.
- Provincial autonomy has been accepted.
- Urdu has been declared as the National language of Pakistan. Article 251.
- President has the discretion to order holding referendum on any national issue. Article

The relevant article of the Constitution of Islamic Republic of Pakistan, 1973 is Article 251. It reads as under:

"**251. National Language.-** The National language of Pakistan is Urdu, and arrangements shall be made for its being used for official and other purposes within fifteen years from the commencing day.

(2) Subject to clause (1), the English language may be used for official purposes until arrangements are made for its replacement by Urdu.

(3) Without prejudice to the status of the National language, a provincial Assembly may by law prescribe measures for the teaching, promotion and use of a Provincial language in addition to the national language."

- Constitution has 12 Parts, 280 articles and one annex and seven schedules.

What are provincial languages?

Article 28 is one of the guarantees enshrined in the Constitution. It is in respect of the Preservation of language, script and culture. It reads as under: "Subject to Article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and, subject to law, establish institutions for that purpose."

Punjabi, Sindhi, Baluchi and Pashto are spoken as provincial languages. Record of evidence is also maintained in the Provincial languages along with English record especially in murder cases by the trial courts. During One Unit (West Pakistan) period the Presiding officers had to pass a provincial language

examination after their appointments. It was a pleasant experience and was really useful in the ends of justice. During my first appointment in Sindh at Ghotki as Civil Judge and First Class Magistrate[28] the knowledge and understanding of the Sindhi language and script facilitated in the discharge of my functions on both sides. Now the world has gone towards the Therapeutic Jurisprudence and it is gaining popularity. To involve in depth in doing justice by a judicial officer is not possible without knowing and understanding the regional language and script. The language barrier between the litigants and the court system in a plural society is a source of deprivation for the illiterate litigants to know first hand information about the processes and courts orders relating to their cases. By

[28] From 4 March 1966 to 22 March 1968.

bridging this gap, the litigant is empowered to know by him/her-self the determinations of his/her rights and/or liabilities in court proceedings. This helps in lessening the negative impact on a litigant about an order or judgment that goes in favour of the opposite party. The reliability of the litigant on second (translated information by the counsel or court official) or third hand information (understanding of the issue and translation of the court orders / proceedings through a friend or colleague) brings the credibility of the information conveyed to a lesser degree. By proceeding in the language of the litigant, the credibility of information conveyed to the litigants will be strong and the ultimate outcome of the legal process will result in therapeutic impact on him. It may highlight the chances that

the litigant is satisfied by the court order and instead of filing unnecessary appeal or review, he may opt to follow the order.

In the same way, giving and recording of evidence in the language of the litigant or the area where the court is working helps in avoiding any mis-quotation or mis-understanding of the actual narration by the witness. For example, a witness deposes in Seraiki language (as spoken in Southern Punjab), his deposition must be recorded in that very language to become the master document of his deposition. Afterwards, if so required, the translation in Urdu (national language) or in English (official language) may be made. For this purpose, the judicial officers and staff may be trained in regional languages

through intensive language courses either in the Judicial Academies or with the cooperation of language institutes of the Universities.

The present law /procedure which states that the evidence will be recorded by the Court either in the language of the Court or in English is reflection of continuation of the policies of the colonial rulers because they were native speakers of English. After partition of sub-continent in 1947 and establishment of indigenous system of government through a Constitution given by the people themselves, we need to change the understanding and the spirit of recording of the evidence in the language of the witness as compared to the national or English language as first mode of maintaining the deposition of witness. Original is original and translation is

translation; and further translation of the translation is more so hazardous and requires caretaking. I am stressing upon it to find out the truth, to become close and proximate to it.
Similar were the views of my colleagues at all levels.
As far as the Languages other than the mother tongue are concerned those are all respectable and they have their usefulness as media of mutual understanding and communications. We express ourselves by means of language. All the languages are also creations of God. Languages are many and multiple. Their variations are not futile. Allah Almighty has not created anything futile. There is meaning and purpose even in them. Those are great signs to reflect and understand that glorified is the Being

called Allah Almighty and all praise belong to Him. The Holy Qur’an says:

وَمِنۡ ءَايَـٰتِهِۦ خَلۡقُ ٱلسَّمَـٰوَٰتِ وَٱلۡأَرۡضِ وَٱخۡتِلَـٰفُ أَلۡسِنَتِكُمۡ وَأَلۡوَٰنِكُمۡۚ إِنَّ فِى ذَٰلِكَ لَأَيَـٰتٍ لِّلۡعَـٰلِمِينَ ٢٢

And among His Signs is the creation of the heavens and the earth, and the variations in your languages and your colours: Verily in that are Signs for those who know.
[30: 22]

Who can deny the competition among the languages? It is there and will remain there. This world is a stage and all things created on it are to play their role competitively. At present English is the

leading language in Science and technology and there is much labour and effort behind this surpassing and excelling. Despite this entire still in many affairs other languages have maintained their stay and status in tact to bring closer to the truth. The source or the root has always its importance and significance.

Can Article 28 be invoked to compel a University to make permanent provision for a regional language as a medium of instruction for answering examination papers?

The answer is "No". The judicial precedent in support of this negative

answer is available in a case decided by the Sind High Court seated at Karachi where in the honourable judges of a Division Bench observed that article 28 envisages that if there is a section of the citizens who have a distinct language and culture of their own and want to preserve the same they have the constitutional right to do so. However, under the provisions of this Article a University cannot be compelled to make permanent provision for a regional language as a medium of instruction for answering examination papers.[29]

Option to Magistrate in cases u/s 355 Cr. P. C.

Section 358 Cr. P. C. is on the subject. It lays down:

[29] PLD 1957 Karachi 611 (DB).

" In cases of the kind mentioned in s.355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in s. 356, or , if within the local limits of the jurisdiction of such Magistrate the Provincial Government has made the order referred to in s. 357, in the manner provided in the same section."

- The above provision of law relates to procedure in a criminal court.
- It relates to cases of the kind mentioned in s. 355.
- It is not mandatory in its language. It is discretionary. The reason being that the legislature has used the words "may" and also "if he thinks fit". Of course the Magistrate is to exercise his discretion judiciously and also keeping in view all the surrounding

circumstances. His exercise of the discretionary power must be reasonable and not arbitrary, bonafidely and not capriciously.

- Taking down of evidence in the mother tongue by a Court or Session or a Magistrate is subject to the direction made by the Provincial Government availing the power given to such Government by section 357 of the Cr. P. C.

Mode of recording evidence under section 356 or section 357

The relevant provision of law on the above subject is available in section 359 of the Cr. P. C. It consists of two sub-sections. Subsection (1) is mandatory while subsection (2) is discretionary.

The text of the section is reproduced for ready reference:

359. Mode of recording evidence under section 356 or section 357.- (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question answer, but in the form of a narrative.

(2) The Magistrate or the Sessions Judge may, in his discretion take down , or cause to be taken down, any particular question and answer.

Procedure in regard to such evidence when completed?

The answer is made available by the legislature in the next section i.e. section 360 Cr. P. C. which lays down:

(1) As the evidence of each witness taken down under s. 356 or s. 357 is completed, it shall be read over to

him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was

given, or in the language which he understands.

What is the object of reading over the evidence to witness?

A careful reading of section 360 Cr. P. C. shows that the object of reading over the evidence to witness is to obtain an accurate record of what witness really meant to say and to give him an opportu nity of correcting the words taken down. It is not to enable him or his counsel to suggest corrections, or to change his story.[30]

The witness is entitled to be sure that the evidence has been read over and the witness has had an opportunity of correcting the witness record. But he is

[30] AIR 1927 Privy Council 44; AIR 1952 SC 214.

not necessarily entitled to the opportunity of suggesting corrections. [31]

Interpretation of evidence to accused or his pleader

The relevant provision on the subject is contained in section 361 Cr. P. C. It brings to light three situations and provides for the solution thereof. It states:

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court and

[31] Ibid.

not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Situation one is that where accused is present in person and the evidence against him is not understood by him. Two duties are cast upon the Court. One is to interpret it to the accused in a language understood by him. The second is to do so in Open Court. The question is: Why? The answer is that only in this manner fair trial is shown. The wording of the law "language understood by him" is extensive. It may be a language other than the language of the Court.

Remarks regarding demeanour of witness

This is the heading of section 363 of the Cr. P. C. 1898.

The text of section 363 Cr. P. C. reads as under:

"When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination."

1. Who is a Sessions Judge?

According to section 6 of Cr. P. C. 1898 besides the High Court and the Court constituted under any law other than the Code of Criminal Procedure for the time being in force, there shall be two classes

of Criminal Courts in Pakistan, namely, (i) Courts of Session; and (ii) Courts of Magistrates.

According to section 7 each Province shall consist of session divisions, and every sessions division shall, for the purposes of this Code, be a district or consists of districts.

According to section 9 it is the duty and function of the Provincial Government to establish a Court of Session for every such division, and appoint a Judge of Such Court.

Briefly stated a Sessions Judge is:

- An officer appointed by the Provincial Government to be the Presiding officer of a Court of Session established for Session Division.[32]

[32] Section 9(1) of the Cr. P. C. 1898.

- Head of the District judiciary and appellate or Revisional Court of the courts subordinate to his jurisdiction in the sessions division.
- Vested with criminal jurisdiction in the session's division[33].

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[33] On the civil side he is designated as a District Judge and all subordinate Civil Courts are under his appellate and Revisional jurisdiction.
Administratively in Pakistan a single person holds both the portfolios referred to above and is called District and Sessions Judge.
He is a Grade 21 Officer in National Pay Scale.
Subject to qualifications he is eligible for elevation to the Provincial High Court.
His age of superannuation is 60 years.
Serving Sessions Judges are eligible for appointment as:

(i) Presiding Officers of the Special Courts, like Accountability Courts, Banking Courts, Anti-terrorism Courts, Custom Courts, Drug Courts, Child Protection Courts, Narcotics Courts, Juvenile Courts, Anti-Corruption Courts.
(ii) Registrar of High Court.

- Vested with power to make rules or give special orders consistent with this Code and any rules framed by the provincial Government under section 16 as to the distribution of business among such Magistrates and Benches.
- Under the supervisory, appellate and criminal and Constitutional jurisdiction of the Provincial High Court[34].

(iii) Faculty member in the Judicial Academies.

Prior to the enforcement of the National Judicial Policy 2009 (NJP) , the District and Sessions Judges (D&SJ) were eligible to be appointed as:
Federal Additional and Joint Secretary, Solicitor General, Draftsman, Provincial Secretary Law, Solicitor, Secretary to the Attorney General, Secretary to Senate, Secretary to the National Assembly, Secretary to Provincial Assembly etc.

[34] Under section 4(1) (f) High Court means the highest Court of criminal appeal and revision for a Province.

2. Who is a Magistrate?

Section 4 of the Cr. P. C. 1898 defines this term in clause (mm) of its subsection (1). According to this clause "Magistrate" means a Judicial Magistrate and includes a Special Magistrate appointed under section 12 and 14. According to section 12 of the Cr. P. C. the Provincial Government has been given the discretionary power at to appoint as many person as it thinks fit, besides the District Magistrate to be the Magistrate of the fist, second or third class in any district; and the Provincial Government or the District Magistrate, subject to the Control of the Provincial Government, have been given the discretionary power to define local areas

within which such persons may exercise all or any of the powers which they may respectively be invested under this Code, from time to time.

In other words the appointing authority of Magistrates is the Provincial Government.
The Provincial Government may appoint any person as a Magistrate.
The Provincial Government may invest such appointee with powers of any class of Magistrate, i.e.1st, 2nd or 3rd Class. The discretion lies with the Provincial Government.

Under section 16 the Provincial Government may, from time to time, make rules consistent with this Code for the guidance of all Magistrates and

Magistrates’ Benches in any district respecting the following subject:

(a) the classes of cases to be tried;

(b) the times and places of sitting;

(c) the constitution of the Bench for conducting trials;

(d) the mode of settling differences of opinion which may arise between the Magistrates in session;

(e) the mode and manner of conducting raids and trials on the spot.

3. What is evidence?

Under Article 2 of the Qanun-e-Shahadat Order 1984 “evidence” means and includes:

(1) Oral Evidence: All statements which the Courts permit or require to be made before it by witnesses in

relation to matter of fact under inquiry.

(2) Documentary evidence: Documentary evidence means documents produced for the inspection of the Court.

Evidence signifies only the instruments by means of which relevant facts are brought before the Court, namely, witnesses and documents. A judge cannot refer to a statement in another case, if the statement is not on the record in the present case. Specimen signature of writing under Article 84 is not evidence.

Thus the definition of evidence covers,-

(a) Oral evidence of witnesses , and

(b) Documentary evidence. It does not cover everything that a Court has before it.

There are certain other media of proof, e.g.:

- the statement of parties;
- the result of local investigation;
- facts of which the Court takes judicial notice;
- any real or personal property;
- the inspection of which may be material in determining the question at issue, such as weapons, tools or stolen property.

Relevancy of Evidence is to be judged by the connection of one fact with the other fact in accordance with the provision of the Qanun-e-Shahadat Order 1984.

Cogency of Evidence signifies its worth or sufficiency to decide the matter-in-issue.

Evidence which is relevant is admissible although it need not necessarily be cogent or sufficient to prove the fact sought to be proved. Cogent evidence includes relevant evidence and is something over and above in the sense that it is of sufficient importance and value.

A statement in the inquest report is no evidence by itself and it certainly cannot be pitted against the evidence of the medical witness given in a Court.

Where A tells B that C beat B's wife. C is prosecuted on a charge of beating B's wife. A is not called as witness, but B deposes to what A told him.

B's statement that A told him that C beat his (B's) wife is not evidence in law but

it is hearsay. Under Article 71 of the Qanun-e-Shahadat Order 1984, when oral evidence refers to a fact which can be seen. It must be the evidence of a witness who says he saw it. It is A who can say that C beat B's wife and he saw it.

4. Who is a witness?

Under Article 3 of the Qanun-e-Shahadat Order 1984 all persons shall be competent to testify unless the Court considers that the yare prevented from under standing the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease of body or mind, or any other cause of the same kind.
A lunatic is not competent to testify, unless he is prevented by his lunacy from

the understanding of the questions put to him and giving rational answers to them.

5. What is recording?

Recording means writing on a paper in a manner that it is legible. Record is to be made in the Court language.

6 .What is a remark?

Remark means observation about the thing seen. Here it means whatever the trial court has seen while the examination of a witness was in progress as to the behaviour or reaction on the witness of the questions put to him and the answers given by him.

7. What is the difference between "evidence" and "record"?

Evidence is the testimony and record is its writing on paper and preserved in the Court.

8 .What is meant by "if any"?

"If any" means in case there is any.

9. What is the meaning of the term "as he thinks material"?

The word material is an ***adjective. It has the following meanings:***

> "1. Of evidence, that it is important or essential to an adjudication or determination.
> 2. Having a logical connection to the matters under consideration." [35]

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[35] http://law.yourdictionary.com/material# downloaded on 14-10-2012 at 2.57AM.

Here it means that the Judge is to use his own discretion to find a logical connection to the matter under consideration.

10. What is "demeanour"?

M.C. Sarkar in his world famous contribution titled as "Law of Evidence" has very nicely and lucidly explained all aspect of Demeanour of a witness"

The Demeanour or bearing of a witness should be very closely observed.

Unless the witness is a skilled actor, his Demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witness that it has repeatedly held that his decision on

a question of fact should not be lightly disturbed.
Sarkar[36] quoted Sir John Coleridge's following observation made by him in the case titled as: R. v. Bertrand:

> *"The most careful note must often fail to convey the evidence fully, in some*

[36] *Sarkar On Evidence* is the most read and respected commentary by the Bench and the Bar. Its 15 editions have since been published (1912-2012) and it has seen a period of over a century and applauded all the way long. I am grateful to the author, the editors, and the publishers for having availed certain references from this valuable book. I have been a member of the Bar and also Bench and now teaching law at all levels up to Ph. D. I have been using this book the most and recommended my students to go through it deeply. No doubt by the Islamization process we have now the Qanun-e-Shahadat Order 1984 but still the value of this book is in tact. The reason is the sincere effort in conducting research. Wadhwa and Company, Nagpur is doing great service to the legal fraternity for having maintained the standard (both intrinsic and extrinsic) and keeping the price moderate. Let their noble struggle in the cause of law, justice and fair play may flourish many fold. [Justice ® Dr. Munir Ahmad Mughal].

of its most important elements; to those for which the open oral examination of the witness in presence of prisoner, judge and jury, is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or considerations; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied when given openly and orally, by the ear and eye of those who receive it".[37]

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[37] R. v. Bertrand (1867) LR 1 PC 520, 533.

Sarkar also quoted two Indian rulings where it was observed by their lordships:

"When the question of credibility depends on the Demeanour in the box, the manner in which the witness answers, and by how he seems to be affected by the question put and so on, the trial judge has an advantage. But when the views upon credibility are founded upon argumentative inferences from facts not disputed, the court of appeal is really in as good a situation as the trial judge."[38]

The absence of a separate note regarding Demeanour of a witness is immaterial, specially when judgment is

[38] Palchar v. P, 27 CWN 14: A 1922 PC 315.

written before the recollection of the judge has become dim.[39]

When judges arrive at a conclusion after seeing demeanour it will be difficult to reject their appreciation, except upon ground which prove that there view was wrong.[40]

An impression as to the Demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of his evidence and it is open to the appellate court to find that the view of the trial judge as t Demeanour was ill-founded.[41]

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[39] Reamrks of Lord Atkins during argument in Sitalakshami v. Venkata [34CWN 593: AIR 1930 PC 170].

[40] Nana v. Gopal, [A 1940 PC 93; 72 CLJ 263: 1940 Kar 235]

[41] Yuill v. Yuill 1945, All ER 183 CA.

11. What is examination?

When a Court summons a witness to give evidence he appears or is produced by the party and his evidence is to be recorded in open court. It may take three stages, namely, examination in chief by the party who produces him, cross examination by the party against whom he deposes and re-examination if it is considered necessary in the ends of justice.

Examination of Accused How recorded?

On this subject, comprehensive procedural law has been incorporated in section 364 of Cr. P. C.

The text of this provision of law is reproduced for ready reference:

364. Examination of accused how recorded. (1) Whenever the accused is examined by any Magistrate or by any Court other than a High Court the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In a .case in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound as the examination proceeds, to make memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.

The important points in this section are:

- the whole of examination including every question put to accused and every answer given by him shall be recorded:

- in full
- in the language in which he is examined or
- if that is not practicable,
  - in the language of the court or
  - in English

- Such record shall be shown or read to the accused or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands and
- The accused shall be at liberty to explain or add to his answers.

- When the whole is made conformable to what he declares is the truth, both the accused and the magistrate or judge of such court shall sign it

- The most important thing is that the magistrate or judge shall certify under his own hand two things:
    - That the examination was taken in his presence and hearing;
    - That the record contain a full and true account of the statement made by the accused.

- Where such examination is not recorded by the magistrate or the judge himself, he shall be bound as the examination proceeds to make a memorandum thereof in the language of the court or in English, if he sufficiently acquainted with the later language and such memo shall be written

and signed by the magistrate or judge with his own hands and shall be annexed to record.

- In case of any inability to make a memorandum as above required, the magistrate or judge shall record the reason of such inability.
- Where examination of accused is under section 263 Cr. P. C. nothing contained in section 364 shall be deemed to apply to such examination.

RECORD OF EVIDENCE IN HIGH COURT.

Section 365 deals with this subject. It is reproduced as under:

365. Record of evidence in High Court. *Every High Court shall from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court and the evidence shall be taken down in accordance with such rule.*

This section empowers the high court to prescribe its own manner of taking down the evidence. For this purpose, the High Court has its own rules.