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The Qualifications of a Witness under the Law of Evidence in Pakistan with Special Focus on Child Witnesses

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ABSTRACT

This article deliberates upon the Pakistani jurisprudence regarding a witness's qualification, especially that of a child witness. The main findings of this article are that there is no fixed age to be a witness although some courts have attached ages to be a witness. The major prerequisite is whether a person has the intellectual capacity to be a witness, whether they are able to understand and appreciate the questions put before him and provide reasonable or logical answers to the same. There is a divergence of views regarding the procedure to be adopted to ascertain the child's intelligence by the Courts, while others have ruled that the child's intellectual capacity is irrelevant as long as the evidence fits the facts and circumstances of the case subject to strict scrutiny. Hence, there is a lack of consistency in the jurisprudence regarding the child witnesses. The Courts have also ruled that corroborative evidence is needed to supplement child witness's testimonies as they are easy targets of potential manipulation. The Courts have also ruled that child witnesses and child victims who are also witnesses must be treated differently, with the latter to be treated more delicately and whose testimony will be accepted even without strict scrutiny provided he is able to withstand the test of cross-examination and recount his experiences. The methodology used in this paper is doctrinal.

Keywords: *Evidence, Witness, Child Witness, Testimony, Qanun-e-Shahadat Order 1984.*

INTRODUCTION

One of the most significant laws is the law of evidence. Without evidence, there can be no conviction, no decree, no order, no acquittal. This is based on the age-old principle of "*audi alteram partem*," which means everyone is entitled to have an opportunity of being heard. That is to say, anyone alleged of anything has a right to defend himself, with proper evidence. This is also equally applicable to the side that makes an allegation or claim. He cannot make such allegations or claims without any semblance of evidence. No can say anything or can allege anything about anyone. Such allegations or claims hence need to be supplemented with proper proof. This involves a two-phase process of reconstruction and evaluation.[1] The first phase is to reconstruct the claims or allegations that are related to an event or a state of affairs in the past or present for and before the fact-finder.[2] The second phase is to evaluate such claims or allegations and to see whether they are in fact truthful or not.[3] Hence, the trial Court acts as a fact-

[1] Karl H. Kunert, "Some Observations on the Origin and Structure of Evidence Rules under the Common Law Legal System and Civil Law Legal System of 'Free Proof' in the German Code of Civil Procedure", *Buffalo Law Review*, 16, No. 1, (1966): 123. <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=2538&context=buffalolawreview> accessed 23rd February 2024.
[2] Ibid.
[3] Ibid.

finder, trying to assess and determine whether such claims or allegations have their basis in what actually happened or not.

Hence, in a proper trial, there needs to be an assessment of evidence so as to make sure that the trial is indeed a fair trial and that there is no breach of the doctrine of due process. This does not just apply to common law but also Islamic law. Under Islamic law, an accused has certain fundamental guarantees in a trial even, without which there can be no proper trial.[4] Naturally, one such fundamental guarantee is the scrutinization of evidence.

Hence, there can be no case made without evidence. Without any evidence, there can be no acquittals convictions, no remedies. It forms the basis of every fabric of legal dispute and case, especially civil and criminal cases. That is why evidence must be scrutinized properly and even the ones who give them must be scrutinized properly as well. Witnesses are a central aspect of the case as anything they say means life and death for the other, especially in criminal cases. Thus, witnesses must also be qualified to give testimonies. There must be a set criterion on which basis a witness can be qualified to give testimony or not. What is this criterion? Should they be sane? Should they be an adult? Can children give testimonies as well? Or are they disqualified from doing so? This is the central proposition on which this paper focuses on.

This article thus deliberates on the law of evidence during the eras of ancient India and Muslim rule; it explores how the law of evidence was used by the EEIC before the British completely imposed their common law principles by means of legislation; it probes how the Evidence Act, 1872 after being adopted in Pakistan was repealed by the Qanun-e-Shahadat Order, 1984; it evaluates the jurisprudence of the Courts regarding the qualifications of a witness with particular emphasis on the qualifications of a child witness. To that extent, the article will contemplate multiple literature and the judgements of the Pakistani Superior Courts and other common law jurisdiction so as to understand the complexities involved in child witnesses and whether Pakistani jurisprudence has evolved to that extent.

LITERATURE REVIEW

Very little has been written on the theme of this subject unfortunately. The very first critical commentary of child witnesses came from the ex-Chief Justice Muhammad Munir in his famous commentary of the law of evidence.[5] While the commentary was originally made on the Indian Law of Evidence, it is still relevant as there are still similar principles that are shared between both jurisdictions in light of the fact that both countries inherited the original Evidence Act of 1872 notwithstanding the fact that Pakistan has replaced it with the Qanun-e-Shahadat Order, 1984. Additionally, the commentary has been the subject of revisions and updates since it was first published. While it is not an exclusive work on child witnesses, it still encompasses judicial decisions from the time of the Anglo-Indians and as we shall see hereinbelow, the Pakistani judges have not yet moved on from the jurisprudence of Anglo-India.

Another similar work in terms of it not being an exclusive work on child witnesses but ultimately still incorporates within academic scrutiny on witnesses is Asma Siddiqui's thesis on the development of the

[4] For a detailed deliberation on the procedural safeguards for the accused under Islamic Law, see, Muhammad Munir, "Fundamental Guarantees of the Rights of Accused in the Islamic Criminal Justice System", *Hamdard Islamicus*, 40, No. 4, (Oct-Dec 2017): 45-65.
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093026> accessed 23rd February 2024.

[5] Muhammad Munir, "*Law of Evidence: Being a Commentary on the Indian Evidence Act, 1872 as amended by Act 13 of 2013*" Manmohan Lal Sarin (ed.), Shakil Ahmad Khan (ed.) (Universal Law Publishing Co., 16th ed., 2013).

law of evidence in the Pakistan and Bangladesh.[6] Chapter 3 of the same has been denoted exclusively to the principles regarding the qualification of a witness.[7] She makes a very apt comparison of the principles regarding a witness's qualification in Pakistani, Bangladeshi and Islamic jurisprudence respectively.

An exclusive academic scrutiny on child witnesses in Pakistani jurisprudence was valiantly undertaken by Raja Jahanzaib Akhtar.[8] His academic scrutiny was made comparatively of Pakistani, Indian, American, Canadian and Anglo law. However, his analysis also goes into the nuances of not just child witnesses but other special witnesses such as those who are disabled. He also accurately surmises that a special procedure handling such special witnesses must be developed and used extensively. Hence, his work is not an exclusive study of the principles revolving child witnesses.

Sheer Abbas and Hafiz Muhammad Azeem[9] have also conducted a very good study into the competency of child witness testimony and how courts should develop better standards for the same in compliance with international human rights standards. However, their legal appraisal of both the statutory law and the various judicial decisions are very brief and additionally they have not gone beyond the consideration of age of the concerned child as enunciated by the superior court jurisprudence.

Brief Historical Background of the Law of Evidence before Partition

In ancient India, there were many different independent states who followed the ancient Hindu law of *Dharma*. All their law of evidence was thus based on the customary and religious law of *Dharma*[10] and this went on before the establishment of the *Sultanat-e-Delhi* and the Mughals respectively, whose legal system was primarily based on the *Shariah*[11] and thus followed the Islamic law of evidence. Afterwards, the English East India Company (EEIC), which was an English Company that settled in India for the sake of furthering British commercial interest and also made endeavours to expand their political power[12] administered justice arbitrarily as they were all traders and had no knowledge of law.[13] The EEIC's authority was replaced by the British Crown after the Charter of 1726 which provided that the Courts that were to be constituted by view of this Charter derive their authority by the King rather than the EEIC.[14]

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[6] Begum Asma Siddiqui, "*Development of the Law of Evidence in Pakistan and Bangladesh with Special Reference to Witness Testimony*" (PHD thesis: School of Oriental and African Studies, London, 1994). <https://soas-repository.worktribe.com/output/387100> accessed 19th July 2025.

[7] Ibid, pp. 101-147.

[8] Raja Jahanzaib Akhtar, "Competence of Child and Special Ability Witnesses" *Federal Law Journal*, Vol. I, no. 2 (2022): 49-65. <https://www.flj.gov.pk/docs/issue2/4.pdf> accessed 19th July 2025.

[9] Sheer Abbas and Hafiz Muhammad Azeem, Child Testimony Across Borders: Ensuring Reliability and Admissibility in Line with International Human Rights Standards, *Pakistan Journal of Criminology*, 17 (1) (2025): 1-14.
<https://www.pjcriminology.com/publications/child-testimony-across-borders-ensuring-reliability-and-admissibility-in-line-with-international-human-rights-standards/>

[10] Vepa P. Sarathi, "Historical Background of the Indian Evidence Act, 1872" *Journal of the Indian Law Institute*, 14, special issue, (1972): 1-25.

[11] For a detailed discussion on the legal system during the eras of *Sultanat-e-Delhi* and the Mughals respectively, see, Muhammad Munir, "The Administration of Justice in the Reign of Akbar and Aurangzeb: An Overview" *Journal of Social Sciences*, 5, no. 1, (August 2012): 1-19.
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792411> accessed 23th February 2024.
See also, Muhammad Basheer Ahmad, "*The Administration of Justice in Medieval India*" (Aligarh: The Aligarh Historical Research Institute, 1941).

[12] Muhammad Munir, *Precedent in Pakistani Law*, (Karachi: Oxford University Press, 2014), 1.

[13] Ibid, p. 2.

[14] Muhammad Munir, "The Judicial System of the East India Company: Precursor to the Present Pakistani Legal System", *Annual Journal of International Islamic University, Islamabad*, 13/14, (2005-2006): 63. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1820122 > accessed 23rd February 2024.

These Anglo Courts in India proceeded to apply common law and were to take guidance of the principles of "justice, equity and good conscience" in their cases.[15] Although, for a long time, these Courts' jurisdiction were limited to certain territories and in cases of personal law, they were still to apply the respective religious and customary law of the Muslims and Hindus, provided that said rule of custom was not abolished by a legislative enactment.[16] Hence, the laws of evidence were based on the principles of the Hindu *Dharma*, Islamic Law and even Common Law, which we shall discuss even further hereinbelow.[17]

Indian Evidence Act, 1872

Prior to the promulgation of the Indian Evidence Act, 1872, India, which at this point was a fully-fledged British colony enacted several enactments which provided for certain rules of evidence that were to be followed by the Anglo-Indian Courts. This included Act 10 of 1835, Act 19 of 1837, Acts 5 and 9 of 1840, Act 7 of 1844, Act 15 of 1852, Act 19 of 1853.[18] However, not all of these Acts were applicable to the whole of British India, they were only applicable to certain Courts in certain territories. This changed when Act 2 of 1855, which was an Act that was introduced in 1855 for the further improvement of the law of evidence was passed. It was applicable to the whole of British India.[19] Matters that were not provided by this Act were to be decided according to Islamic Law.[20] After the British Crown took direct control of India as a result of the war of 1857, three more Acts that were related to the law of evidence were promulgated, which were Act 8 of 1859, Act 25 of 1861 and Act 15 of 1869.[21] Subsequently, the Evidence Act of 1872 (Act I of 1872) was promulgated in the 15th of March, 1872. Section 2 and the Schedule of the same was repealed by the Repealing Act, 1938 (Act I of 1938).[22]

POST-PARTITION: LAW OF EVIDENCE IN PAKISTAN

Pakistan and India became two separate independent states by virtue of the Indian Independence Act, 1947. It provided British Indian law to continue as the law of Pakistan and India with certain adaptions.[23] A provision for the continuance of existing law existed in all Pakistani Constitutions from 1956 till the present Constitution of 1973.[24] Hence, the Indian Evidence Act, 1872 was adapted as the Pakistan Evidence Act, 1872. This went on until Zia Ul Haq's enforcement of martial law. Zia Ul Haq was known

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[15] For a detailed discussion on the Old Anglo-Indian Courts' application of the principle of 'equity, justice and good conscience', see Uzmat Batool, *Anglicization of Shari'ah by Anglo-Indian Courts and its Impact on Pakistani Law: A Case Study with Special Reference to Waqf, Inheritance and Equity* (PHD thesis: International Islamic University, Islamabad, 2019). <http://prr.hec.gov.pk/jspui/bitstream/123456789/12154/1/Usmat%20batool%20shariah%202019%20iiui%20isb%20prr.pdf> accessed 23rd February 2024. See also, this author's, The Evolution and Role of 'Justice, Equity and Good Conscience' under the Anglo-Indian and Pakistani Jurisprudence: An Inquiry into the Past and Present and Future Towards a Coherent Shari'ah Based Interpretation, *Legal Transformation in Muslim Societies*, Vol. 2, no. 1 (2025): 1. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4312224> accessed 23rd February 2024.

[16] Ibid, p. 66.

[17] For a detailed discussion on the historical background of the law of evidence, see, Sarathi, Historical Background, *supra* note 10.

[18] Ibid, pp. 16-17.

[19] Ibid, p. 18.

[20] Ibid.

[21] Ibid.

[22] See, The Repealing Act, 1938 (Act I of 1938), The Gazette of India, March 5th 1938. <https://punjabcode.punjab.gov.pk/en/show_article/VmIAN1BhV28-> accessed 24th February 2024.

[23] Muhammad Munir, "Evolution and Sources of the Pakistani Legal System". <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975421> accessed 24th February 2024.

[24] Ibid.

for his so called "Islamisation" of laws during his regime. This included even the Evidence Act, 1872 which was repealed by the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as the "Order"). However, this was not at all an Islamised superior alternative to the old Evidence Act but was merely a reenactment of the same under the guise of being "Islamised."[25] It is in fact the revised, amended and consolidated form of the old Evidence Act, 1872.[26] "Almost all the provisions of the Evidence Act, 1872, have been kept intact with a few amendments because it has been said that most of the provisions of the Evidence Act were not repugnant to Islamic principles of law, and that very few amendments were required to bring it into conformity with the tenets of Islam."[27] "Some of the amendments in the Evidence Act are of formal nature only and do not seem to have changed any rule of law at all."[28] Hence, the Order itself is not a complete overhaul of the previous law of evidence, but rather its rearranged and remodelled self with bits of Islamic principles thrown here and there. This much should suffice as a detailed comparative analysis between the repealed Evidence Act and the Order is beyond the scope of this work.[29]

Qualification of a Witness

A witness is any individual who provides evidence or testimony in legal proceedings before a tribunal or a court of law.[30] They can also be called a person who gives his testimony under oath in court, concerning what they have seen, heard, or otherwise observed.[31] Or a person who has knowledge of an event.[32] He is also someone who subscribes his name to a deed, will, or other document, for the purpose of attesting its authenticity, and proving its execution, if required, by bearing witness thereto.[33] Hence, such a person is an important element of a trial or will or even other such important legal effects.[34]

It stands to reason that there must be a requisite criterion that must be fulfilled in order for one to qualify as a witness. Under Section 118 of the previous Evidence Act, 1872, any person is allowed to testify provided that they are able to understand the questions that are put to them and are able to provide rational answers to said questions. Should any person be unable to provide a rational answer due to being very young or old or suffering from some mental or physical disease or any cause of the same kind, then he is not allowed to be a witness. Hence, the biggest element is that a person must be able to understand the question put to him and provide a rational answer to it. There is no added element of any particular

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[25] See, Muhammad Munir, "Islamisation or De-Islamisation?: De-Islamisation of the Law of Evidence under the disguise of Islamisation by General Zia-Ul-Haq in Pakistan" <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413113> accessed 24th February 2024.

[26] Siddiqua, "Development of the Law of Evidence, *supra* note 6 at p. 27.

[27] Ibid, p. 28.

[28] Ibid.

[29] See, Lucy Carroll, "Pakistan Evidence Order ("Qanun-i-Shahdat"), 1984: General Zia's Anti-Islamisation Coup", in Dispensing Justice in Islam: Qadis and their Judgments, edited by Muhamamd Khalid Masud, Rudolph Peters & David S. Powers, Brill, Leiden-Boston, 2006. See also the report of the Law and Justice Commission, Report on the Law of Evidence in which the Evidence Act, 1872 was examined to see whether it was repugnant to the injunctions of the Holy Qur'an and Sunnah of the Holy Prophet (S.A.W). <http://ljcp.gov.pk/Menu%20Items/Publications/Reports%20of%20the%20LJCP/reports/report04.htm#:~:text=According%20to%20Section%20118%20of,mind%2C%20or%20any%20other%20cause> accessed 24th February 2024.

[30] James Cahoy and others, *West's Encyclopedia of American Law*, Vol. 10, (Thomson Gale, 2005), 405.

[31] Ibid.

[32] Henry Campbell Black, *Black's Law Dictionary*, 2nd ed. (St. Paul, Minn: West Publishing Co., 1910), 1230.

[33] Ibid.

[34] For a detailed discussion on the role and importance of witnesses, see, G.S. Bajpai, "Witnesses in the Criminal Justice Process: Problems and Perspectives- An Empirical Study", *Indian Law Review*, 1, no. 1, (Nov 2009): pp. 249-265. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181079> accessed 24th February 2024.

age or gender. These are rather explanations of the witness's incompetency to understand and provide rational answers to the questions put before them.

Article 3 of the Order is para-material with this provision, with slight additions. It provides that a person is not allowed to testify if he has been previously convicted for presenting false evidence or committing perjury.[35] However, he will be allowed to testify should the Court be satisfied that the person has since then repented and will not repeat such behaviour.[36] The provision also provides that a witness's competence shall be determined in accordance with the criterium provided by the injunctions of Islam as laid down in the Qur'an and Sunnah's.[37] It also provides that where such witness is not forthcoming, then the Court has the discretion to take the evidence of any other witness who is available.[38] These two are the slight additions added to this provision which was not previously available in the previous Evidence Act. Lastly, the explanation to the provision provides that a lunatic is also competent to be a witness provided that he is not prevented from his lunacy to understand and provide a rational answer to a question put before him.[39] This seems to be similar to the principle that a man who suffers from temporary insanity is competent to enter into a contract in the intervals where he is sane under the law of contract.[40] In fact, if we consider the element of understanding and providing a rational answer to a question put before him, that too is a parallel to the principle that a person is competent to contract if he has a sound mind and is capable of understanding and forming a rational judgement as to its effects upon him.[41]

A comprehensive observation on this regard was made by the Sindh High Court in "*Muhammad Feroze v. State*."[42] The Court observed that

> "*The only incompetency that the Qanun-e-Shahadat Order recognizes is incompetency from immature or defective intellect. This may arise from (i) Infancy, (ii) Idiocy, deafness, dumbness, (iii) lunacy (iv) illness. No precise age limit can be given as the person of same age differ in mental growth and their ability to understand the questions and give rational answers. Sole test is whether the witness has sufficient intelligence to depose. In determining the question of competency, the Court under Article 3 of Qanun-e-Shahadat Order, 1984 has to test the capacity of a witness to depose by putting proper question. It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding he is able to give rational account of what he has seen or heard on a particular occasion.*"[43]

This observation is both laudable and self-explanatory. Hence, all things considered, anyone who is able to understand and provide reasonable or logical answers to the questions put before him is allowed to be a witness. This applies to police officers as well. They are allowed to be witnesses unless it is proved they

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[35] See, Qanun-e-Shahadat Order, 1984, (President's Order X of 1984), 28th October 1984, art. 3.
[36] Ibid.
[37] Ibid. It should also be noted that this same principle is incorporated under the Article 17 of the Qanun-e-Shahadat Order, 1984. See also, *Muhammad Dawood v. State*, PLD 1985 Karachi 730, 738, *Noorul Islam v. State*, 1986 P Cr. L J 1818 [Karachi], 1821.
[38] Ibid.
[39] Ibid.
[40] See: The Contract Act, 1872, (Act IX of 1872), 25th April, 1872, sec. 12.
[41] Ibid. For a detailed discussion on the principle of a person's competency to enter into a contract, see this author's, "The Jurisprudence of Capacity under the Law of Contract in Pakistan: A Critical Appraisal", *Journal of Law and Social Studies*, 5, no. 4 (2023): pp. 657-662. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532953> accessed 12th December 2024.
[42] PLD 2003 Karachi 355.
[43] Ibid, 363.

are biased for any extraneous reasons.[44] It also does not matter whether the witness has some sort of relationship with the complainant or deceased as this would not remove the evidence of such witnesses.[45]

Tazkiya-al-Shuhood

Tazkiya-al-Shuhood refers to the Court's duty of ascertaining the truthfulness of witness in matters pertaining to *Hudood*[46] as sentences of *Hudood* are of a very harsh nature and thus the witness in such cases must be tested in terms of bring just, righteous, credible and truthful so as to ascertain the commission of the precise offence.[47] This element has been incorporated through proviso (3), and Article 17 of the Order, where both of them provide that a witness's competence is required to be determined in accordance with the injunctions of the Qur'an and Sunnah. This is especially mandatory in cases of *Hadd* and *Qisas*.[48] In fact, the requirements of *tazkiya-al-shuhood* can be fulfilled by remanding the case if the facts and circumstances of the case warrant it so.[49] However, it is not mandatory in cases other than *Hadd* and *Qisas* as discussed hereinabove.

Does the Court have to Scrutinise every Witness?

We have discussed hereinabove that there is a separate criterion for witnesses in cases of *Hadd* and *Qisas*. Such witnesses have to be scrutinized by the Court. The question arises, whether this applies to each and every case? This was answered in the negative by Munawer J. in "*Muhammad Dawood v. State*,"[50] where he considered whether each and every witness be scrutinized by the Court to the extent of determining his capacity as a witness under the criterium laid down in the Qur'an and Sunnah as evinced within Article 3 of the Order? He held that it is not necessary to determine qualifications of a witness and that such a scrutinization by the Court can only occur where the Court doubts whether the witness in question has the requisite criteria to be giving testimony in the first place.[51] He also held that in such cases, the appropriate course of action would be to presume that the witness is competent to testify until the contrary is proved by concrete evidence.[52] Hence, this proviso is not mandatory as there is no penalty for its non-compliance and also, the Magistrate is free to record the evidence of anyone else who is available where such witness is unavailable.[53]

Is a Child Allowed to be a Witness?

From the discussion hereinabove, we have garnered that a person should not be allowed to testify if his 'tender age' prevents him from understanding and providing a rational answer to the questions put before him. We can see that there is no fixed age provided for someone to be a witness.[54] And even then, the age

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[44] *Nur Hussain v. The State*, 1993 SCMR 1608. See also, *Allan Dino v. State*, 2017 P Cr. L J Note 91 [Sindh (Hyderabad Bench)], at para 13.
[45] *Meedu v. State*, 2017 P Cr. L J Note 180 [Lahore], at para 10.
[46] *Shahid Orakzai v. Pakistan*, Shariat Petition No. 9/I of 2004, at para 19. <https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%20No%209%20I%20of%202004.pdf> accessed 26th February 2024.
[47] Ibid.
[48] Ibid, at para 11. See also, *Sanaullah v. The State*, PLD 1991 FSC 186.
[49] *Mumtaz Ahmed v. The State*, P L D 1990 FSC 38.
[50] PLD 1985 Karachi 730.
[51] Ibid, 738.
[52] Ibid.
[53] *Zahir v. State*, 1986 P Cr. L J 1503 [Federal Shariat Court], at para 6.
[54] *Muhammad Abbas v. State*, 2018 P Cr. L J 537 [Lahore], 547. See also, *Arif Hussain v. State*, 2018 YLR Note 259 [Gilgit-Baltistan Chief Court], at para 10, *Ahmad Ali v. State*, 2020 P Cr. L J 964 [Lahore], at para 13, *Kalu v. State*, 2020 P Cr. L J 598 [Lahore], at para 12, *Muhammad Bilal Hussain v. State*, 2022 YLR Note 48 [Sindh], at para 10.

itself is not a major prerequisite.[55] The major concern is whether a person is prevented from understanding and providing rational answers due to his "tender" or "old" age.[56] Hence, a child or an elderly person for that manner is allowed to testify provided they have the intellectual capacity to do so. Thus, "a crispy-age child can indeed be allowed to testify if he has the intellectual capacity to comprehend questions and gives rational answers to them."[57] This can be seen in the case of "*Wheeler v. United States*,"[58] where Brewer J. when confronted by the question of a child witness's competency to testify, he observed that

> "*That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.*"[59]

Hence, the notion of a child in itself is not absolutely disagreeable. "Generally, it is required by the courts that a child witness must remember and identify the time and place of the incident or wherefrom he/child witness got the knowledge of certain facts relating to the issue in hand."[60]

Hence, there are expectations of a logical sequencing of the events that took place from a child witness. In fact, certain individuals even prefer child testimony as "it minimizes the likelihood of adult influence."[61] Hence, child witnesses are allowed to testify provided they have the necessary intellectual capacity to do so. This is also the case with our law as can be seen hereinabove. Our judges have also more or less reached the same conclusion as Justice Brewer did so hereinabove. However, as will be seen hereinbelow, they do not welcome it with as much an open mind as Brewer did. Instead, they do remain a bit sceptical.

In "*Khalil v. State*,"[62] where the appellant had appealed his conviction for murder in the High Court and had argued that the testimonies of child witnesses are unreliable. They also contended that the trial judge had not recorded anything to the effect that provides that he was satisfied with whether the child witnesses were intelligent to understand and answer the questions provided. The Court observed that the trial judge had made a note in which he gave his observation confirming that he was satisfied that the children were indeed intelligent enough to understand and answer the questions.[63] The Court also relied on an old Anglo-Indian case[64] and ruled that when examining witnesses of a tender age, it would be preferable that the trial court ascertains said witness's intellectual capacity by asking a few ordinary and

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[55] Ibid.
[56] Ibid.
[57] Srinibas Nayak and Sidhartha Das, "Position of Child Witness under Indian Evidence Act, 1872-An Analytic Study" *Psychology and Education*, 57, no. 9, (2020): 945.
< http://psychologyandeducation.net/pae/index.php/pae/article/view/380> accessed 24th December 2024.
[58] 159 U.S. 523 (1895).
[59] Ibid, 524.
[60] Nadia Zafar, "A Critical Analysis of Precedents on Child Evidence in Child Abuse Cases" *Pakistan Journal of Islamic Research*, 21, no. 1, 97.
<https://pjir.bzu.edu.pk/website/journal/article/6018fe8cc4d50/file/6018fef7d0be4/download> Accessed 23rd December 2024.
[61] Thomas D. Lyon, Kelly McWilliams and Shanna Williams, "Child Witnesses" in "*Psychological Science and the Law*" ed. Neil Brewer and Amy Bradfield Douglas, (New York: Guilford Press, 2019), 157. < https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1392&context=usclwps-lss> accessed 23rd December 2024.
[62] PLD 1956 (W. P.) Lahore 840.
[63] Ibid, p. 845.
[64] Tulsi v. Emperor, AIR 1928 Lahore 903.

simple questions and record a note so as to make sure that the Appellate Court is satisfied with the child's qualification as a witness.[65] The Court further ruled that even if such course is not followed, it does not mean that the child witness's evidence becomes defective.[66] Further, that there was statutory provision that provided for the trial judge to ask such questions to determine his competency as a witness.[67] Rather, it is sufficient enough that a trial judge has recorded a note that provides his satisfaction as to the intellectual capacity of the child.[68] In such cases, it will be presumed that such a note is truthful unless and until the contrary is proved.[69] The Court then dismissed the appeal but converted the death sentence of the convict to a life imprisonment instead. In his separate opinion, one of the judges, Aziz J. observed that while it is true that there is no definitive legal provision that provides for a trial court to ask questions to ascertain the intellectual capacity of a child witness, it must be done so as the Appellate Court will have to entirely follow the judgement of the trial court in such a matter, no matter how much potentially erroneous it might be.[70] On the other hand, if such questions are recorded, then the Appellate Court will be able to determine whether the trial court's judgement of the child witness's intellectual capacity was indeed correct or erroneous.[71] He based his opinion on the case of "*Abbas Ali Shah v. Emperor*,"[72] which was rejected by the other judge who authored the majority judgement, Shabir J. In this case, Agha J., was sceptical in relying on the testimonies of child witnesses. Shabir J. had rejected this premise. Aziz J. felt that this observation was correct as many subsequent judgements also made similar observations.[73] Interestingly enough, this case was presided by a divisional bench, in which case if there was a divergence of views between both judges, then the course of action was to constitute a higher bench in order to resolve the controversy.[74] It is entirely possible however that such a principle had not yet been developed at this time. In some subsequent cases, the observations of Shabir J. would be reiterated[75] while in other cases, the observations of Aziz. J. would be reiterated instead.[76]

Hence, there is a divergence of views for this specific proposition. However, the most important element is that the child's intellectual capacity must be ascertained by the judge. Should the child's intellectual capacity be such that he is unable to understand and provide rational answers to questions put before, then such testimony would have no value.[77] A similar question was posed before Changez J. in "*Muhammad*

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[65] PLD 1956 (W. P.) Lahore 840, *supra* note 37, at 845.
[66] Ibid, pp. 845-46.
[67] Ibid, p. 846.
[68] Ibid. See also, *Karu Singh v. Emperor*, AIR 1942 Patna 159, *Lakhan Singh v. Emperor*, AIR 1942 Patna 183.
[69] Ibid.
[70] Ibid, p. 849.
[71] Ibid.
[72] AIR 1933 Lahore 667.
[73] See, *Krishna Kahar v Emperor*, AIR 1940 Calcutta 182, *Ah Phut v. The King*, AIR 1939 Rang. 402, *Mst. Ram Sakhia v. Emperor*, AIR 1934 Pat. 651, *Ghulam Hussain v. Emperor*, AIR 1930 Lah. 337.
[74] See, *Mst. Samrana Nawaz v. M.C.B. Bank Ltd*., PLD 2021 SC 581. See also, *Qaiser v. The State*, 2022 SCMR 1641.
[75] See: *Atta Muhammad Shah v. State*, PLD 1967 Lahore 357, at para 6. See also, *Bashir v. State*, PLD 1974 Peshawar 113. The Court relied on ex-Chief Justice Muhammad Munir's Principles and Digest of the Law of Evidence. *Nazir Hussain v. State*, PLD 1984 Lahore 509, at para 6, *Uaria v. State*, 1968 P Cr. L J 569 [Dacca], 575, *Ameer Umar v. State*, 1976 SCMR 338, 341, *Qadeer Hussain v. State*, 1993 P Cr. L J 2158 [Shariat Court (AJK)], pp. 2162-63, *Abdul Majeed v. State*, 2002 P Cr. L J 41 [Lahore], at para 17, *Ghulam Farid v. State*, 2014 P Cr. L J 1803 [Lahore], at para 8, *State v. Muhammad Boota*, 2014 YLR 306 [Lahore], at para 14, *Shahzad Masih v. State*, 2016 YLR 1922 [Sindh], 1935, *Muhammad Ghazanfar v. State*, 2020 P Cr. L J Note 106 [High Court (AJ&K)], 110-111.
[76] See, *Bashir Ahmed v. State*, PLD 1979 Karachi 147, at para 6. See also, *Amir v. State*, PLD 1985 Lahore 18, at para 9, *Fida Hussain v. State*, 2023 P Cr. L J 1546 [Lahore (Multan Bench)], at para 12.
[77] *Abdul Hye v. State*, 1969 P Cr. L J 343 [Dacca], at para 11.

Afzal v. State."[78] He held that a rule of universal application could not be laid down for such cases.[79] Rather, each case would depend upon its particular facts and circumstances.[80] However, he also cautioned that such testimony from a child witness should be strictly scrutinized before it should be completely accepted.[81] This was the case in "*Sikander Shah v. State*,"[82] where an objection was made to the evidence of the child witnesses as they were of only 8 and 9 years old. Khan J. observed that they should not be considered child witnesses as they were far too mature for their age and answered all questions subjected to them in cross-examination as an adult would do.[83] He also observed that the trial judge had first made sure that they possessed the necessary understanding and matureness for such an ordeal.[84] Interestingly enough, Khan J. does not categorise them as child witnesses as they seemingly possessed the maturity of an adult. Does this then mean that a child witness is a witness who is a child and possesses childish maturity? He himself believes that there is no definition of a 'child witness'[85] but proceeds to provide a definition of a child witness as one who does not possess an adult like maturity and understanding. But then what of the adults who possess childlike maturity? Should they be also categorised as a child witness then? But are they not in fact an adult? Should we call them an adult witness then? This confusion can be better sorted if we instead consider a child witness as a child who is a witness and possesses the necessary intellectual capacity to be qualified as a witness.

A similar observation was also made by the Supreme Court in "*Maqsood Khan v. State*."[86] The Court even ruled that a child witness's intellectual capacity to be qualified as a witness is irrelevant as long as the story is consistent, how said story endures the cross-examination and how far it fits with the evidence and circumstances of the case.[87] The Court also ruled however that strict scrutiny must also be applied to such testimony.[88]

In a recent case, the Supreme Court observed that the judge's ascertainment of the child's intellectual capacity to testify is termed as a 'rationality test.'[89] The Court even discusses how the trial judge should interact with the child witness after discussing how foreign judges treat them.[90] The Court observed that the mode and manner of recording evidence from a child witness needs to change especially in cases where the child witness is also a victim.[91] The Court observed that

> "*In this regard, we note that the 'rationality test', which is applied by the presiding Judge at the commencement of the examination-in-chief of a child witness, should be made applicable throughout the testimony of the child witness. If at any stage, the presiding Judge observes any hindrance or reluctance in the narration of events, the evidence should be stopped, and remedial measures should be taken to ease the stress and anxiety the child witness might be under, and if required, the case be adjourned to another date. And further, in case the child witness is still*

[78] PLD 1957 (W. P.) Lahore 788.
[79] Ibid, 793. See also, *Muhammad Din v. State*, 1988 P Cr. L J 238 [Lahore], at para 13.
[80] Ibid. See also, *Mst. Shah Azizan v. State*, 1997 P Cr. L J 1563 [Lahore], at para 6.
[81] Ibid. See also, *Junaid v. State*, 2017 P Cr. L J 509 [Sindh], at para 21.
[82] PLD 1965 (W. P.) Peshawar 134.
[83] Ibid, at para 20.
[84] Ibid.
[85] Ibid.
[86] 1982 SCMR 757, 764.
[87] Ibid, pp. 764-765.
[88] Ibid, 764.
[89] *Raja Khurram Ali Khan v. Tayyaba Bibi*, PLD 2020 SC 146, at para 45.
[90] Ibid, at para 46.
[91] Ibid, at para 47.

> *unable to narrate his testimony with ease, then the presiding Judge ought to record his findings on the demeanour of the child witness, conclude his evidence, and relieve him as a witness.*"[92]

Such careful treatment for both a child witness and victim are a welcome change. This distinction was also discussed by the Lahore High Court in "*Iftikhar Ali v. State*."[93] The Court observed that a child witness's testimony must be scrutinized as there could be the influence of tutoring while in a child victim's testimony, where the child is able to recount his sufferings alongside competently withstanding the test of cross-examination, his testimony shall be accepted.[94]

Hence, we can understand that the majority of the courts wanted to apply a sort of a discretionary judicial mechanism of ascertaining a child witness's intelligence before allowing said child witness to take the stand. Similar mechanisms were also introduced in other countries as well.[95]

How Trustworthy are Child-Witnesses?

While we have understood that child witnesses are allowed to testify provided the judge is satisfied of their intellectual capacity. However, as already mentioned hereinabove, majority of the judges remain sceptical to child witnesses and caution for special scrutiny against it. In fact, there is also a divergence of views for the particular process to be followed in ascertaining their intelligence as discussed hereinabove This is mainly because there is a general perception that child witnesses are easily manipulated and therefore easily susceptible to tutoring.[96] The Peshawar High Court while appraising the evidence of child witnesses in a murder case observed that other than the discrepancies in their statements, they were disinterested witnesses because of their tender age and were positively under the influence of the Investigative Agency.[97] The Supreme Court also observed that basing a conviction on the evidence of a child is dangerous as a child could be easily tutored.[98] The Sindh High Court has also made a similar observation.[99] The lack of trust towards child witnesses can be surmised from the following observation of the Lahore High Court in "*Haq Nawaz v. State*:"[100]

> "*Children are dangerous witnesses. They have good memories but they cannot have conscience, for lack of understanding and sense of piety or impiety. They can be easily taught stories and sometimes after hearing stories they can have imaginary illusions that they have seen those things happening. Fear of punishment, hope of rewards, desire to be known are grown up ones, also can influence their mind. The real tests to believe their statements are consistency in the story and the fact as to how far it fits in with the rest of evidence and the circumstances of the case.*"[101]

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[92] Ibid, at para 48.
[93] 2022 P Cr. L J 1396 [Lahore (Rawalpindi Bench)].
[94] Ibid, at para 12.
[95] Nicholas Bala, Karuna Ramakrishnan, Roderick Lindsay and Kang Lee, "Judicial Assessment of the Credibility of Child Witnesses" *Alta Law Review*, 42, no. 4, (2005): 995-1017.
< https://pmc.ncbi.nlm.nih.gov/articles/PMC4640896/pdf/nihms239773.pdf> accessed 24th December 2024. See also, Fiona E. Raitt "'Robust and Raring to Go?': Judges' Perceptions of Child Witnesses." *Journal of Law and Society* 34, no. 4 (2007): 465. <http://www.jstor.org/stable/20109763.> accessed 24th December 2024.
[96] Ibid, p. 946.
[97] *Abdul Hamid v. State*, PLD 1980 Peshawar 25, 32.
[98] *Umar Jehan v. The State*, 1979 SCMR 186.
[99] *Sultan v. State*, PLD 1965 Karachi 615.
[100] 1987 P Cr. L J 1944 [Lahore].
[101] Ibid, at para 16.

Hence, such is the lack of trust towards child witnesses.[102] This lack of trust is a reiteration of the observation of the Lahore High Court in "*Abbas Ali Shah v. Emperor*,"[103] where the Court relied on Courtney Kenny's book, the 'Outlines of Criminal Law.'[104] The Court made a similar observation in a subsequent case, ruling that the evidence of children unless immediately available and unless received before any possibility of coaching is notoriously dangerous.[105] Hence, our lack of trust towards child witnesses stems from our Anglo Indian judges relying on Anglo jurisprudence. However, ultimately the Lahore High Court ruled that a child witness is competent to testify, provided that there is strong corroborative evidence that supports the child witness's testimony.[106] This principle was endorsed by the Supreme Court in the case of "*State v. Farman Hussain*"[107] which has since then been relied upon in subsequent cases.[108] Hence, such testimony of a child witness needs sufficient corroboration. It does not matter even if such testimony inspires such confidence that there is no need for corroborative evidence.[109] Such evidence needs to be sought out so as to prevent any grave miscarriage of justice.[110]

Is There Any Age Specified for those of "Tender Age"?

We have already discussed hereinabove that under our law, the age itself is not the most important factor for becoming a witness. What is most important is whether said age impairs the person's intellectual capacity in anyway. However, is there any specified age for those who come under the ambit of "tender age"? Generally, "because of the difficulties young children encounter in braving testimony, very few preschoolers make it to the stand in criminal cases, with school-age children and teenagers predominating."[111] Hence, an age bias or preference may be put in place due to the older ones being able to withstand the witness stand. This can be even seen in the practice of our judiciary. The Supreme Court in one case held that a child of under 15 years or even under 12 years cannot be said to be of tender age.[112] The then Dacca High Court similarly ruled that a child who is above the age of 10 years cannot be also considered of "tender age."[113] Hence, ages were being presumed for children to be able to testify. However, the Lahore High Court has recently ruled that there is no precise age which determines the question of a witness's competency to give testimony.[114] Hence, while there are some cases where the Courts assigned ages under the scope of 'tender age,' the same as already discussed hereinabove is not a major prerequisite in the first place as far as our law and jurisprudence are concerned.

CONCLUSION

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[102] See, *Muhammad Feroze v. State*, PLD 2003 Karachi 355, 363-364. See also, *Mir Muhammad Farid v. Mst. Amreen*, 2003 YLR 2234 [Shariat Court (AJ&K)], 2239.
[103] AIR 1933 Lahore 667.
[104] Courtney Stanhope Kenny, "*Outlines of Criminal Law*" (London: Macmillan & Co. Ltd.), 1907.
[105] *Darpan Potdarin v. Emperor*, AIR 1938 Patna 153.
[106] *Bagga v. State*, 1995 P Cr. L J 1108 [Lahore], at para 12.
[107] PLD 1995 SC 1, at para 24.
[108] See, *Muhammad Akram v. State*, 2008 MLD 407 [Lahore], at para 11, *Mst. Parveen Akhtar v. State*, 2011 YLR 1899 [Karachi], at para 18, *Umer Zaman v. State*, 2013 P Cr. L J 708 [Peshawar], at para 11, *State v. Aamir Hussain Shah*, 2019 YLR 2171 [Islamabad], at paras 9-13, *Altaf Hussain v. State*, 2020 P Cr. L J 1419 [Lahore (Multan Bench)], at paras 19-22, *Muhammad Ghazanfar v. State*, 2020 P Cr. L J Note 106 [High Court (AJ&K)], 110-111, *Raja Khurram Ali Khan v. Tayyabi Bibi*, PLD 2020 SC 146, at para 45.
[109] *Mst. Shah Azizan v. State*, 1997 P Cr. L J 1563 [Lahore], at para 6.
[110] Ibid.
[111] D. Lyon and Williams, *Child Witnesses*, 158.
[112] *Ghulam Mustafa v. State*, 1968 P Cr. L J 1525 [Supreme Court], 1527.
[113] *Uaria v. State*, 1968 P Cr. L J 569 [Dacca], 575.
[114] *Ghulam Farid v. State*, 2014 P Cr. L J 1803 [Lahore], at para 8. See also, *State v. Muhammad Boota*, 2014 YLR 306 [Lahore], at para 14, *Mst. Imam Sain v. State*, 2015 YLR 17 [Lahore], 26.

From the discussion hereinabove, we can conclude that the law of evidence is one of the most important principles as no one can be condemned on the basis of any allegation or claims without any evidence. Sufficient evidence is needed for every case, criminal or civil. In India, before the advent of the British, the law of evidence was based on the Hindu religious law of *Dharma* in ancient India before being replaced by the law of evidence under Islamic Law during Muslim rule in India. During the EEIC era, the law of evidence of both Islamic Law and Hindu Law were applied depending upon whether the parties were Muslims or Hindus. After a Court system was set up, there were some Courts where the Anglo common law principles of evidence were applied, but only to the extent of their territory. In other places, the Islamic law of evidence was mostly applied. After the British completely took over, they promulgated several Acts for the law of evidence, ultimately promulgating one that applied to the whole of India. This went on until the Evidence Act of 1872 was promulgated. This Act was adapted and enforced until it was repealed by the Order, which was an attempt of a military dictator's attempt at 'Islamizing' the law. In reality, the law was just a reshaped version of the Evidence Act, 1972, with the provision's order being changed. The only differences were the slight additions of certain Islamic provisions.

Article 3 of the Order is para-material with Section 118 of the Evidence Act, 1872 with the only difference being that a sub-provision provided for the witness's qualifications to be determined in accordance with the Qur'an and Sunnah's injunctions When it comes to the qualifications of a witness to testify, the biggest prerequisite is that he must be able be conscious of and understand the questions put before him and provide logical or reasonable answers to the same. And that he must not be prevented by either his 'tender' or old age or by many mental or physical ailment to answer the question. A lunatic is also allowed to testify provided he is able to understand and provide rational answers to the questions put before him. This is similar to the principle in the law of contract which provides that a person suffering with temporary insanity is allowed to enter into or enforce a contract during the periods he is sane.

However, the Order also provides that in cases of *Hadd* and *Qisas*, the witness must be determined in accordance with the criterion set up under the Qur'an and Sunnah's injunctions, especially in the case of *Hadd* as such offences are of such a heinous nature that it requires precise and completely honest testimony. This is called *Tazkiya-al-Shuhood*. In such cases, that it is not necessary to determine qualifications of a witness and that such a srutinisation by the Court can only occur where the Court doubts whether the witness in question has the requisite criteria to be giving testimony in the first place. Rather, the appropriate course of action would be to presume that the witness is competent to testify until the contrary is proved by concrete evidence. The provision also provides that where such witness is not forthcoming, the Court is also allowed to bring another witness. The Courts have also ruled that even a police officer is allowed to testify, provided there is no biases from their side and that the relationships between the parties and witness are irrelevant as such relationship would not disqualify such evidence.

When it comes to those of 'tender age,' a few Courts have attached ages under it. However, the law itself does not provide for any fixed age to become a witness. As already mentioned hereinabove, the major prerequisite is whether a person has the intellectual capacity to become a witness. Thus, a child or old man can become a witness, provided he has the requisite intellectual capacity to do so. When it comes to the child however, the trial judge has to ascertain his intellectual capacity. However, the Courts have differed in the mannerism that has to be adopted to do so. One school of thought is that that the trial judge has to only write a note in which he expresses his satisfaction of the child's intellectual capacity. The presumption would be that the note is correct. The second school of thought is that the judge must ask simple questions to test the child's intelligence and also record such questions. This way, the Courts would not be bound by the trial court's note which could also be potentially incorrect.

In Pakistan, the former view is mostly adopted. Some Courts have even ruled that child witness's intellectual capacity to be qualified as a witness is irrelevant as long as the story is consistent, how said

story endures the cross-examination and how far it fits with the evidence and circumstances of the case. In such cases, the Courts have ruled that strict scrutiny must be applied.

However, despite all these judicial mechanisms being enunciated, child witnesses are not even considered to be that trustworthy by the Courts as the child could be influenced by the elders or investigative agency, that is to say they are more prone to manipulation. The Courts have ruled that such evidence must have corroborative evidence even if it appears that it does not need to be corroborated so as to prevent any miscarriage of justice. The Courts have also ruled that child witnesses and child victims who are also witnesses must be treated differently, with the latter to be treated more delicately and whose testimony will be accepted even without strict scrutiny provided he is able to withstand the test of cross-examination and recount his experiences. Hence, while children are allowed to be witnesses, they must have the requisite intellectual capacity and should be supplemented with corroborative evidence. The Courts also differ on the procedure to ascertain said child's qualifications to be a witness, while some Courts rule that the child's intellectual capacity is irrelevant as long as his testimony after strict scrutinization fits in with the facts and circumstances of the case. Hence, there needs to be more consistency with the law regarding child-witnesses.