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Reassessing the Burden of Proof under Pakistan's Qanun-e-Shahadat Order, 1984: A Doctrinal Analysis

Abstract

This research paper critically examines the burden of proof under the Qanun-e-Shahadat Order (QSO) 1984 by analyzing relevant laws and jurisprudence developed in this context. It argues that though common law principles of initial burden are consistent with Articles 117-118, yet statutory presumptions as enshrined in Articles 119-129 pose risks of unjustifiably transferring the burden of proof to defendants. The refusal of the courts to receive electronic evidence also diminishes the value of adjudication. Comparative analysis reveals that, as compared to Indian and Western jurisdictions, the courts in Pakistan has been reluctant in developing an evidentiary framework. This sheds light on the weaknesses of doctrines in the QSO mainly ambiguity, imperviousness to contemporary framework of evidences, and lack of comparative flexibility. It asserts the need for law amendment which is required to be in conformation with modern concept of evidentiary practice of justice.

Keywords: Burden of Proof, Qanun-E-Shahadat Order 1984, Doctrinal Analysis, Evidentiary Law, Comparative Jurisprudence, Presumption of Innocence

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Abstract

This research paper critically examines the burden of proof under the Qanun-e-Shahadat Order (QSO) 1984 by analyzing relevant laws and jurisprudence developed in this context. It argues that though common law principles of initial burden are consistent with Articles 117-118, yet statutory presumptions as enshrined in Articles 119-129 pose risks of unjustifiably transferring the burden of proof to defendants. The refusal of the courts to receive electronic evidence also diminishes the value of adjudication. Comparative analysis reveals that, as compared to Indian and Western jurisdictions, the courts in Pakistan has been reluctant in developing an evidentiary framework. This sheds light on the weaknesses of doctrines in the QSO mainly ambiguity, imperviousness to contemporary framework of evidences, and lack of comparative flexibility. It asserts the need for law amendment which is required to be in conformation with modern concept of evidentiary practice of justice.

Keywords:

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Introduction

The burden of proof is a principle of judicial adjudication that forms a base on which the validity of judicial decision rests on provable evidence and not on assertion or application of arboreal discretion. The Qanun-e-Shahadat Order, 1984 (QSO) does capture the classical maxim *incumbit probatio qui dicit*, but its operational lines are rudimentary. The initial burden under the doctrinal allocation of the first paragraph 117 and 118 is often collapses with the judicial practice as of today, which

often flattens the distinction between the evidential burden and the persuasive burden, and in so doing disturbs the presumption of innocence that forms the core of criminal adjudication. There is a clear distinction between the burdens of persuasion, production, and tactical engagement, which jurisprudence in comparative common-law jurisdictions has preserved (Prakken and Sartor, 2016) but, the in Pakistan, there is evident ambiguity, which has been exacerbated by a conventional dependence on presumptions between



Article 119 and Article 129. Rather than eliminating the apparent state of uncertainty as to the evidence, these presumptions overload the weaker litigant and undermine procedural fairness- particularly where the court cannot find the probative value of scientific and electronic evidence like DNA tests and other forensic techniques.

Comparative analysis has been made in order to identify shortcomings in the QSO. Whereas jurisdictions like India, the European Union and the United States have increasingly altered evidentiary conceptions to accommodate new developments in forensic science, probability-based standards and rights-sensitive thresholds, the evidentiary regime in Pakistan is underdeveloped in evolving jurisprudence in the context of technological advancements. Such impediments are reflected in the unwillingness of the judges to accept the use of scientific evidence in the issues of legitimacy as well as strict control over witness qualification (Mirza and Rizwan, 2022). All these institutional and doctrinal deficiencies do not only serve to dilute the justice in Pakistan, but also represent problems of other jurisdictions (Seriah, 2024; Kazazi, 1996). The hybrid form of the QSO that oscillates between Islamic jurisprudence and common-law tradition may be expediency justifiable, but normatively unsustainable, in the perpetuation of systemic injustice and as an insult to the vision of justice.

This article analyses the principle in the context of ambiguities in the application of the burden of proves under the Qanun-e-Shahadat Order, 1984 (QSO), which have weakened the Pakistani justice system. It has comparative insights revealing how evidential practices, judicial recession over scientific and forensic evidence, and rigid presumptions all corrupt norms of fair trial and judicial economy (Sheraz et al., 2025). The doctrine is thus situated in the Pakistani socio-legal context and linked to Islamic jurisprudence, the fundamental rights guaranteed by the Constitution of Pakistan (Grando, 2006; Prakken and Sartor, 2016). It offers doctrinal clarity and structural demands to reform, and it offers a jurisprudential roadmap that places Pakistan evidentiary regime in choose with the current global trends.

Literature Review

The burden of proof has long been the focus of a scholarly debate under various legal traditions, but

the literature has shown that there have been gaps that persist in being addressed by the Pakistani system under the Qanun-e-Shahadat Order, 1984 (QSO). Grando (2006) finds inconsistencies in allocation in WTO disputes, whereas Hahn and Oaksford (2007) identify a distinction between practical adjudicative burdens and argumentative reasoning and the lack of clarity in the distinction between evidentiary and legal burdens- a problem reflected in the QSO. Prakken and Sartor (2016) distinguish the burdens of persuasion, production, and tactical burden and observe its different treatment by systems; Kaplow (2011) and Cheng (2012) reveal the absence of normative and probabilistic coherence in the distribution of burdens. The ambiguities in the thresholds of proof, civil and criminal, as both Allen and Stein (2013) and Nance (2016) emphasize the doctrinal obscurity that is also typical of Pakistani law.

Kaur (2022) criticizes the evidentiary framework in India as insufficient to protect against irrelevant and unfair evidence, and Mirza and Rizwan (2022), show that judges in Pakistan have not embraced scientific and forensic evidence, strict requirements of witnesses, and outlived presumptions of credibility. Comparative works including Amin et al. (2023), disclose the tensions between the norms of Islamic jurisprudence, statutory law, and ingrained social practices, reflecting the ways in which the burden of evidence can be used to uphold the disparities, especially gender and class. Abbasi and Badshah (2023) also observe that there is no regulation of electronic evidence, which reveals the failure of the QSO to adapt to the current technological conditions.

It has been analyzed and indentified ambiguities in the doctrine, the failure to have pace with the science and modern technology . As such, it has failed to adjust in the international standards of a fair trial. However, none of the studies has provided an in-depth doctrinal and comparative claim of the evidentiary regime of the QSO. This paper addresses this gap by critically examining Articles 117-129 QSO and raising questions about the apportionment of burdens in civil and criminal litigation, displacement and assumptions. Through the comparative treatment of the common law, Indian law and Islamic jurisprudence the paper contextualizes the evidentiary system in Pakistan within the broader discussion of fairness, the

presumption of innocence and the imperative to revise evidentiary laws.

Doctrinal Analysis and Jurisprudence Developed regarding the principle of Burden of Proof

The Qanun-e-Shahadat Order, 1984 (QSO), article 117-129 provides for statutory and codified framework and the application of evidential responsibilities. This draws upon both Islamic jurisprudence and common-law. The given investigation shall take a mixed direction of research by inquiring the primary sources, not only the QSO, but also the most important judicial precedents. These case-law burdens exhibited imbalance in application: in the case of Squadron Corporation Ltd versus. Rehmat (PLD 1977 SC 515) and Pakistan Penal Code v. The court evidential burden was found met when invoked through the alibi exceptions raised by the defence in Kala (1987 SCMR 385) a case that emphasized in the case of Decoder Tribunal Corporation Ltd. vs. Rehmat: v. to (1969 PCR LJ 1047) the burden shifted in such a way that the prosecution was required to establish that they produced the guilt beyond. These precedents are found to contain a paradox; a judicial praxis can be used to obscure what appears to be a consistent statute.

The principles of the *onus probandi* and statutory presumptions still rely on secondary evidence authorities, first and foremost Sarkar (1999) and Woodroffe and Amir (1991). Probabilistic rationality and risk analysis have recently infiltrated evidential law (Allen, 2014), and comparative studies celebrate an increasingly open minded approach to forensic and electronic evidence (Agrawal, 2021; Anushka, 2021; Mahanat and Bansal, 2021). In contrast, Pakistani jurisprudence is cautious regarding certain applications of science, including the DNA- in the form of evidence, which reflects a broader resistance to the use of modern evidence-gathering technologies.

Statutory analysis, precedent, and jurisprudence developed in this regard identify three aspects of this principle. First, although Articles 117-129 provide a consistent legislative framework, the judicial practice threatens to fragment around doctrinal differences in the cause of fairness. Second, the statutory presumptions, notably under Article 128, hold a conservative evidential philosophy, which is

unresponsive to the adoption of scientific methods. Third, the backwardness of the Pakistani approach to the modern innovations of evidence, as shown by comparative journeys, especially the ones of Indian origin, significantly weakens the right to a fair trial and harms judicial economy.

It points out that the urgent necessity exists to redefine the QSO so that it can integrate the outmoded principles of law into the current science and international law, which, according to it, is the building stone of the procedural justice.

Analysis of Article 117, QSO 1984

Qanoon e shadaat order 1984 (QSO 1984) article 117 embodies the Latin favour of *inumbit probatio qui dicit, non qui negat*, effectively establishing that the burden of proving a claim is on the claimant and who is negating the claim. This condition determines that any party that demands the judgment on a legal right or liability will have to substantiate the facts upon which they are basing that claim on. The principle is that the burden of proof that has been placed domiciled is not transferable throughout the course of proceedings. To put it in other words, the burden of presenting the existence of the facts that supports a claim lies on the side of the claimant (Qanoon-e-Shahadat Order, 1984, art. 117).

The main provision of Article 117 is the proponent of the affirmative side of an issue must prove the same. For instance, where the accusation against an offender is that such a person committed a crime, the accuser has the burden of proving this offense by provision of evidence beyond any doubt. The Pakistani Supreme Court has reiterated this principle on several occasions ruling that the prosecution has to prove its case without relating it to the infirmity of the defense (Ali Gohar v. Crown, 1969 P.C.L.J. 1047; Rehmaw. In State v/s PLD 1977 SC 515. This is the reflection of the fact that justice must be provided by positive evidence and not based on denial.

Though the default position is that burden of proof rests on a party making the positive claim, Article 117 also identifies situations in which the burden of negative proof may reside. As an example, a fact especially within the knowledge of one of the parties, i. e., possession of a will or self-defense, is on the party. The principle prevents injustice as it makes it impossible to unjustly shield or conceal any evidence that can only be potentially obtained by

one party but not by the other party (Qanoon-e-Shahadat Order, [1984](#), art. 117(2)).

Within the scope of jurisprudence in respect of administrative criminal proceedings, the Article 117 imposes the constant burden on the prosecution to prove the guilt beyond reasonable doubt and this burden can never be shifted. Any doubt that one entertains must favour the accused (Ali Gohar v. B). In the case of clergy, the offense in point is matrimonial abandonment which was distinguished from legal abandonment (Crown, 1969 P.Cr.LJ 1047). In non-criminal matters, however, the burden of proof is on the side who makes an assertion of a fact, e.g. a claim of ownership or a default on a contract, e.g. a plaintiff. This is the same with the dictum pronounced by Lord Maugham in *Constantine Line*. He repeated this view [([1941](#)) 2 All ER 165, 179] in *Imperial Smelting Corporation*. Pakistani courts adhere religiously to this rule to maintain the fairness of a trial and to avoid shifting of burdens willy-nilly.

Initial Burden (Articles 117–118 QSO)

There is a shift of the burden of proofs to the party making the claim in Article 117. This conforms to the presumption of innocence and the age old postulate of *onus probandi* in relation to criminal cases. Pakistani courts elaborate that the prosecution must prove the guilt. The principle establishes that the burden of proof against the prosecution is rarely reversed in the federal cases (Allen & Stein, [2013](#); Prakken & Sartor, [2016](#)). Article 118 sets a fail-safe a burden rests with who, in case of no evidence offered. That reasoning follows nineteenth-century interpretations of the evolving certainty in trial (Thayer, [1890](#)). These 2 provisions are sound doctrinally. But practice indicates decline of speed of reading. Relying only on the burden of production, instead of burden of persuasion, runs a risk of lowering the standards of beyond-reasonable-doubts (Allen & Stein, [2013](#); Prakken & Sartor, [2016](#)). The provisions do not even speak about probabilistic proof. Recent scholarship has indicated that using the concept of preponderance as a ratio rather than a 0.5 bar, eliminates classic paradoxes and serves to increase civil adjudication coherence (Cheng, [2012](#)). The lack of such a lens in the local application causes a possibility of inconsistency of the thresholds and reasoning.

Onus Probandi and Shifting Burden

In Pakistan, burden of proof continues to shift in civil litigation. When a defendant has conceded a liability-in-principle, the burden may fall to the proof of immunization (e.g. discharge in dower or tenancy). Shifts of limited periods are also understood in the criminal law, and an evidential burden also arises when evidentiary pleas such as alibi or private defence are given, and it is the state that should carry a persuasive burden of proving guilt (Prakken & Sartor, [2016](#); Thayer, [1890](#)). The hazard is in excess shift. Socio-economic unfairness costs may hinder the presentation of counter-evidence by the defendants and makes the presumption of innocence null and void in its application (Allen & Stein, [2013](#)). Normative scholarship issues a warning about setting or shifting burdens in ways that do not consider error-costs and deterrence, and thus can diminish overall welfare and fairness (Kaplow, [2011](#)). A doctrinal framework that articulates when and how an evidential shift should be justified, and is not treated as a persuasive shift, would allow minimizing the wrongful conviction rates with preserving the trial efficiency (Nance, [2016](#)).

Presumptions and Judicial Discretion (Articles 119–129)

In articles 119–129, presumptions are overly codified. Presumptions assist in the finding of facts about life, death, legitimacy and normalcy (Articles 123–124, 128). Others lay the burden of proof on the party that has special knowledge (Article 122). The benefit of presumptions is that it can create efficiency and eradicate doubt but it transfers risk as well (Nance, [2016](#)). The pressure point is Article 122. It can cause the defendants to prove things that are open to the state with due diligence. Under that, there is encouragement to overreach unless courts interpret the provision very narrowly and require the state to show first (Prakken & Sartor, [2016](#); Thayer, [1890](#)). Article 128 on legitimacy demonstrates the cost of presumption issues being out of line. The local courts have opposed binding adoption of DNA in paternity claims, and maintain hold on older presumptions. This position is inconsistent with modern-day rules of science and hinders an effective search for truth. Comparative practice accords science a great deal of authority in the area of legitimacy and sexual-offence cases, which Pakistan

courts have failed to address. Electronic evidence is not treated any better as it encounters the same reluctance, even though Islamic-law friendliness promises reliability in that case (Abbasi & Badshah, 2023). Without more principled guidance on when presumptions give way to superior scientific evidence, Articles 119-129 threaten to entrench mistaking and seeking to prevent it (Nance, 2016; Cheng, 2012).

Article 121: Exceptions in Criminal Law

Article 121 places the burden on the accused who claims a general or special exception by the provisions of the Penal Code. The classic interpretation embraces an evidential burden on exceptions without a loss of ultimate persuasive burden to the prosecution (Prakken & Sartor, 2016; Allen & Stein, 2013). In Pakistani judgments, the distinction between the exception and the persuasive burden on the defence is sometimes lost and the exception can begin to resemble a persuasive burden. Such drift increases the potential hazard of wrongful conviction, particularly with psychiatric defence cases and other forms of justificatory claims with complexities. The issue is depicted by the practice in the area of insanity defences as it is currently conducted. Courts are guided by medical standards that are outdated and courts have limited forensic capabilities, thus making it more difficult to meet the burden than even an evidential burden (Javed et al., 2021). Comparative criminal law continues the burden of the state and adjusts the standards to seek an equivalent of precision and deterrence (Allen & Stein, 2013; Kaplow, 2011). Clarity in doctrines is thus imperative: Article 121 should only place on the accused a production burden, after which the exception must have been disproved by a prosecution beyond reasonable doubt. Anything more robust would be in violation of main evidentiary theory and current comparative practice (Prakken & Sartor, 2016; Nance, 2016).

Comparative Doctrinal Insights

Generally, international scholarship clarifies the subtler discourses which are concerned with division of burdens. Similar differences have also been determined by Grando (2006) in the allocation of WTO burden that might be also indicative of the capricious nature of Pakistani courts. Kaplan (2011)

and Nance (2016) further propose that the core rules of deterrence, equitability and efficiency should be balanced using burden-allocation rules. These normative forms, nevertheless, remain conspicuously poor within Pakistani jurisprudence, which remains complicit in adamantly incomprehensive, standards averse implementation of laws, and incompetent to consider its consequent social impact.

Critical Observations

In the Qanun-e-Shahadat Order, some loopholes have been identified in the context of case law. The first weakness is ambiguity of doctrine in terms of doctrine. When or how the burden of the proof is supposed to change is not so clearly expressed in the law. Articles 117-122 present broad guidelines which are quite inconsistently applied. The transfer of burdens in the courts can be unpredictably so, even more so in criminal cases. This provides an unfairness since a defendant is exposed to uncertain guidelines. According to Thayer (1890), the burdens need to move in an orderly manner in the case of emergence of new defenses. As Nance (2016) pointed out, it is of utmost importance to be able to determine clearly who is bearing the burden during trials so that justice could be practiced properly. The sentiment of obscurity in QSO is a demerit which reduces the level of belief in the system.

The second weakness is opposition to new evidence. Courts in Pakistan are not ready to accept scientific, and electronic evidence as core evidence. The forensic reports and analysis of DNA are usually regarded only as supplementary data. Some researchers demonstrated that this practice will compromise justice when it comes to rape trials. Likewise, courts do not use and resort to taking electronic evidence even though the role of electronics in conflicts is increasing. According to Abbasi and Badshah (2023), regulating bodies can submit electronic evidence to the court because reliable evidence is unrestricted by Islamic law. However, the QSO has failed to incorporate the developments into its structure. This rejection to modern science depicts a distance between science and law. It also reduces the capacity of courts to give precise and timely justice.

Thirdly, from a relative analysis with other jurisdictions, the QSO has not developed techniques in line with the modern needs and requirements

unlike other common or civil law jurisdictions. In England, the burden of persuasion, production and the tactical burden are explicitly differentiated (Prakken & Sartor, 2016). The civil law regimes are also flexible enough notwithstanding that they are less clear cut relying on the dynamics of the situation. In India, there is the regulation that the use of DNA and scientific information has been admitted in delicate cases under their evidence law. Pakistani law is incomparably stationary in contrast. It depends on strict regulations and does not implement changes that keep the law in line with time. Such comparative lackluster puts Pakistan out of world trend in the legal perspective and disarms its credibility.

Thus, above mentioned discussion reveal that QSO has not been able to strike a balance between the past and the future. The doctrinal assessment indicates that the QSO 1984 is working in a hybrid context of Islamic-common law system but has not been developed doctrinally. The findings of the comparative literature are quite critical and support the argument that evidentiary doctrine of Pakistan needs revision to introduce justice, consistency, and fairness.

Critical Analysis of Cases Laws Regarding Burden of Proof in Pakistani Courts

The Qanun-e-Shahadat Order, 1984 (QSO) provides for statutory provisions regarding evidentiary burdens in Pakistan; however, the same is viewed as ambiguous. The QSO is based on an eclectic mixture of Islamic jurisprudence, English common law and precedent (Mehmood, 1984), and was initially designed as a compromise method in order to bring together classical evidentiary dogma and modern adjudicative imperatives (PLD 1995). But its use has been very patchy, especially where scientific and electronic evidence is concerned, to which the courts have consistently assigned a strictly corroborative role. Such a backlash, which is evident in rape and paternity trials undermines probative evidence and entrenches the use of unreliable oral evidence, further increasing the chances of a wrong verdict, lengthy process, and decline of popular trust in the court.

Articles 117 -129, at the statutory level, codify the regulations that govern evidential burdens, but do not clearly delineate differences between the burden of production, burden of persuasion and the tactical

burden. Article 117 provides in its general principle that a claimant to a fact has the burden to prove it on its own; frequently, however, judicial practice has drawn evidential and persuasive burdens together which is apparently contrary to the canonical rule established in *Woolmington v. DPP* (1942 AC 1). Courts in Pakistan had imposed onerous evidentiary burdens on the accused in *Crown* (1969 P.Cr.LJ 1047) and *Rehmat* (PLD 1977 SC 515) due to exceptions and special-knowledge provision (Articles 121,122), thereby undermining the presumption of innocence and increasing the risk of miscarriages of justice (Kaplow, 2011; Nance, 2016).

Equity is worsened by the doctrine of presumptions (Articles 119,129). Article 128 on the legitimacy of children was initially intended to alleviate uncertainty; but its inflexibility functions against weaker litigants, and against the application of DNA testing, as its use in India and other common-law systems has been recognized by courts.

Forensic evidence is still formally described as non-determinative (collaborative) even following the amendments added under the Anti-Rape Act of 2021. The still widely existing hierarchical order of testimonial precedence as a remnant of an ancient culture still insist on precedence of oral testimony over scientific fact. Such a jurisprudential scientific divide has been the subject of criticism in comparative jurisprudence, in which the evidence standards have been restructured via probabilistic and risk-based models of adjudication (Allen and Stein, 2013; Cheng, 2012; Prakken and Sartor, 2016).

Indian Courts are recognizing the use of modern devices in evidence by accepting DNA tests and an approach to a flexible presumptions in dowry, narcotics and legitimacy, bringing courts closer to modern common-law practice (Kaur, 2022; Agrawal, 2021). On the other hand, the Pakistani courts are still bound by the assumptions of colonial times (*AIRinder1935Lah.49*; *AIRinder 1938 Mad 192*), despite the fact that the state is in a much better position to displace evidence (Nance, 2016). These remnants of judicial discretion cause a phenomenon of doctrinal indeterminacy with unfair results and to some minority litigants.

The QSO exhibits structural weaknesses such as:

1. Doctrinal confusion in the allocation and transfer of burdens;

2. Refusal of courts to accept forensic and electronic evidence as primary evidence;

This analysis attempts a bold doctrinal inquiry into the structural insufficiency of the burden of proof regime enshrined in the Qanun e Shihad t order of 1984 (QSO). In comparison with the earlier comparative, or theoretical, writing on the burden of proof; it interrogates the socio-legal, constitutional, and Islamic jurisprudential developments in Pakistani society, and puts the framework in the perspective of international human-Rights standards. Harmonizing evidentiary practice in line with best international practices and reconciling of doctrinal accuracy and comparative understanding, the research argues that changes in evidence law of Pakistan are necessary for integrity, independence and check on te discretionary powers of courts in accepting evidences.

Conclusion

The Qanun-e-Shahadat Order, 1984 (QSO), provides for an evidentiary practice that is ambiguous,

especially when it deals with the shifting and transfer of the burden of proof on the litigant parties. This is evident from Articles 117-118 which imposes the first legal burden on the claimant as per the long-established common-law tradition. However, the legal tradition has tended to be confused on the distinction between the element of evidence and the element of persuasion, thereby subjecting suspected individuals in criminal prosecution to a disadvantageous practice of the presumption of innocence. Moreover , loopholes have been identified in evidence law which instead of addressing issues of ambiguities in the application of burden of proof , gives way to a discretionary acceptance of results of modern devices. This kind of judicial conservatism is reflective of an ancient split in jurisprudence and ends up depriving the sanctity of judicial process. Other common-law jurisdictions such as India, have been relatively more prone to accepting scientific and electronic evidences and a balance has been struck assessing presumptions in line with safeguarding constitutional rights.

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