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Rules of Evidence: A Comparative Study of *Al-Majallah al-Aḥkām al-Adaliyyah* (1876) and Indian Evidence Act (1872)

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Abstract

This paper analyzes the rules of evidence as articulated in Indian Evidence Act (IEA) 1872 and the Ottoman Civil Code known as *Al-Majallah al-Aḥkām al-Adaliyyah* (*Majallah*). Both laws were enacted in the same era, i.e., 1870s, and have enjoyed a considerable influence. Their spatial proximity makes a case for their content analysis in a comparative manner. They have evolved similar rules in some areas, while differed on others. They are averse to hearsay evidence, and allow it occasionally. They follow comparable rules in the domains of admissions and presumptions. They recognize the concept of documentary evidence. Both laws are founded considerably differently in some important respects, such as, competency of witnesses, number of witnesses, and relevancy of facts and reliability of evidence. While specific number as well as gender of witnesses is pre-requisite for proving civil cases in the *Majallah*, the IEA emphasizes on quality of evidence instead of quantity and gender of witnesses. The administration of oath to the parties is one of the grounds for decision under the *Majallah*, but it is conspicuously absent from the IEA. Despite introductory nature of this study, the paper enriches academically about the considerations and thoughts shaping two great legal traditions, i.e., Islamic law and common law, for discovery of truth in litigious matters.

Keywords: Evidence, rules, *Majallah*, Indian Evidence Act

Introduction

In litigations, the contesting parties controvert each other's claims by producing evidence. This domain is regulated by law of evidence in legal systems. Role of law of evidence is to scientifically reconstruct the past events on which the contesting parties dispute.[1] The object of law of evidence is to discover truth and be an effective tool of fact-finding process.[2] In short, it performs 'truth seeking function'.[3] James Stephen pointed out that the rules of evidence were founded on practical convenience in addition to the contemplations pertaining to human nature and society.[4] Therefore, different and distinct rules for discovery of truth may be conceived and promulgated in various legal systems based on the practical convenience and the appreciation of human nature and society by respective legal systems. The present paper is a comparative study of the Indian Evidence Act 1872 (hereinafter IEA) and the provisions relating to law of evidence as incorporated in the Ottoman Civil Code *Al-Majallah al-Aḥkām al-Adaliyyah* (hereinafter *Majallah*). The earlier part of the paper introduces the IEA and briefly refers to the *Qānūn-e-Shahādat* Order 1984 (hereinafter QSO). It then introduces the *Majallah* along with contemporary debate about the codification of Islamic law. This explanation helps us to locate the IEA and *Majallah* in their respective historical settings as contemporaneous to each other though representing different legal traditions. At the time of enactment, the IEA was a standard embodiment of common law or English law on the subject, and the *Majallah* was considered to be a sublime refinement of Islamic law relating to civil transactions and litigations including the law of evidence. Both laws are part of their legal traditions. They should not be considered to have monopolized

[1] Richard Glover & Peter Murphy, *Murphy on Evidence* (Oxford: Oxford University Press, 2013), 3.

[2] Adrian Keane & Paul Mckeown, *The Modern Law of Evidence* (Oxford: Oxford University Press, 2012), 2.

[3] H Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008), 51.

[4] James Fitzjames Stephen, *The Indian Evidence Act 1872* (London: Macmillan, 1872), 1.

the interpretative domain in their respective traditions preventing the possibility of any divergent interpretation. The later part of the paper is a comparative analysis between the IEA and *Majallah* exploring some major similarities and distinctions. The comparative scope of the paper does not extend to the QSO. This study is the first of its kind and does not aim to be an exhaustive analysis of the subject. Anyhow, this groundbreaking study explores the respective positions of the IEA and *Majallah* on important topics ranging from competency of witnesses to burden of proof. Being mindful of the *Majallah's* exclusive application to civil cases, the scope of the present analysis is confined to civil jurisdiction only. Furthermore, this comparative analysis uses the terminologies of common law and English law as interchangeable, because at the time of enactment of the IEA, England enjoyed, if not solitary, significantly extended monopoly over the tradition of common law.

Indian Evidence Act 1872

The law of evidence was started to be systematically introduced by British colonial government in the Indian Subcontinent in 1835.[5] In 1855 a law was enacted for bringing further improvements on the subject.[6] However, all such legislative endeavors were corrective and not comprehensive.[7] This state of legal affair necessitated the formulation of a comprehensive legal code.[8] Eventually, James Stephen was assigned the task for codification of law of evidence, and his draft bill was enacted as the IEA 1872. The IEA remained applicable in Pakistan till 1984 when it was replaced by the QSO with an aim to Islamize the law by President General Zia-ul-Haq.[9] It still applies in India and a number of other common law countries, such as, Bangladesh,

[5] Syed Ameer Ali & John George Woodroffe, *The Law of Evidence Applicable in British India* (Calcutta: Thacker, Spink & Co., 4th Edition, 1907), 6.

[6] S. C. Sarkar, *Law of Evidence* (LexisNexis Malaysia Sdn Bhd, Malaysian Edition, 2016), 2.

[7] Tarapada Banerji, *The Indian Evidence Act 1872* (Calcutta: Mukhurji & Co., 1896), xiv.

[8] Ali & Woodroffe, *The Law of Evidence*, 7.

[9] Charles H. Kennedy, "Islamization and Legal Reforms in Pakistan 1979-1989", Pacific Affairs, Vol. 63, No. 1, (Spring 1990): 62-77 at 67-69.

Malaysia and Singapore with some modifications and amendments.[10] Sarkar is of the opinion that the IEA was 'based entirely' and 'drawn chiefly' from English law of evidence.[11] According to James Stephen, the IEA systematically articulated the propositions of English law and modified some of them considering peculiar circumstances of India.[12] Ameer Ali pointed out that the provisions relating to relevancy of facts from sections 5 to 16 were an innovation to English law.[13] Three cardinal principles of the IEA, according to Stephen, are: (1) evidence must be confined to the matters in issue; (2) exclusion of hearsay evidence; and (3) the best evidence rule.[14]

Ottoman Civil Code *Majallah*

The *Majallah* was compiled by Ottoman Empire in late 19th century from 1869-1876. It outlived the Ottomans, and remained applicable in Jordan and Palestine for a considerable period in 20th century. It is comprised of 1851 articles segregated into 16 books in addition to one hundred legal maxims forming part of its introduction.[15] The *Majallah* was based on *Ḥanafī* School of law and patterned on European civil codes.[16] It aimed at preparing a comprehensive compendium of civil law dealing with substantive and procedural aspects. The books dealing with 'Evidence and Administration of an Oath' and 'Administration of Justice by the Courts' are respectively placed at serial no. 15 and 16, and enacted by royal decree in 1876. It does not deal with family law and inheritance.[17] The codification of *Majallah* demonstrates

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[10] Sarkar, *Law of Evidence*.

[11] Sarkar, *Law of Evidence*, 3-4.

[12] Stephen, *Indian Evidence Act*, 2.

[13]Ali & Woodroffe, *The Law of Evidence*, 8: Glover & Murphy, *Murphy on Evidence*, 5.

[14] Stephen, *Indian Evidence Act*, 3.

[15]Al-Majallah Al-Aḥkam Al-Adaliyyah (The Ottoman Courts Manual Ḥanafī), Accessed Febryary3, 2021.https://www.iium. edu.my/deed / lawbase/ al_ majalle/index.html

[16] Ahmed Akgunduz, *Introduction to Islamic Law: Islamic Law in Theory and Practice* (Rotterdam: IUR Press, 2010), 248.

[17] M. Habibur Rahman & Noor Muhammad Osmani, "*An Appraisal of Majallaht al-Ahkam al-Adliyyah: A Legal Code of Islamic Civil Transactions by Ottoman*"

the adaptability of Islamic law to changing circumstances. This process preferred 'commanding approach of legalization' over 'commentarial approach' generally followed by *fiqh* literature.[18] Rudolph Peters argues that systematically enacting Islamic law, like the *Majallah*, caused a major shift to locus of authority away from jurists/scholars and bestowed it on a modern state.[19] Islamic law prior to the codification era was like discursive terrain available to scholars to opt from diversity of opinions according to the exigency of time and situation. The codification process has not only shifted the locus of authority, but also converted plural Islamic discourse into a monolithic Islamic law sponsored by state.[20] Uncodified laws remain unpredictable and unpredictability ushers irrationality to laws. This line of argument suggests that to transform laws into rational ones, they should be predictable, impartial and codified.[21] Hence, shift towards codification is propelled to endow it with rationality and predictability. The last two factors are highlighted by Weber as important steps towards the modernization of a state.[22] Some scholars claim that the codification of Islamic law in the form of *Majallah* was not an evil deviation from Islamic tradition. It aimed at bringing efficiency in justice delivery system without going away from Islamic law. Selim Has says that *Majallah* was extensively derived from *Ḥanafī fiqh*

International Journal of Academic Research in Business and Social Sciences, 8/9, (2018) 1381-1393 at 1386.

[18] Rehman & Osmani, "An Appraisal of *Majallaht al-Ahkam al-Adliyyah*", 1387.

[19] Rudolph Peters "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified" Chapter 5, pp. 82-95 in Barbara Allen Roberson, *Shaping the Current Islamic Reformation*, (London: Frank Cass Publishers, 2003).

[20] Peters, "From Jurists' Law to Statute Law".

[21] Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, (Cambridge University Press, 2008), 45-46.

[22]Simge Zobu, "Late Ottoman Modernization Jurisprudence: Reassessing the Approach to the Islamic Tradition of Fiqh 1908-1915", (M.A. Thesis, 2020), Middle East Technical University, Turkey, 33. Accessed February 2, 2021.https://etd.lib. metu.edu.tr/ upload/12625869/index.pdf

literature.[23] 20% of the *Majallah* was based on one of the most authoritative *Ḥanafī* books of late Ottoman Empire known as *Multaqā al-Abḥur* and its commentaries, 10% from *Al-Fatāwā al-Hindiyya* and other 8% from *Al-Durr al-Mukhtār*.[24] Samy Ayoub proposes that "the emergence of the Mecelle [*Majallah*] should be understood, not in terms of an epistemic break from the pre-modern Islamic legal reasoning, but in terms of a continuation and transformation within the legal tradition".[25] Some important external factors, such as, lack of qualified *'Ūlamā'* to work as Qazis, non-Muslim population's demand for non-*Sharī'ah* based laws, pressure from Western powers for systematization of laws for ease of trade and commerce, contributed to the codification derive by the Ottomans.[26] In this context, the codification of *Majallah* may appear as an endeavor to keep Islamic legal tradition relevant to the legal system of the Ottoman Empire in later half of 19th century.

Competency of Witnesses

There are three sections 118-120 in the IEA dealing with competency of witnesses. The first section states that all persons irrespective of their age, religion, gender and relationship with contesting parties are competent if they are not prevented from understanding the questions put to them and responding them in rational and sensible manner. It further clarifies that some persons might not fulfill this criterion due to their tender years, extreme old age, disease of body and mind etc. A lunatic should not be presumed to be incompetent unless he is prevented from understanding the questions put to him and giving sensible answers to those questions.[27] A dumb person may

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[23]Sukru Selim Has, "The Use of Multaqa'l-Abhur in the Ottoman Madrasa and in Legal Scholarship", The Journal of Ottoman Studies, VII-VIII, Istanbul, (1988), 393-418.

[24] Has, "The Use of *Multaqa'l-Abhur* in the Ottoman Madrasa", 410.

[25] Samy Ayoub, "The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic law in the Nineteenth and Twentieth Centuries" Journal of the Ottoman and Turkish Studies Association, Vol. 2 (1), (2015), 121-146.

[26] Zobu, "Late Ottoman Modernization Jurisprudence", 60-62.

[27] Section 118 of the IEA.

give his evidence in any intelligible manner, such as, gestures/signs.[28] Parties to any proceeding and the spouses of parties are also competent witnesses.[29]

Under the IEA, a child may be a competent witness similar to an adult. A woman is competent witness like a man. There is no disqualification of being witnesses on the basis of religion. Close relatives of the contesting parties, such as parents, children, spouse, may adduce evidence on their behalf. Proximity of relationship alone is not disqualification unless some ulterior motive is established. Generic tenor of the IEA is accommodating to all as competent witnesses without any prior assumption of their incompetency on the basis of age, gender, religion and relationship, etc. Hence, competency was a rule under the IEA, and incompetency formed its exception.[30] The legal framework as evolved by the IEA distinguishes between the issues of competency and reliability, and it does not go beyond the former.[31] Once a witness is treated to be competent that does not lead automatically to his credibility and trustworthiness. A competent witness may hide or fabricate important evidence.

Articles 1700 to 1705 of the *Majallah* deal with the competency of witnesses. Article 1700 emphasizes on absolute impartiality of a witness. It disqualifies ascendants, descendents, and spouses to give evidence on behalf of their children/grandchildren, parents/grandparents and spouses respectively. Barring these relationships, all relatives are competent witnesses on behalf of their relatives. The last mentioned provision also disqualifies the one who is financially maintained by another on behalf of the latter. These disqualifications are of absolute nature. There are some other disqualifications which are of partial nature or confined to specific event/s, e.g., one partner on behalf of another partner for the partnership property, and the surety for that payment of principal for which he stood as surety.

[28] Section 119 of the IEA.

[29] Section 120 of the IEA.

[30] Ali & Woodroffe, *The Law of Evidence,* 682.

[31] Ali & Woodroffe, *The Law of Evidence,* 682.

Friends are competent witnesses for each other except when they make use of each other's property freely.[32]

Under the IEA, friends are competent witnesses unless they are excluded for some ulterior motive. Similarly, the relatives of the parties without any distinction are competent witnesses for and against the parties unless they have engendered any ulterior motive to adduce false/fabricated evidence. The presence of enmity against one party is a recognized ground for disregarding the evidence of such witness under the IEA. This kind of witness is termed as an 'interested witness'.[33] In short, presence of ulterior motive to falsely implicate any party is the main worrying point instead of mere relationship under the IEA.

Similarly, article 1702 of the *Majallah* makes absence of enmity of temporal nature between the witness and the party against whom the former intends to give evidence a condition precedent for adduction of evidence. At any stage of inquiry, if it is proved that the evidence of any witness was propelled by ulterior motive, such evidence would be discarded.[34] In this regard, the *Majallah* is analogous to the concept of 'interested witness' as developed under the IEA, but its scope is limited to those who are not disqualified for proximity of relationship, financial dependency or partnership as discussed earlier. Article 1703 of the *Majallah* prevents a person from playing a dual role of plaintiff and witness in the same trial.[35] The *Majallah* rejects evidence of dumb and blind persons unconditionally.[36] These provisions are in stark contrast with the rules crafted by the IEA. The *Majallah* emphasizes that a witness must be an upright person and the qualification of an upright person is that his good qualities are well beyond his bad traits.[37] The language employed is emphatic and makes uprightness a condition precedent for

[32] Article 1701 of the Majallah.

[33] Zahoor Ahmad Vs State PLD 2017 SC 1662.

[34] Article 1724 of the Majallah.

[35] See also article 1704 of the Majallah.

[36] Article 1686 of the Majallah.

[37] Article 1705 of the Majallah.

adducing evidence. Under the IEA, instead of personal uprightness of a witness, the focus is shifted to the quality of his evidence: a witness, who is not upright generally, may bring trustworthy and reliable evidence in particular case.

In a nutshell, the *Majallah* is structured on different perspective on competency of witnesses than the one evolved by the IEA. There are a number of disqualifications enumerated in the *Majallah* that prohibit a person from being a witness. Contrarily, the IEA assumes all persons as competent witnesses unless they are prevented from appreciating a reality properly due to tender years, extreme old age, etc. Under the IEA, competency of a witness is something distinct from the issue of reliability. The *Majallah* seems to blur the line between the competency and reliability of a witness by assuming unreliability of some people and preventing them to be a witness, e.g., ascendants, descendents, spouses, and partners. It is not implied here that all competent witnesses are also considered reliable persons under the *Majallah*: it lays down a procedure for verification of credibility of witnesses before putting reliance on them.[38]

Number of Witnesses

Section 134 of the IEA says that no particular number of witnesses is required to prove any contested dispute. It is left entirely to the discretion of the courts to determine how many witnesses are sufficient to prove any controversy. Under the IEA, "neither the number of witnesses, nor the quantity of evidence is material. It is the quality that matters."[39]

Article 1685 of the *Majallah* deals with the number of witnesses, and states that in civil cases, evidence of two men or one man and two women is mandatory. It further says that in those matters which are exclusively in the knowledge of women, such as, suckling, evidence of women alone will be acceptable. In addition to the number of witnesses, other factors as to

[38]Articles 1716 to 1726 of the Majallah.

[39] Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, The Indian Evidence Act (21st Edition Edited by Y V Chandrachud & V R Manohar) (Nagpur: Wadhwa & Company), 732.

credibility of their evidence must also be taken into consideration.[40] Therefore, the number per se is an important consideration under the *Majallah* and without meeting this requirement a party would not get a favorable decision, but it is not the sole criterion for rendering a judgment. On the contrary, the IEA does not provide for specific number of witnesses in any case and makes the quality of evidence as sole arbiter.

Relevancy of Facts and Reliable Testimony

Under the IEA, the concept of relevancy of fact is of great consequences. According to section 3, there are two main characteristics of a relevant fact: it is connected with other facts, and its connection is recognized to form the relevancy of facts under the IEA. There are detailed provisions enlisting relevant facts from sections 6 to 55. Under the IEA, only those facts are admissible in the courts which are declared as relevant.

The word reliability relates to truthfulness and convincingness of evidence. If a piece of evidence inspires confidence of a court as to veracity and dependability, and gives a feeling of accuracy and authenticity that piece is considered to be reliable. The IEA enlists the relevant facts exhaustively without delving into the issue of reliability. The latter is left to be determined by the courts with the application of common sense and logic. Under the *Majallah*, evidence is consisted of 'reliable testimony'.[41] The *Majallah* treats only those statements as evidence which are adduced in trial,[42] and uttered with solemnity and seriousness by employing the phrase, such as, evidence.[43] Therefore, reliable evidence when adduced in a judicial proceeding by a solemn and formal manner is treated as admissible evidence.

Under the *Majallah*, conclusively substantiated evidence is comprised of the statements made by a number of persons when their unanimity on giving false evidence contradicts reason and logic.[44] Some provisions require the

[40] Article 1732 of the Majallah.

[41] Article 1676 of the Majallah.

[42] Article 1687 of the Majallah.

[43] Article 1684 of the Majallah.

[44] Article 1677 of the Majallah.

presentation of that evidence which is in conformity with the claim.[45] Evidence conflicting with the claim is inadmissible.[46] Contradiction in evidence of witnesses on subject matter of the claim, important matters, identity and price of the subject matter makes their evidence inadmissible.[47] These rules are based on common sense and logic and facilitate the ascertainment of reliable evidence.

It is noteworthy that there is no comprehensive list of those pieces of evidence which would be admissible in the courts in the *Majallah* similar to the concept of relevancy of facts under the IEA. The *Majallah* commences with emphasizing on the adduction of reliable evidence, and then comes up with some logical rules for the determination of reliable evidence. Furthermore, these rules are not exhaustive to prevent the courts from considering other factors in this regard.

Hearsay Evidence

One of three cardinal principles of the IEA described earlier is the exclusion of hearsay. Section 60 of the IEA emphasizes that oral evidence should be direct. Further, the definition of 'fact' as provided in the IEA makes a point that facts forming part of evidence should be appreciated through senses of a witness, e.g., hearing, seeing and tasting.[48] These provisions underline the principle of exclusion of hearsay evidence.

Article 1688 of the *Majallah* articulates that "witnesses must personally have seen the thing with regard to which they give evidence and must testify accordingly. The giving of hearsay evidence that is to say, evidence of what the witness has heard other people say, is inadmissible."

Both laws entertain the similar sort of aversion about hearsay evidence, and in principle do not admit it. However, they have enlisted various exceptions to the general rule in different provisions. For instance, the *Majallah* accepts hearsay evidence when it comes from reliable source and deals with the

[45] Articles 1706-1707 of the Majallah.

[46] Article 1711 of the Majallah.

[47] Articles 1712 to 1715 of the Majallah.

[48] Section 3 of the IEA.

matters of administration, death and paternity.[49] The IEA also entertains hearsay evidence in some exceptional situations.[50]

Admissions

The concept of admission is incorporated in both the IEA and *Majallah*. Sections 17 to 23 and 31 of the IEA deal with it. Admission is comprised of statements made orally or in writing that suggest some inference about any fact in issue or relevant fact.[51] However, its relevancy is restricted to those situations when it is made by parties or their privies only,[52] and goes against one's own interest.[53] It is an important piece of evidence and sometimes it may estop its maker to switch stances, but does not amount to conclusive evidence.[54]

Comparable rules are enacted in the *Majallah*. Admission is considered to be made by one person against his own interest and in favor of another.[55] It may also be made in writing.[56] The person making it must be adult and of sound mind.[57] It must be made voluntarily,[58] and should not go against obvious facts.[59] An admission is proof against the person making it and he is bound by it unless it is proved to be false by the decision of a court.[60]

Comparing the framework relating to admission as evolved under the IEA and *Majallah*, one notes that the provisions of the latter are more elaborate in their content, whereas the former deals with the major issues legislatively and

[49] Article 1688 of the Majallah.

[50] Sections 6 and 32 of the IEA.

[51] Section 17 of the IEA.

[52] Sections 18-20 of the IEA.

[53] Section 21 of the IEA.

[54] Section 31 of the IEA.

[55] Article 1572 of the Majallah.

[56] Article 1606 of the Majallah.

[57] Article 1573 of the Majallah.

[58] Article 1575 of the Majallah.

[59] Article 1577 of the Majallah.

[60] Article 79 and 1587 of the Majallah.

leaves the details to be supplied by the courts. Under the *Majallah*, an admission carries more evidential weight as compared to the IEA. However, under the latter, after declaring an admission as relevant, it is left to the judicial discretion to accord it evidential value according to the circumstances of each case.

Administration of Oath

The *Majallah* treats administration of oath by the parties as an important tool for the determination of a dispute. Taking or refusing to take an oath is one of the important grounds for rendering a judgment.[61] To have effect, an oath should be made in a court,[62] and the party obliged to take it must personally swear and not through his agent.[63] If a person is obliged to take an oath, and he refuses, the court may pronounce a judgment on such refusal.[64] A dumb may also be obliged to take an oath in form of recognizable gestures and signs,[65] and his refusal may carry consequences similar to those of a smart person. It is interesting to note that a dumb is not a competent witness under the *Majallah*.[66] However, his competency to undergo the process of administration of an oath is maintained. In sheer contrast to the *Majallah*, the IEA does not recognize the administration of an oath by the parties as a valid technique for concluding a dispute.

Examinations of Witnesses and Credibility of Witnesses

It is an important concern in any law of evidence how to determine trustworthiness of evidence adduced by witnesses. The IEA and *Majallah* have adopted a divergent course on this subject. The IEA has evolved a complete methodology for various kinds of examinations, i.e., examination in chief, cross examination and re-examination.[67] There are detailed rules as to

[61] Article 1742 of the Majallah.

[62] Article 1744 of the Majallah.

[63] Article 1745 of the Majallah.

[64] Article 1751 of the Majallah.

[65] Article 1752 of the Majallah.

[66] Article 1686 of the Majallah.

[67] Section 137 of the IEA.

when, who, and how would the examinations be conducted.[68] Examination in chief is conducted by the party on whose behalf the witness is brought before the courts. Then cross examination of the same witness is carried out by the opposite party. Thereafter, if necessity arises, re-examination of the same witness may be allowed to the party who at first conducted examination in chief. In fact, cross examination is considered to be the most potent weapon at disposal of the opposite party for eliciting truth by shaking the confidence of the witnesses and highlighting the contradiction in their testimony in an open court.

The *Majallah* has not adopted the methodology of examinations of witnesses in line with the IEA, and evolved its own credibility check founded on the concept of *tazkiyah al-Shuhūd* under Islamic law. In this process, the opinion of those persons is sought who have interacted in various capacities with the witness for the determination of the latter's reliability. This process could be executed secretly as well as in open court. Hence, the assistance of public is sought for evaluating the credibility of a witness.

The above process as crafted under the *Majallah* assumes that a generally credible person is more likely to come up with trustworthy and convincing evidence. On the other, the IEA focuses on specific event/s, and makes an endeavor by resorting to the complex technique of examinations of witnesses for measuring the extent of truthfulness of adduced evidence without getting into the general credibility of those witnesses. Arguments for and against both distinctly structured techniques under the *Majallah* and IEA may be advanced. However, these techniques underline that discovery of truth in judicial process could be made through various routes.

Documentary Evidence

Both IEA and *Majallah* recognize the documentary evidence and accord it preferred status considering the accurate record keeping potential of documentation. Under the *Majallah*, mere writing down something is not an actionable proof per se unless it is proved that the same is free of forgery.[69]

[68] Sections 137, 138, 141, 142, 143, 146, and 154 of the IEA.

[69] Article 1736 of the Majallah.

However, the documents prepared under the Sultan/state's patronage are treated as conclusive evidence unless their authenticity is doubted on the ground of forgery and deception.[70] The rules enacted in the IEA on documentary evidence are more elaborate than the comparable provisions of the *Majallah*.[71] Under the IEA, documents are categorized into primary and secondary, public and private in addition to creating a specific category of thirty years old documents.

Presumptions

Presumptions play an important role in the adjudication of disputes. The IEA has extensively dealt with various kinds of presumptions. There are a number of provisions unfolding presumptions relating to documents, e.g., presumptions about certified copies,[72] judicially recorded evidence,[73]and gazettes.[74] Some other presumptions mentioned in the chapter on burden of proof symbolize the presumption of continuity, e.g., on the question of life and death of a person,[75] on continuity of tenancy, agency and partnership,[76] etc. The IEA has also enlisted numerous presumptions of fact, and further evolved a framework for crafting such presumptions.[77] The most authoritative kind of presumption, under the IEA, is termed as 'conclusive proof' and no one is allowed to controvert it.[78] The *Majallah*'s treatment of the presumptions is fairly abridged than the IEA. However, they share each other in essence. The *Majallah* considers presumptions as a ground for judgment,[79]

[70] Article 1737-1739 of the Majallah.

[71] Sections 61 to 100 of the IEA.

[72] Section 79 of the IEA.

[73] Section 80 of the IEA.

[74] Section 81 of the IEA.

[75] Sections 107-108 of the IEA.

[76] Section 109 of the IEA.

[77] Section 114 of the IEA.

[78] Section 4 of the IEA; See also Sections 41, 112 and 113 of the IEA.

[79] Article 1740 of the Majallah.

and treats the inferences generated by presumptions as 'positive knowledge'.[80] It implies that in an appropriate case a presumption could be regarded as a proof itself, and in others, it may shift the burden of proof on the opposite party. These implications are principally akin to those presumptions which are incorporated in the IEA in more detail.

Similar to the presumption of continuity as embodied in the IEA,[81] the *Majallah* has expounded some legal maxims. For instance, "it is a fundamental principle that a thing shall remain as it was originally".[82] Furthermore, in line with documentary presumptions as illustrated in the IEA,[83] the *Majallah* raises presumption of genuineness about some kinds of documents in absence of forgery and deception, e.g., Sultan/state's land record,[84] judicial registers,[85] and documents of charitable institutions registered with courts.[86] The *Majallah* does not explicitly categorize presumptions in various categories as done by the IEA. Hence, despite sharing this domain in principle, they might differ about the effects of various presumptions. Contrary to the IEA, the *Majallah* leaves it to the courts substantially to articulate presumptions and allocate them evidential impact considering the circumstances of each case.

Burden of Proof

Under the IEA, burden of proof lies on the party who wishes the court to believe in the existence of certain facts which constitute his right or other party's liability.[87] The party who is bound to lose his cause if no evidence is brought before the court from either side is burdened with the responsibility

[80] Article 1741 of the Majallah.

[81] Sections 107-110 of the IEA.

[82] Article 5 of the Majallah; See also Article 10 of the Majallah.

[83] Sections 79-86 of the IEA.

[84] Article 1737 of the Majallah.

[85] Article 1738 of the Majallah.

[86] Article 1739 of the Majallah.

[87] Section 101 of the IEA.

of producing evidence.[88] Generally, the one who asserts in affirmative is bound to prove, and the one who denies he is not required to prove his denial because negative assertions are incapable of proof. To some extent, the rules followed in the *Majallah* on burden of proof are similar to the above referred approach that the one who asserts is bound to prove the case. Article 76 says that "evidence is for him who affirms and oath for him who denies". However, with respect to the administration of oath, there is a striking contrast between two laws. Meticulous provisions are enacted on the administration of oath by the parties and its consequences in the *Majallah*.[89] The purpose of evidence is to establish what is contrary to status quo or appearance, whereas the administration of oath is meant for continuation of the original state.[90] We find a unique concept of 'preferred evidence' in the *Majallah*. There is no comparable notion in the IEA because it confines itself to burden of proof, and does not go beyond this point. However, the *Majallah* is interested in relative value and weight of the evidence presented by the contesting parties. The provisions relating to preferred evidence illustrate that if both parties come up with evidence whose evidence would be preferred over other.[91] This aspect of the *Majallah* is in accord with its overall aptitude about delving into the reliability of evidence and witnesses: it does not remain as spectator on relative weight and value of evidence like the IEA.

Conclusion

All legal systems evolve the rules of evidence for discovery of truth. Despite the similitude of purpose, various legal systems may come up with different, but comparable strategies to meet this end. In this background, the present study has analyzed comparatively the rules of evidence as incorporated in the *Majallah* and the IEA. At the time of their enactment, they represented the most articulated and refined legal traditions of the world. The *Majallah* and IEA seem to have unanimity over the topics/subjects forming part of the law

[88] Sections 102 of the IEA.

[89] Articles 1778 to 1783 of the Majallah.

[90] Article 77 of the Majallah.

[91] Article 1762-1764 of the Majallah.

of evidence. They espouse similar rules despite the differences in format and details in a number of areas, e.g. admissions, presumptions, documentary evidence. They are informed by different perspectives on some areas, e.g. competency and number of witnesses, relevancy of evidence, manner of evaluating the credibility of witnesses. In the matter of competency of witnesses, the IEA is more liberal and assumes all persons as competent witnesses initially unless ulterior motive is established. On the other, the *Majallah* presumes partiality on the basis of proximity in blood relationship and financial dependency, and debars such witnesses even without evidence of ulterior motive. On the issue of number of witnesses in contradistinction to the IEA, the *Majallah* encapsulates Islamic dictates and requires specific number as well as gender of witnesses in civil cases. On the ascertainment of reliability of witnesses, the IEA relies on various sorts of examinations of witnesses extensively, such as, examination in chief, cross examination. On the contrary, the *Majallah* is inspired by Islamic technique of *tazkiyah al-Shuhūd*. Furthermore, the *Majallah* assumes that personal probity of a witness ensures the reliability of his testimony, whereas the IEA lays more emphasis on event specific evidence and does not encourage a generic honesty check of a witness. Despite convergences and divergences between the laws, they underscore that the process of discovery of truth in judicial proceedings is a human driven enterprise that cannot claim to be flawless.