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بِوَسِيْلَةِ سُنَّتِيْ اِسْلَامِيَّةٍ اِنْجَارًا رَجْحًا مِلْدِيَّةً

**THE EVIDENCE ACT AND UNDER
THE SHARIAH LAW
A COMPARATIVE APPRAISAL**

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ABSTRACT

Judicial inquiries forms a necessary part of the administration of justice. The object of every judicial inquiry is to ascertain the truth or otherwise of the matter submitted for judicial of the court as to the existence or non-existence of certain facts on which the rights or liabilities of the parties and the decision of their case depend.

According to Stephen, the law of evidence determines "how the parties are to convince the court of the existence of that state of facts, which, according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist."

The type of evidence that is commonly tendered at the trial, to prove or disprove facts in issue or relevant facts are testimony, documentary evidence, real evidence and inferential or circumstantial evidence. Particularly in criminal cases circumstantial evidence as a mode of proof becomes important because other modes of proof may be either difficult to obtain, unreliable or even unavailable. A leading work on circumstantial evidence "Wills' Principles of Circumstantial Evidence" was written more than one and a half centuries ago. Since then no major work of such calibre has yet been written.

The purpose of this thesis is to conduct a study relating to the principles of circumstantial evidence then and now as worked out by the court. The thesis

first attempt to state and discuss the principles of circumstantial evidence at common law, then under the Indian Evidence Act 1872 and those jurisdictions that have adopted the Act like the Malaysian, Singaporean and the Sri Lankan Evidence Acts. After this the position of circumstantial evidence or qarinah is delved into.

The approach is essentially expository, analytical and comparative. The law as found in the three systems is stated, discuss, analyzed and discussed comparatively when necessary. The suggestion are given after this comparative study. Apropos the common law, the law of most of the common law jurisdiction (excluding U.S.A) is surveyed and analyzed. The predominant approach is through case law, leading texts and articles on the subject. Then the principles of circumstantial evidence as interpreted and applied by the courts under the Indian, Pakistani, Sri Lankan, Singaporean and Malaysia Evidence Acts respectively are considered Circumstantial evidence or qarinah under the Islamic law is studied through the medium of the primary source of Islamic law, the Qur'an, the Hadiths consensus and legal opinions of Islamic jurists. Here because of the nature of the system case law is virtually absent.

The thesis begins with an introduction in which fundamental concepts such as evidence proof, facts, relevancy are explained and discussed. Also touched upon are the difference between circumstantial and other types of evidence.

Chapter 2 goes on to consider the nature of circumstantial evidence in some detail. Here the nature and relevance of the concept of *corpus delicti* is explained. Then the question of the quantum of proof required when the prosecution case is based substantially on circumstantial evidence is discussed.

Chapter 3 delves into the notion of *res gestae* at common law, and considers whether as most of the decisions of section 6 seem to suggest, *res gestae* as explained by common law comes within the scope of section 6.

Chapter 4, necessarily a short one, states, explains and analyses the circumstances that go to show the cause and effect of a fact in issue or relevant fact. It also discusses the notion of the facts that constitute the state for the existence of a fact in issue or relevant fact.

Chapter 5 is a useful chapter, wherein are considered the concepts of motive, preparation, conduct which provide important sources of circumstantial evidence. The difference between a statement and a complaint are discussed, through case law analysis.

Chapter 6 is also an important chapter. The most useful of the chapter is on identity of person things etc. Recent development like identification of the accused through a one-way mirror, identification by DNA profiling and proper methods of conducting and identification parade are comparatively considered.

Chapter 7 concerns circumstantial evidence relating to conspiracy. Conspiracy, is usually hatched in secrecy and carried out in darkness. Direct evidence of conspiracy is not always forthcoming. Evidence of the crime of wrong often has to be collected from collateral circumstance. The scope of section 10 is discussed with reference to the common law and decisions under the section.

Facts that are consistent or inconsistent, with the fact in issue or which render the facts in issue highly probable or improbable, provide useful collateral circumstances to show the existence or non-existence of a fact in issue. Circumstances which show the creation, modification or abrogation of customs which are in issue, are all circumstantial facts is the subject matter of chapter 8.

Similar fact evidence forms an important part of circumstantial evidence. The area is so complex and so much case law has developed on the subject, that the thesis has taken three chapters - 9 - 11 to propound the law on this topic. First there is an exposition of the law. Then the cases are analyzed and discussed. How the law is applied by the various common law jurisdictions is considered in depth. After this a similar approach is taken when discussing the law under the Evidence Act. Again decisions of the various jurisdictions which have the Evidence Act are discussed, analyzed and evaluated. After this the approach taken by the Malaysian courts is thoroughly considered and analyzed.

The necessity and role of opinion evidence especially expert opinion forms the subject matter of chapter 12. Opinion being inferential in nature, it forms a valuable type of circumstantial evidence in the decision making process. The law is critically examined under common law, the Evidence Act and Islamic law.

The 13th chapter is devoted to the exposition of the principles of the Law of Evidence under Islamic Law. Then the status of the principles of circumstantial evidence is discussed by reference to the Quran, the hadiths, and the opinions of legal jurists.

Finally in the conclusion after a critical appraisal of the law relating to circumstantial evidence under the common law, the Evidence Act and Islamic law suggestions are made as how best to apply those principles so that the litigants get a fair trial.

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INTRODUCTION

THE NATURE OF EVIDENCE

It is not easy to define the word "evidence", since the meaning would depend on the particular context in which it is used.¹ In a general sense, "evidence"² signifies "any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact."³

Best⁴ defines "judicial evidence" as "the evidence received by the courts of justice in proof or disproof of facts, the existence of which comes in question before them." Taylor explains the term, when considered in relation to law, to include "all legal means exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."⁵ Taylor's definition would include not merely oral, documentary and real evidence, but also other means

¹ Stephen notes the ambiguity of the term "evidence". It sometimes means testimony (the utterance of a witness). At other times it means "relevancy" (the facts asserted in the testimony). Vide Stephens, Digest of the Law of Evidence, 5t. ed. p.xi. Stephen, Introduction to the Indian Evidence Act, p.3.

² Best calls this "natural evidence": Best Evidence 9th ed. Article 34.

³ Bentham: Judicial Evidence, 17. Best on Evidence, 9th ed. Article 11. Bentham called the fact to be proved - the primary fact (**factum probandum**) and the proving fact, the evidentiary fact (**factum probans**). The relation between the two has been called that of relevance.

⁴ Best Articles 32 - 34. In Article 34 he says judicial evidence is, for the most part, nothing else more than natural evidence, restrained or modified by rules of positive law." J.L Montrose, in "Basic Concepts of the Law of Evidence", asks "It this qualification "for the most part" necessary? (1954) 70 LQR at p.529.

⁵ Taylor, Practical Treatise on the Law of Evidence, p. 5 note (i).

which would enable the court to arrive at a conclusion as to the existence or non-existence of a fact. Such other means would include judicial notice, presumptions, admissions and estoppels.⁶ If the term "legal means" is construed as "admissible means", Taylor's definition would not include matter which though tendered are rejected by the courts.

The definitions suggested by Best above emphasises the use of the word in the sense of facts as evidence of other facts.⁷ Taylor's definition on the other hand, highlights the means by which a fact is established, or attempted to be established.⁸

Both these definition it is submitted are incomplete as Best centres his definition on facts whereas Taylor concentrates on the means or modes of proof.

The definition suggested by Wills is similar, Wills defines evidence as "the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."⁹ Nokes' definition is clearer: Judicial evidence consists of (1) facts which are legally admissible, and (2) the legal means

⁶ But it is submitted that facts may be established other than means of proof. Facts formally admitted (Section 58 Evidence Act 1950) or judicially noticed (Section 56 and 57) are established are established, though not proved in the strict sense. Nokes, Introduction to Evidence p. 5.

⁷ Y.D Nokes: An Introduction to Evidence, p.4, 4th ed. 1967. Sweet & Maxwell.

⁸ Nokes' pp. 4-5

⁹ Wills: Circumstantial Evidence p. 2