HUMAN RIGHTS IN LAW OF EVIDENCE: AIMING TO SECURE RIGHTS OVER UNDERSTANDING COLLATERAL DAMAGE CONTROL

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ABSTRACT

The formation of a criminal legal system was a colonial initiative, to maintain law and order in a colonized India. The role of law of evidence is crucial in a criminal justice system, for it is evidence that settles the case, causing conviction or acquittal. The Court's views on evidentiary value of various proofs ultimately become the standard against which conviction becomes possible. The Indian Evidence 1872, like most of its contemporaries, is part of legacy of the British. However, unlike in other areas, where the roots may be borrowed from English Common Law but which have been adapted according to the country's needs, the Evidence Act was left untouched by the Indian Parliament. Over the last decade the Parliament has taken cognizance of certain provisions that were being misused and has repealed those provisions. But the Indian Parliament seems reluctant to make any positive changes to promote human rights and revamp law of evidence, drawing it completely out of colonial shadows into broad daylight. This research paper focuses on those aspects of law of evidence which can be reformed to guarantee an active protection of human rights rather than assuring a passive watch over non-violation of the same. It will highlight the unique requirements of the Indian society which calls for a departure from the traditional colonial mentality. Certain issues like: raising offences against women and criminality in politics are unique to the Indian subcontinent. The paper will revisit the evidentiary value attached to certain components of evidence, like presumption of innocence, dying declaration and scientific evidences , and will explore the setting of different standards to secure a more human-rights friendly trial.

INTRODUCTION

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The main work of a legal system is deciding matters of past fact. Blackstone remarked that "experience will abundantly show that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of[3]." It is rightly said, "Find the facts and the law is usually easy".

Evidence is the ways and means used to persuade the judge or jury of your facts as the judge is expected to start off with a blank slate; no preconceived idea or knowledge of the facts. The Court's views on evidentiary value of various proofs ultimately become the standard against which conviction becomes possible. It is evidence that settles the case, causing conviction or acquittal. The legal concept of evidence is neither static nor universal. Medieval understandings of evidence in the age of trial by ordeal would be quite alien to modern sensibilities and there is no approach to evidence and proof that is shared by all legal systems of the world today. Even within Western legal traditions, there are significant differences between Anglo-American law and Continental European law[4].

Evolution of the Human rights legislations, case laws and principles are transforming criminal evidence across the common law world. The countries, which follow the common law legal system, have separate rules of evidence or separate code of evidence law. Many international institutions such as the (EU) European Council and Commission[5] and the (Council of Europe's) European Court of Human Rights[6]; the UN ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), International Criminal Court[7]; have led to increase in the consciousness of human rights in the rule of criminal evidence and procedure. These human rights aspect has evolved in the area of criminal evidence under evidence obtained by torture, the presumption of innocence, hearsay, privilege against self-incrimination, rape shield laws, bad character, dying declaration etc. With the impact of the ongoing human rights revolution on the law of criminal evidence in a variety of common law jurisdiction, there has been a need to alter those aspects of law of evidence which can be reformed to guarantee an active protection of human rights. A variety of common law

[3] William Blackstone, Commentaries on the Laws of England 330 (Oxford, 1765-69).
[4]Abimbola, A., 2001, "Abductive Reasoning in Law: Taxonomy and Inference to the Best Explanation", Cardozo Law Review, 22: 1683–1689.
[5]P Craig and G de Búrca, EU Law: Text, Cases and Materials, 4th edn (Oxford, OUP, 2008) chs 1, 2 and 11.
[6]A Mowbray, Cases and Materials on the European Convention on Human Rights, 2nd edn (Oxford, OUP, 2007) chs 1–2.
[7]A Cassese, International Criminal Law, 2nd edn (Oxford, OUP, 2008) Part III; R Cryer, Prosecuting International
Crimes (Cambridge, CUP, 2005).

jurisdictions clearly demonstrate how difficult it can be to integrate rapidly emerging and sometimes expanding conceptions of human rights into more traditional body of criminal evidence law.

However, there is a marked diversity in the pace and intent of acceptance of this aspect in the individual legal systems. Some jurisdictions, such as Canada and New Zealand, already have several decades' experience in reviewing and sometimes adjusting their criminal procedures to the dictates of human rights norms, especially the right to a fair trial. Others, for example the State of Victoria and the Australian Capital Territory, are just embarking upon similar legislative experiments[8]. Another group of jurisdictions, notably including the Republic of South Africa and Hong Kong, have embraced international fair trial standards as part of reformed and rededicated constitutional frameworks[9].

The law of criminal evidence in United Kingdom has constitutional foundation and is also influenced directly by human rights concept. The rights found in the International Covenant on Civil and Political Right (ICCPR), European Convention on Human Rights (ECHR), UN Convention against Torture (UNCAT) etc., have been incorporated in its legal regime. Moreover, the values underpinning the UK evidence law reflect the libertarian nations and human rights considerations. Also in the United Kingdom's criminal law jurisdictions, the Human Rights Act 1998 has now been in force for over a decade. Its impact on criminal procedure and evidence has already been profound, and the process of transformation is by no means complete. This Human Rights Act strikes a 'subtle constitutional balance', reenacting the substantive rights contained in the European Convention on Human Rights and establishing an interpretive presumption that other legislation is consistent with the Human Rights Act, unless the Parliament plainly intents the contrary. Currently UK follows the Police and Criminal Evidence Act, 1984 (along with amendments), Police and Criminal Evidence (Northern Ireland) Order 1989, and the Criminal Justice Act, 2003 for laws relating to evidence in criminal investigation which has been made keeping in view the Human Rights Act. Thus the United Kingdom legal system has been through a major change with respect to the criminal evidence and procedure making it a more modern \, evolved legal system.

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[8]See generally, J Gans, T Henning, J Hunter and K Warner, Criminal Process and Human Rights (Sydney, Federation Press, 2011).

[9]Introduction—The Human Rights Revolution in Criminal Evidence and Procedure, Paul Roberts and Jill Hunter.

In India the law relating to the criminal evidence, IEA (Indian Evidence Act, 1872) has been shaped by British colonial influence and is the brainchild of Sir James Fitz James Stephen, who was an active participant in the legal discussions of Victorian England[10].In his own words, "The Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India[11]." Therefore the Indian Evidence 1872, like most of its contemporaries, is part of legacy of the British. However, unlike in other areas, where the roots may be borrowed from English Common Law but which have been adapted according to the country's needs, the Evidence Act was left untouched by the Indian Parliament. Over the last decade the Parliament has taken cognizance of certain provisions that were being misused and has repealed those provisions. But the Indian Parliament seems reluctant to make any positive changes to promote human rights and revamp law of evidence, drawing it completely out of colonial shadows into broad daylight.

The purpose of this paper is to offer some reflections on two general and related questions. The first is about the development of criminal evidence in United Kingdom with respect to the human rights. Here the focus is on the reception the Strasbourg jurisprudence has received in the highest domestic courts and its value to the English courts in their task of responding to the human rights challenges to the domestic law of criminal evidence.

The second is about the nature of the Indian judicial response to these challenges, which raises the question of how far the Indian courts and Parliament have discharged their duties and exercised their powers so as to develop a distinctive approach to human rights in the law of evidence. We have drawn an analysis of both the legal systems dealing with criminal evidence and a comparative study has been made to determine the aspects in which the Indian legal system still lacks concerning the human rights aspect. In this paper we are going to revisit the individual criminal evidence law of the United Kingdom and India, the ongoing

[10] His family, containing well-known figures in England, certainly contained strong contributors to this conversation. Both his father, Sir James Stephen, and grandfather, James Stephen, played a large role in the anti-slavery movement as an administration official and chancery judge respectively. See Sir James Fitzjames Stephen, 6 GREEN BAG 161, 161 (1894).

[11] Indian Evidence Act, No. 1 of 1872, India Code (1872), vol. 5; James Fitzjames Stephen, the Indian Evidence Act (i. of 1987) with an introduction on the principles of judicial evidence 137–214 (1872).

reformation in relation to Human Rights in the former legal system and the scope for parallel reformation in the latter legal system.

THE NATURE OF EVIDENCE AND EVIDENCE LAW

"Evidence" and "evidence law" are two quite distinct concepts. "Evidence" generally refers to those inputs to decision-making that influence its outcome in what, to introduce a third concept, is normally referred to as a "rational manner."[12] In the United States and most other countries, "evidence" also has a technical legal meaning to refer to the testimony and exhibits introduced at trial, but this label is problematic.[13] Investigators must take into account their observations of witnesses (i.e., demeanor), which is "evidence" in any useful sense of the term. On a more fundamental level, no observation may be processed and deliberated upon without the use of a vast pool of preexisting concepts; observations; and decision-making tools, such as logic, abduction, and utilities. Thus, a useful concept of evidence must travel considerably far beyond the mere "trial inputs" or the observations of witness testimony and exhibits.

By contrast, "evidence law" refers to the manner in which the evidentiary process is arranged, though the arrangement of the evidentiary process dependent on both "evidence" and the nature of "rationality." Evidence law is thus contingent upon, and must accommodate, at least three things: (1) universal truths of the human condition; (2) contingent aspects of the nature of government and its legal system; and (3) highly specific policies to be pursued in addition or opposition to the pursuit of truth.[14] The observance of Human Rights is one such specific policy which Evidence law is fast incorporating.

The designer of a legal system faces an enormous number of policy choices. Evidence law, especially in the India context, does some things because of constitutional commitments. We now turn many of the specific policy issues that must be accommodated by the law of evidence.

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[12] See Laura K. Brennan, Exploring New Opportunities for Evidence-Based Decision Making, 39 AM. J. PREVENTATIVE MED. 282, 282 (2010) (finding that without sufficient input evidence, public health decision-makers cannot make effective and rational decisions).

[13] 1 Mccormick on Evidence § 1 (Kenneth S. Broun ed., 7th ed. 2013).

[14] Reforming the Law of Evidence of Tanzania (part two): Conceptual overview and Practical Steps, Ronald J. Allen.

1. PURSUIT OF FACTUAL ACCURACY

This is the one policy that no legal system can afford to ignore. One might reasonably suppose that natural reasoning processes based on innate cognitive capacities work well enough, and thus should be deferred to in the pursuit of factual accuracy in all cases. However, there may be recurring situations that lead to error. In such cases, rules of evidence may attempt to correct for that systematic error. The possibility that natural reasoning assumptions about certain evidence can generate error explains the frequently found authorization to exclude evidence when it may be misleading or unfairly prejudicial.[15] It also underlies other rules, such as limitations on character and propensity evidence,[16] and the requirement that witnesses testify from firsthand knowledge.[17] The circumstances under which individuals systematically make errors heavily depends on culture and, in this instance, important work by the drafters of the law of evidence must be undertaken to identify the situations when the law should impede, rather than embrace, natural reasoning processes.

Factual accuracy is the most significant aspiration of a rational legal system, but it is by no means the only one. Accuracy has a cost element to it, and the cost can sometimes exceed its value. A legal system overly preoccupied with factual accuracy may undermine the very social conditions that the legal system is trying to foster. A dispute worth a fraction of what it would take to litigate it to a factually accurate conclusion perhaps should not be litigated; no one would argue for hiring an expert to dispute a traffic ticket, for instance. Such litigation may very well reduce overall social welfare and discourage private settlement of disputes. The legal system must strive to provide cost effective but factually accurate decisions. To keep costs low, it is essential that the system should be swift, streamlined and uncomplicated. It must be flexible enough allow the less fortunate to represent themselves and save expenses towards legal counsels, specifically in financially strapped economies where free legal aid is pragmatically difficult to achieve. Where the limit is reached is difficult to say, and surely

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[15]*Fed. R. Evid*. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury. . . ."); *Hodge M. Malek, Jonathan Auburn & Roderick Bagshaw, Phipson on Evidence* § 20-63, 540 (16th ed. 2005) ("The [English] common law discretion to exclude evidence more prejudicial than probative remains. . . .").

[16]*Fed. R. Evid*.. 404 ("Evidence of a person's character . . . is not admissible to prove . . . the person acted in accordance with the character."); Criminal Justice Act, 2003, c.44, §§ 99–112 (U.K.) (excluding character evidence subject to exceptions).

[17]*Fed. R. Evid*.. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

depend in part on local views. A drafter of any rules of evidence must concentrate on where this limit is and ensure that the rules accommodate this point.

2. THE VALUE OF INCENTIVES

Factual accuracy competes not just with cost but also with other policies that a government may reasonably pursue. The list of such policies is long and, again, is culturally contingent. For example, the law of privileges may foster and protect numerous relationships that a specific culture considers important (e.g., spousal, legal, medical, spiritual, and governmental). [18]Another example is that a system can incentivize people to fix dangerous conditions in a timely fashion after an accident by preventing the use of evidence that a person fixed a dangerous condition on her property following an accident but before trial.[19] Perhaps the settlement of disputes is preferred to litigation, which leads to the exclusion of statements made during settlement talks.[20] The encouragement of settlement is also a reason not to price litigation too low. The more the public subsidizes litigation, presumably the more of it there will be, and the less of private negotiation. Still other policies can be pursued by the creation of incentives in the law of evidence. For example, in the United States, a vast body of exclusionary rules is premised on the perceived need to regulate police investigative activities.[21] Rules of evidence can also encourage or discourage certain kinds of lawsuits from being brought.[22]

3. GENERAL CONSIDERATIONS OF FAIRNESS

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[18]See, e.g., Fed. R. Evid.. 501 advisory committee notes to 1974 enactment (outlining a proposed system of privileges for the Federal Rules of Evidence, including protections for communications between husbands and wives and communications with clergy, among several others); Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (pt. 11-A), Rules 73, 75 (Sept. 9, 2002) (providing absolute privilege for attorney-client and family communications, while privileging certain confidential communication with professionals – such as doctors, counselors, and clergy – when it meets certain requirements).

[19]See, e.g., Fed. R. Evid. 407 (disallowing the admission of evidence where "measures are taken that would have made an earlier injury or harm less likely to occur" to prove negligence, culpable conduct, design defects, or need for warning); Hart v. Lancashire & Yorkshire Ry. Co., [1869] 5 Can. L.J. N.S. 327, 329 (Ct. Exchequer) (Bramwell, B.) ("People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident.").

[20]See, e.g., Fed. R. Evid. 408 (holding settlement offers inadmissible as evidence).

[21] See Ronald J. Allen & Ross M. Rosenberg, The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge, 72 ST. JOHN'S L. REV. 1149, 1174(1998) ("The point of the exclusionary regime . . . is to stop . . . inappropriate searches from occurring in the first place.").

[22] See generally John Leubsdorf, Evidence Law as a System of Incentives, 95 IOWA L. REV. 1621 (2010).

These may also influence the law of evidence, although the precise effect of this variable is often hard to sort out from more overtly utilitarian motivations. Some think that the limit on unfairly prejudicial evidence reflects not only the concern about accuracy but also the concern about humiliation, as is the case with rape relevancy rules.[23] The limits on prior behavior and propensity evidence reflect in part a belief that an individual should not be trapped in the past.[24]The hearsay rule to some extent reflects the values of the right to confront witnesses against you.[25]

4. THE RISK OF ERROR

A mistake-free legal system is not possible. It is critically important to recognize that two types of errors can be made: a wrongful verdict for a plaintiff, including a conviction of an innocent person, and a wrongful verdict for a defendant, including an acquittal of a guilty person. In the subsequent pages the supposed tradeoff between the right of fair trial of accused and that of the witnesses and the victims is dealt with along with wrongful conviction. Resource allocation and other decisions affect the relationship between these two types of errors. Normally, civil litigation is structured to both reduce the total number of errors and equalize the number of errors made on behalf of plaintiffs and defendants. In civil cases, an error either way results in the identical misallocation of resources. If a plaintiff wrongly wins a five million verdict, a citizen (the defendant) wrongly must part with five million. If a defendant wrongly wins a verdict that he or she does not owe five million, a citizen (the plaintiff) will be wrongly deprived of five million that he or she rightfully should possess.

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[23] See Fed. R. Evid. 412–15.

[24] See, e.g., United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.) ("When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, . . . [it] implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life."); I Wigmore, Evidence § 57 (3d ed. 1940) ("The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."); W. R. Cornish & A. P. Sealy, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208 (reporting on a study where the number of jurors voting to convict a defendant rose 30% after impeachment evidence of the defendant's past conviction despite limiting instructions); Julie Horney & Cassia Spohn, Rape Law Reform and Instrumental Change in Six Urban Jurisdictions, 25 Law & Soc'y Rev. 117, 117, 119 (1991) (describing the problems associated with admitting evidence of a victim's sexual history in rape cases).

[25] See Crawford v. Washington, 541 U.S. 36, 51, 53 (2004) (acknowledging that while "not all hearsay implicates the Sixth Amendment's core concerns," concern with hearsay is the amendment's "primary object").

These two cases are analytically identical. The criminal justice process, by contrast, is designed to reduce the possibility of wrongful convictions at the admitted expense of making more mistakes of wrongful acquittals. Although the matter is complicated, these perspectives explain in large measure the preponderance standard in civil cases and the standard of proof beyond a reasonable doubt in criminal cases.[26]

The analysis in the previous paragraph states the conventional account of legal errors, but an important qualification is necessary.[27] The actual error rate at trial is dependent on the baseline of factually innocent and factually guilty people who go to trial and the accuracy of probability judgments made by the fact-finders. In addition, the normal approach neglects the values of true findings of guilt and innocence, and thus is not an appealing approach as a normative matter. Consider a simple example. If the decision rule is set to ensure that there are ten erroneous acquittals for every erroneous conviction, a legal system would be compliant with this objective if it wrongly acquitted ninety out of every hundred defendants and wrongfully convicted nine out of every hundred defendants. This means that a system that made mistakes in ninety-nine out of every hundred cases would be in compliance. Such an error-ridden system hardly seems ideal, but it is a direct derivative of the conventional thinking about errors.

NEED FOR A HUMAN RIGHTS REGIME UNDER INDIAN EVIDENCE ACT

The Indian Evidence Act has been amended twice so far. The amendments have been basic[28], a) to upgrade evidence law to include electronic media and b) to strengthen "rape shield laws" in the wake of public uproar[29]. However the nation from which India derived its evidence act has managed to progress by leaps and bounds in incorporating human rights in its native evidence law. Moreover some of India's fellow previously colonised counterparts

[26] Tanzania shares these well-known standards. See Evidence Act, § 3(2) (Tanz.).
[27] See, e.g., Ronald J. Allen & Larry Laudan, Deadly Dilemmas, 41 TEX TECH L. REV. 65 (2008); Larry Laudan & Ronald J. Allen, Deadly Dilemmas II: Bail and Crime, 85 CHI. KENT L. REV. 23 (2010).
[28] Reforming the Law of Evidence of Tanzania (part one): the Social and Legal Challenges, Ronald J. Allen
[29] State v. Ram Singh, 2014 SCC Online Del 1138.

like Australia, Canada, Hong Kong, Malaysia, Singapore etc., too have managed to reform their common law intensive evidence regimes[30].

With the enactment of Human Rights Act, 1998 law of criminal evidence in England and Wales has evolved to adopt a nuanced approach to dealing with human rights claim. The act imports European Convention on Human Rights (ECHR) and incorporates it into England's municipal law and allows the United Kingdom Supreme Court to rely on the Strasbourg jurisprudence being formed by the European Court of Human Rights. Juxtaposed with United Kingdom is the nation of India which still relies on the fundamental rights enshrined in the Indian Constitution which is as the primary source of human rights allowed to its citizens. The Indian Supreme Court remains unsupported by any International forum or conventions save for a few to which India is a signatory. Being a dualist nation India needs to ratify and incorporate International covenants in a freshly formed domestic legislation, a process which is undertaken in rare cases.

In this section of the research work an attempt is made to compare the status of Human Rights in Indian Evidence Law which remains largely primitive with that of the fast evolving evidence law in the United Kingdom and other common law countries. The Human Rights aspect in fair trial, self-incrimination, hearsay evidence, and evidence obtained illegally, will be examined closely in this comparative analysis.

FAIR TRIAL

Indian Evidence Law like other evidence regime in other countries tends to focus exclusively on rights of the accused. This bias has been built into the specifications of "right to fair trial" as enshrined in International instruments like ICCPR and ECHR. These instruments were drafted as a backlash to authoritarian regimes before and after 1945 when providing legal protection for citizens who were vulnerable to abuses of State power was paramount. While the need to ensure the rights of accused remains an important aspect of fair trial contemporary debates have moved on to focus on rights of the complainants and witnesses. Major reforms have been implemented across common law jurisdictions to assist complainants and witnesses to give their best evidence in a humane procedure which treats

[30] Eg Els v. Minister of safety and security 1998 (2) SACR 93 (NC); Shabalala v. Attorney General of Transvaal 1995 (2) SACR 761 (CC)

them with appropriate concern and respect. Legal conceptions of the right to fair trial have been adjusted accordingly, and human rights laws have played a monumental role in affecting this change. Today for judges in London, Sydney and Strasbourg it is uncontroversial settled law that, "there must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests taking into account the position of the accused, the victim and the public".

In relation to the key question of how far fair trial rights under art 6 are in any sense absolute, the English cases demonstrate a selective approach. None of the rights appears to be incapable of qualification or restriction, but some appear to be more negotiable than others. The main standard used for negotiability is that of proportionality in pursuit of a legitimate aim.

A common misconception is peddled in legal circles that rights of victims and witnesses are to be secured at the expense of procedural safeguards afforded to the accused. Victims do not truly get justice when alleged offenders are convicted unfairly or still the innocent are convicted. Denial of a fair trial is as much injustice to the accused as it is to the victim and society. The various points under fair trial covering Human Rights aspect are as follows:

1. RIGHT TO BE PRESUMED INNOCENT

"It is better that ten guilty escape than one innocent suffers[31]." This quote reflects the principle, known in criminal law as Blackstone's Formulation named after English jurist William Blackstone, "that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person". This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilized society[32]. For example, the sentence served by an innocent person cannot be erased by any subsequent act of annulment[33].

Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right[34]. The Apex Court in P.N. Krishna Lal v

[31]Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.
[32]Kali Ram v. State of Himachal Pradesh 1973 AIR SC 2773.
[33] *Ibid*., para. 28.
[34]Narendra Singh and Anr. v. State of Madhya Pradesh, (2004) CrLJ (2842), para. 31.

Government of Kerala[35]clarified that the principle of presumption of innocence is entrenched in the Indian Constitution, the Universal Declaration of Human Rights and the Civil and Political Rights Convention, to which India is a member, guarantee fundamental freedom and liberty to an accused person. To protect this right to be presumed innocent, Section 101 of the Indian Evidence Act further reinforces this right, by providing that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts[36]. The Universal Declaration of Human Rights (UDHR) lays down the common standard to be met by all nations. Article 11(1) states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Indian law is precisely in line with Article 14(2) of ICCPR which states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Therefore, all accused persons must be treated in accordance with this principle and it is the duty of all public authorities to refrain from prejudging the outcome of a trial[37]. Judgments require that in coming to a verdict the Court evidences in its rationale that it: has recognised that the burden of proof lies with the prosecution; has satisfied itself of the degree to which the burden of proof has been shown to be beyond reasonable doubt or been left wanting; indicates the point in the trial when the onus of proof shifted, if at all it did, and the extent to which the other side could displace it; and the effect of the whole on the outcome of the trial. The Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra* stressed the following "five golden principles"[38] that must be fulfilled before the case against an accused can be said to be fully established and called it the Panchsheel of the proof.

In the UK, the right to a fair trial has developed over centuries, and originally derived from sources such as the Magna Carta, the 1689 Bill of Rights and the common law. Today, however, the most pertinent authority is Article 6 of the European Convention on Human Rights. Article 6 applies to both civil and criminal proceedings, but its significance is probably greatest in criminal matters, where it requires a presumption of innocence and other

[35] 1995 Supp (2) SCC 187, para. 23.
[36] The Indian Evidence Act, 1872, Section 101.
[37] General Comment No. 13 (Article 14), in UN Compilation of General Comments, p. 124.
[38] (1984) 4 SCC 116, para. 153.

procedural protections for the accused. All of them are entitled, by law, to a fair trial irrespective of the charge faced. The presumption of innocence (set out in Article 6 (2) ECHR and Article 48 (1) EU Charter) is the cornerstone of the right to a fair trial.

However, the Supreme Court of United Kingdom is open to limiting this right of innocence in certain cases. The law relating to reversal of burdens of proof has been made use of a number of times in English criminal Law. [39] Legal burdens on the defendant are prima facie incompatible with the presumption of innocence under art 6(2) of the ECHR.[40] In numerous cases the defence has raised the issue of compatibility an argued that the legal burden in question should be read down to an evidential burden, using the interpretative power conferred on the courts by s 3 of the Human Rights Act. The Strasbourg jurisprudence on this topic is limited, and says little beyond indicating that the presumption of innocence is not absolute, but that any restrictions on it must be kept 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[41]

In consequence of this perceived lack of help from Strasbourg the English courts have developed an extensive body of domestic jurisprudence dealing with the compatibility issue. The criminal standard of proof of beyond reasonable doubt implies that some of the acquitted might not be factually innocent. In very extreme and rare cases it will be justified to compromise upon the right to be presumed innocent. In some trials, there might be enough evidence to lift a presumption of innocence but not sufficient evidence to pass the beyond reasonable doubt limit. In such cases, acquittal of the accused will hit the confidence of the legally unaware public in the criminal justice system.

2. RIGHT TO REMAIN SILENT

It is a generally accepted principle that the suspect/accused cannot be forced to incriminate him/her. Therefore any coercion exerted by the authorities with the aim of compelling the suspect/accused to make a statement or confess guilt is prohibited during all stages of the

[39] A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Criminal Law Review 306.

[40]R v. Johnstone [2003] 2 Cr App R 33 [47]; Sheldrake v. DPP [2005] 1 AC 264 [41]; R v. Makuwa [2006] 2 Cr App R 11 [28].

[41]Salabiaku v. France (1988) 13 EHRR 379 [28]. See also Janosevic v. Sweden (2004) 38 EHRR 473 and, for a general account of the Strasbourg case law, see B Emmerson, A Ashworth and A Macdonald, Human Rights and Criminal Justice (Sweet & Maxwell, 2nd ed, 2007) 348–52. For further discussion, see A Stumer, The Presumption of Innocence (Hart Publishing, 2010) ch 4.

proceeding. The right to be presumed innocent is impaired if authorities draw adverse inferences from the silence of the suspect/accused. Under no circumstances may the silence of the accused be considered as proof of guilt. The burden of proof rests solely on the prosecution. The right to remain silent is supported by three related underlying policies. First, it ensures that the government is according respect and dignity to its citizens[42]. "To adequately respect the inviolability of the human personality, an accusatory system of criminal law requires that the government attempting to punish an individual must do so by producing its own evidence through its own independent efforts, rather than by the cruel, shortcut, practice of compelling inculpatory statements from the accused's mouth.[43]" Second, the right to remain silent safeguards the accused by deterring police coercion and forced statements[44]. Third, by deterring coerced statements, the right to remain silent helps ensure that the statements made by the accused are reliable[45].

The Constitution of India guarantees every person right against self-incrimination under Article 20 (3) "No person accused of any offence shall be compelled to be a witness against himself". Thus Sections 161, 313, 315 and 316 of the Code raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and trial and also preclude any party or the court from commenting on the silence. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case *of Nandini Sathpathy v. P.L. Dani,*[46]no one can forcibly extract statements from the accused, who has the right to keep silent. In 2010 The Supreme court made narco-analysis, brain mapping and lie detector test as a violation of Article 20(3)[47].

The right to silence has a different view in England and Wales, first having been codified in the Judges' Rules in 1912. A defendant in a criminal trial has a choice whether or not to give evidence in the proceedings. Further, there is no general duty to assist the police with their inquiries. This right is not absolute in all cases and there are number of exceptions under which this right does not prevail. At common law, and particularly following the passing of

[42]Miranda v. Arizona, 384 US 436 (1966).
[43] Ibid. See also 8 Wigmore, Evidence (1961).
[44] Miranda, 384 US 436.
[45] *Ibid*
[46]AIR 1978 SC 1025
[47]"Forced Narco tests illegal: Supreme Court – Times Of India". The Times of India. 6 May 2010. Retrieved 2011-12-21

the Police and Criminal Evidence Act 1984 under Code C adverse inferences may be drawn in certain circumstances where the accused:

- fails to mention any fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention;
- fails to give evidence at trial or answer any question;
- fails to account on arrest for objects, substances or marks on his person, clothing or footwear, in his possession, or in the place where he is arrested; or
- Fails to account on arrest for his presence at a place.

There may be no conviction based wholly on silence[48]. Where inferences may be drawn from silence, the court must direct the jury as to the limits to the inferences which may properly be drawn from silence. In respect of those questioned by the Serious Fraud Office, the right to silence has been reduced by virtue of Section 2 of the Criminal Justice Act 1987[49]. The right has also been reduced for those accused of terrorist offences. Under Section 49[50] and Section 53[51] of the Regulation of Investigatory Powers Act 2000 (RIPA), it is an offence to fail to disclose when requested the key to encrypted data (with a penalty of two years in prison, or five years with regards to child sex abuse cases). Also The concept of right to silence is not specifically mentioned in the European Convention on Human Rights but the European Court of Human Rights has held that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair trial procedure under the Article 6 of European Convention on Human Rights[52].

Australia has no constitutional protection for the right to silence, but it is broadly recognized by State and Federal Crimes Acts and Codes and is regarded by the courts as an important common law right. In general, criminal suspects in Australia have the right to refuse to answer questions posed to them by police before trial and to refuse to give evidence at trial. Recently the State of New South Wales passed the Evidence Amendment (Evidence of Silence) Act 2013 which allows the judiciary to direct the jury to draw unfavourable inferences against a defendant who omits a fact during police questioning that they later rely

[48] Criminal Justice and Public Order Act, 1994, Sec. 38
[49] http://www.legislation.gov.uk/ukpga/1987/38/section/2
[50] "Regulation of Investigatory Powers Act 2000, s. 49". Opsi.gov.uk. Retrieved 2011-12-21
[51] "Regulation of Investigatory Powers Act 2000, s. 53". Opsi.gov.uk. Retrieved 2011-12-21
[52] Murray v. UK, (1996) 22 EHRR 29, at para. [45] (ECtHR 1973)

on in court in a bid to be found not guilty. The law strictly applies to those over the age of 18 and who have an Australian legal practitioner physically present and available. The change is designed to reflect reforms made in the United Kingdom in 1994 and will apply to indictable offences that carry a penalty of five or more year's imprisonment.

A further issue is whether the privilege extends to evidence such as documents which exist 'independently of the accused's will', or whether it is limited to the protection of suspects and defendants from improper pressure to make statements which may be incriminating. This an unexplored aspect of right against self-incrimination towards which the Supreme Court of United Kingdom appears to be in a much better position to legislate.

The right to a fair trial in art 6 of the ECHR is a strong right, in the sense that the terms of the Convention do not permit the kinds of qualifications that can be made to the rights in arts 8–11[53].However, it is clear that the specific express and implied rights in art 6, which constitute guarantees of particular features of fair trial, can be subject to exceptions and qualifications. Article 6(1) itself allows expressly for limitations to be imposed on the right to a public hearing, and the Strasbourg and domestic jurisprudence reveals that limitations may be imposed on the other particular rights in art 6. Accordingly, it is possible to say that all the individual art 6 rights are negotiable to some extent.

The Strasbourg jurisprudence has not developed a uniform methodology for resolving these issues. Although a concept which appears to be one of proportionality has been said to be inherent in the whole of the Convention.[54]It has been referred to in connection with limiting the right of access to the court,[55] and the use of reverse burdens of proof contrary to the presumption of innocence in art 6(2)[56] and in connection with restrictions on the privilege against self-incrimination, and the right to examine witnesses under art 6(3)(d).

[53] Although it is not absolute insofar as a Member state can formally derogate from it under art 15 in time of war or any other public emergency threatening the life of the nation. The UK has never sought to make such a derogation from art 6.

[54]Sporrong and Lonnroth v. Sweden (1983) 5 EHRR 35 [69]; Soering v. United Kingdom (1989) 11 EHRR 439 [89]. Both cases refer to the 'search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. It is this concept of the 'fair balance' which Lord Bingham referred to in Brown v Stott as the standard of proportionality.

[55]Ashingdane v. United Kingdom (1985) 7 EHRR 528

[56]Janosevic v. Sweden (2002) 38 EHRR 22

By contrast, the English courts have been more consistent in using proportionality to evaluate restrictions on art 6 rights, although the practice has not been uniform.[57] Examples of proportionality reasoning in the evidential context relate to restrictions on the privilege against self-incrimination,[58] the presumption of innocence,[59] the right to examine complainants on their previous sexual behaviour,[60] and legal professional privilege.[61] The criteria for a valid qualification or restriction of an art 6 right are to be found in the concepts of legitimate aim and proportionality. To be valid a restriction must first be imposed in pursuance of a legitimate aim, which may be an important goal of public policy, such as the reduction of death and injury caused by the misuse of motor vehicles,[62]or the protection of complainants of sexual offences from intrusive and distressing questioning.[63] Second, the restriction must be proportionate to the aim. This means that it must represent a fair balance between the importance of the community interest in the legitimate aim to be achieved and the importance of the interest in the protection of the defendant's fundamental rights. [64]A considerable number of factors may be taken into account in calculating the 'fair balance', and these will vary according to the nature of the fair trial right in question. The factors relevant to deciding the proportionality of a reverse onus, for example, will not necessarily be the same as those relevant to an evaluation of a restriction on the privilege against self-incrimination. There are, however, some principles of general application. First, the restriction or qualification must bear a rational connection to the legitimate aim.[65] As the Canadian Supreme Court put it in R v Oakes,[66] the measure adopted must be carefully designed to achieve the objective in question; it must not be arbitrary, unfair or based on irrational considerations. Second, it must not go beyond what is necessary to achieve the aim.[67] Third, both the European Court of Human Rights and the English courts will also look carefully at safeguards against unfair infringements of the right in question. The European

[57] The language of proportionality has not been used in the context of hearsay and anonymous evidence, which engage art 6(3)(d), although it is arguable that it could and should be used: see I Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' [2010] Criminal Law Review 255
[58]Brown v Stott [2003] 1 AC 681; R v. S and A [2009 1 All ER 716; R v. K [2010] 2 WLR 905
[59]R v. Lambert [2002] 2 AC 545; Sheldrake v. DPP [2005] 1 AC 264.
[60]R v. A (No 2) [2002] 1 AC 45
[61]In Re McE [2009] 2 Cr App R 1.
[62]Brown v. Stott [2003] 1 AC 681.
[63]R v. A (No 2) [2002] 1 AC 45.
[64]Brown v. Stott [2003] 1 AC 681.
[65]De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80.
[66] [1986] 1 SCR 103.
[67]De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80; Thomas v. Baptiste [2000] 2 AC 1; Brown v. Stott [2003] 1 AC 681, 704.

Court has insisted, for example, that restrictions on a defendant's right to examine witnesses must be accompanied by measures to 'counterbalance' any handicaps to the defence resulting from the inability to cross-examine a witness.[68]

3. RIGHT TO LEGAL REPRESENTATION

Most international Human Rights instruments provide for the right to legal representation in criminal proceedings as part of the right to a fair trial. E.g., ICCPR, Art 14(3)(d); Statute of the International Criminal Court, Art. 67(1) (d); European Convention for Human Rights, Art. 6(3) (c); Charter of Fundamental Rights of the European Union, Art. 47; American Convention on Human Rights, Art. 8(2) (d); African Charter on Human and Peoples' Rights, Art. 7(1) (c). The right to counsel would be pointless if it didn't encompass a right to effective counsel. Both National courts and International Human Rights tribunals have held that states must ensure that legal assistance is both effective and substantial. In particular, States must ensure that every accused person has the right to be assisted by counsel, to be accompanied by counsel before any authority at every stage of the proceedings, and, if detained, to communicate with counsel in private. Moreover, states are obligated to provide full and free legal assistance at all stages of the proceedings to those defendants who lack economic resources[69]. The authorities have a duty to take remedial measures if the appointed lawyer fails to provide effective representation. The well-established jurisprudence of the European Court of Human Rights states that the mere appointment of a defence lawyer does not in itself ensure compliance with the duty to provide effective assistance. Although a State cannot be held responsible for every shortcoming on the part of the lawyer, the right to counsel requires State authorities to intervene if a failure to provide effective representation is either manifest or sufficiently brought to their attention[70] . In such cases, authorities must replace counsel, require him to fulfill his obligations, or otherwise ensure the right to counsel

[68]Van Mechelen v. Netherlands (1997) 25 EHRR 647.

[69]See generally: ICCPR, art. 14(3)(d); Statute of the ICC, art. 67(1)(d); European Convention for Human Rights, Art. 6(3)(c); Charter of Fundamental Rights of the European Union, Art. 47; American Convention on Human Rights, Art. 8(2)(e); UN Basic Principles on the Role of Lawyers, 1990, §3. The United Nations Economic and Social Council has made clear that these obligations are particularly critical in death penalty cases, calling on governments to provide "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases"(ECOSOC Resolution 1989/64, §1(a)).

[70]Artico v. Italy, 6694/74 Eur.Ct.H.R., May 13, 1980; Kamasinski v. Austria, 9783/82 Eur.Ct.H.R., Dec. 19, 1989; Daud v. Portugal, 22600/93 Eur.Ct.H.R., Apr. 21, 1998.

- for example, the court could invite the lawyer to add to or to file an amended pleading rather than declare an appeal inadmissible[71].

Although the right to effective legal representation is well recognized, poor legal representation is the norm in most retentionist states. Lawyers around the world lack resources and training and. although legal aid is provided in theory, the quality of legal aid in practice is hampered by shortages of legal aid lawyers (as in Malawi or China), insufficient funding (e.g., in Jamaica, Zimbabwe, Sudan, Uganda, Malawi, Guinea-Conakry, United States), or overloaded public defenders (United States, India). In many of such countries, lawyers typically meet their clients for the first time on the day of trial. In other jurisdictions, legal aid is virtually nonexistent, and individuals may be convicted and sentenced to death without any legal representation whatsoever (e.g., South Sudan, Guinea-Conakry, Saudi Arabia). Some jurisdictions have parallel justice systems – often traditional or religious courts – where legal representation is not provided (e.g., Sudan). Even when defendants are assisted by lawyers, their delivery of a competent defense is often impaired by their inexperience and lack of training (e.g., Guatemala, India, Cameroon, Malawi, and United States). Interference of the executive with the independence of lawyers or with the access of lawyers to their clients has been reported in some countries (e.g., Belarus, China, Iran, and Indonesia).

Under the jurisprudence of the European Court of Human Rights, for a violation of the right to legal assistance to be established, it is not necessary to prove that the lack of effective representation caused prejudice[72].

HEARSAY EVIDENCE

Hearsay evidence is "an out-of-court statement introduced to prove the truth of the matter asserted therein." In certain courts hearsay evidence is inadmissible (the "Hearsay Evidence Rule") unless an exception to the Hearsay Rule applies. Hearsay refers to testimony given in court by a person other than the one who perceived it. As a general rule hearsay is inadmissible. And this is drawn from Section 63 of the Indian Evidence Act, which explicitly provides that oral evidence must be direct. Oral evidence must be direct. The rule against

[71]Czekalla v. Portugal, 38830/97 Eur.Ct.H.R., Oct. 10, 2002
[72]Artico v. Italy, 6694/74 Eur.Ct.H.R., May 13, 1980, at §35.

hearsay is stated as follows: "A statement made by a person not called as a witness who is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible" There are number of exceptions to the rule of hearsay. All exceptions have been imported in the Evidence Act. Primarily, the exceptions are to be found in Sections 17 to 39 of the Act as well as in Proviso to Section 60. These include admission, confession, statement of persons who are dead, or cannot be found etc., entries in books of account, statement in public document, maps and charts, reputation, expert opinion and statement of experts in treaties (Proviso to Section 60). The exception is also extended to the rule of res gestae (Section 6). It is therefore, said that under certain circumstances the hearsay evidence is held admissible, particularly when it "relates to the question of the credibility of witness."

In England and Wales, hearsay is generally admissible in civil proceedings[73], but is only admissible in criminal proceedings if it falls within a statutory or a preserved common law exception[74], all of the parties to the proceedings agree, or the court is satisfied that it is in the interests of justice that the evidence is admissible[75].

Section 116 of the Criminal Justice Act 2003 provides that where a witness is unavailable, hearsay is admissible where a) the relevant person is dead; b) the relevant person is unfit to be a witness because of his bodily or mental condition; c) the relevant person is outside the UK and it is not reasonably practicable to secure his attendance; d) the relevant person cannot be found; e) through fear, the relevant person does not give oral evidence in the proceedings and the court gives leave for the statement to be given in evidence. The two main exceptions to the rule that hearsay is inadmissible are res gestae and confessions. The scope of this rule has been considered in cases when much of the prosecution case involves evidence by a witness who is absent from court. In Luca v Italy[76], in the European Court of Human Rights, it was held that a conviction solely or decisively based upon evidence of witnesses which the accused has had no opportunity to examine breached Article 6 of the Convention (right to a

[73]Civil Evidence Act 1995, Sec. 1.
[74]The preserved common law exceptions are held in Criminal Justice Act 2003, s.118
[75]Criminal Justice Act 2003, Sec.114 (1) (d)
[76](2003) 26 E.H.R.R. 46, European Court of Human Rights

fair trial). However in *R v. Arnold*[77], in the Court of Appeal, it was said this rule would permit of some exceptions, otherwise it would provide a license to intimidate witnesses - though neither should it be treated as a license for prosecutors to prevent testing of their case. Each application had to be weighed carefully.

EVIDENCE OBTAINED ILLEGALLY

The traditional approach of the Indian Courts has been that in absence of a specific statutory or constitutional provision which provides for the exclusion of certain type of evidence, the fact that evidence was obtained illegally, does not affect the admissibility of the evidence[78]. However, in the common law world there exists varying models on which the decision regarding the admissibility of evidence would be considered. The strictest approach of this rule is adopted by certain countries. India is included within this category. Here the illegality or impropriety of the evidence does render the evidence legally inadmissible. However, such admissibility may be questioned if there exist some specific statutory or constitutional provision which prohibits such evidence from being considered in a court of law[79]. The Supreme Court constitutional bench in *Pooran Mal v. Director of Inspection*[80]discussed the validity of evidence which has been gathered as a result of illegal search and seizure and presented before the court for admission as valid evidence. As recently as 6th September 2013 the Supreme Court in *Umesh Kumar v. State of Andhra Pradesh*[81]held that it is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained.

The Irish Supreme Court has made much better use of constitutional authority by developing an automatic rule of exclusion for evidence obtained in violation of constitutional rights.[82]

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[77][2004] 6 Archbold News 2, Court of Appeal

[78] For criticism see: Admissibility of evidence procedure through Illegal Searches and Seizures, Cowen and Carter, Essays on the Law of Evidence.

[79] An example of this can be Section 123 of the Indian Evidence Act which prohibits unpublished records of the Government from being called as evidence unless and until prior sanction is taken from the Head of the Department/Minister.

[80] (1974) 93 ITR 505 (SC)

[81] 2013(11) SCALE 28

[82]People (DDP) v. Kenny [1990] 2 IR 110

The English position on the admissibility of such evidence can be gathered from the classical case of *Kurma v. R*[83]which represents the dicta on such. The Privy Council relied on earlier English decisions and held that this evidence was admissible, but the person against whom such evidence was taken might have civil remedy against the person who obtained it and may later lead to disciplinary and even criminal proceedings. In Scotland, the trial judge has the discretion to exclude evidences which have been obtained illegally. However, the discretion leans more towards inclusion than exclusion. The position taken up by the Australian High Court in Bunning v Cross[84]relied on public policy and held that the judge in a criminal trial has discretion to exclude evidence. The High Court placing emphasis on the need to protect the right of citizens, held that, "It is not fair play that is called in question...but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into daily affairs of private life may remain unimpaired."

Moreover, legally obtained evidence might in some cases do more harm than good. In the Australian State of Victoria there was a case of miscarriage of justice arising from contaminated DNA evidence. This case illustrated the problem of enormously powerful scientific evidence which can also be powerfully misleading when things go wrong[85]. Evidence which is treated in popular imagination as tantamount to conclusive proof of guilt may be potent source of wrongful conviction. The present case shows how the apparent probative value of a matching DNA profile was allowed to compensate for what were, in retrospect glaring circumstantial weaknesses in the prosecution's case.

The right not to be wrongfully convicted of a criminal offence is a more fundamental procedural right than right to fair trial[86]. However, International Human Rights law does not articulate such a right nor does Victoria's Charter of Human Rights and responsibilities Act, 2006. Arguing for the rights of the accused from this particular position will serve better results than arguing for "fair trial", especially in cases where the judicial opinion is split on the "fairness" attached to the component in question.

CONCLUSION

[83] (1995) 1 All ER 236 (PC)
[84] (1978) 19 ALR 641
[85]AI Goldman, Pathways to Knowledge: Private and Public (New York, OUP, 2002) Ch 7.
[86] CF Roberts and Zuckerman, Criminal Evidence, 2nd Edn (Oxford, OUP, 2008) Part III.

The work undertaken above compares some human rights issues which are routinely dealt with by courts of law when appreciating evidence. The Indian Evidence Act and consequently the judicial reasoning still remain primitive and offer very basic assurances in the name of human rights. The notion of human rights in Indian courts remains skewered either in favour of the accused or the victim in different areas. Moreover, human rights overall occupies a lower position on Indian priority list which is untouched by international development, at least in matters of criminal proceedings. India continues to retain an evidence act drafted in colonial times by colonial powers. Conversely, the nation responsible for colonizing India has moved on with times and is affording much better human rights guarantee to its citizens. A review and reformation of the Indian Evidence Act is the need of the hour, else the country will continue harbor under its self-imposed colonial dictates.