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COLLECTION OF EVIDENCE: FROM PAST TO PRESENT

This paper contains a discussion of the evolution of evidence laws in the Indian subcontinent. It discusses the process of evidence collection in Ancient India as compared to the rules found under the Indian Evidence Act of 1872.

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Introduction

The concept of evidence has always been found coupled with the necessary judicial requirements of structured civil societies. In fact, as we move from the earliest forms of evidence collection, we observe an increasing significance of evidence laws which become even more intricate over time (a process visible in the codification of the various evidence laws today). This progression of evidence laws not only demonstrates how Indian society has evolved through history by both adopting and rejecting various provisions but also puts forth various cultural viewpoints and thought processes that continue to be a part of the Indian subcontinent even today.

Before we proceed to investigate the history of evidence laws in various contexts throughout history foraging for various similarities and differences it becomes necessary to define 'evidence'.

The word 'evidence' finds its origins in the Latin noun 'evidentia' which means "obvious to the eye or mind". Simultaneously, the **Indian Evidence Act of 1872** (hereinafter called the IEA) defines "Evidence" as meaning and including -

"(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) [all documents including electronic records produced for the inspection of the Court;] such documents are called documentary evidence."

Kinds of Evidence

Hindu laws of evidence are built on various Vedic texts and the Dharmashastras (Sanket and Karkara). Several later texts such as the Manusamhita, treaties of Vishnu, Narada, Vasistha, and Brhaspati, (Thakur) contain such laws as well. After analyzing these texts, we can divide the different kinds of evidence found in Hindu law into four categories (Thakur) namely -

1. Documents
2. Witnesses
3. Ordeals
4. Possessions

On the other hand, Muslim rulers followed the Islamic law as laid down in the Holy Quran to determine legitimate forms of evidence (note the subclassifications under Oral evidence) (Sanket and Karkara) -

1. Oral Evidence
 - a. Direct
 - b. Hearsay
2. Documentary Evidence

The Indian Evidence Act, of 1872 identifies many kinds of evidence -

1. Oral Evidence (Section 60 of IEA)
2. Documentary Evidence (Section 3 of IEA)
3. Primary Evidence (Section 62)
4. Secondary Evidence (Section 63)
5. Real Evidence
6. Hearsay Evidence

7. Judicial Evidence
8. Non-Judicial Evidence
9. Direct Evidence
10. Circumstantial Evidence

Oaths

The act of taking an oath as a witness is one of the few practices which have found their way into contemporary times. Interestingly, this act of taking an oath is found in all kinds of cultural jurisdictions seen in this country. Oaths are designed to invoke and inculcate a fear of God in the witness (Sanket and Karkara). They remind the witness of divine punishment pushing him to speak in a calculated way (Sanket and Karkara). Although this practice is frequent the ways of taking an oath differ.

For example, Under Hindu legal proceedings the witness was administered an oath through a very intricate process under which he was supposed to take off his shoes and turban and take either gold, cow dung or sacred grass in his hands (Thakur).

Section 14 of the Indian Oaths Act 1873, lays down diverse ways of administering oaths considering people of different religions as well as those who have no religious belief or may not want to take one due to their belief.

Witnesses – Character and Limitations of Caste and Gender

Witnesses form an integral part of evidence law. They are so valuable in nature that most of the Hindu laws are woven around them, their character and even things such as their class, caste, and gender (Thakur). Such differential treatment of witnesses and their testimonies also occurred in Mughal Court proceedings.

Hindu lawmakers made sure that witnesses must “come from the caste and class of the party by whom they are appointed”, i.e., a woman should be a witness for a woman or lower caste people be witnesses for lower castes (Thakur).

Similarly, Muslim laws too laid down several distinctions for non-believers (Hindus) (Sanket and Karkara), women and other witnesses such as drunkards, professional singers, sons in favour of fathers, etc. Such witnesses were considered incompetent, and their testimonies were inadmissible (Sanket and Karkara). For example, Hindu witnesses against Muslims were considered incompetent while the evidence provided by two women was seen as equal to that provided by one man (Sanket and Karkara). Character and demeanour too played a crucial role in witness evaluations.

The entry of British administrators into the country saw the erasure of such discriminatory practices. The **Code of Cornwallis** discarded the belief against women witnesses and allowed them to provide evidence (Sanket and Karkara). It also removed the two female witnesses equal to one male rule as prevalent under Muslim rulers (Sanket and Karkara).

Although social standings and gender are not considered relevant aspects today, **Sections 52 and 53** of the Indian Evidence Act lays down some rules considering the character of witnesses. Under these provisions, the character of the witness in civil cases is broadly rendered irrelevant

with the exception that it may appear relevant from the facts of the case while the character of any witness in criminal cases is considered relevant.

Ordeals or *Divya* – God’s truth

Ordeals may be considered one of the more distinct and intriguing parts of the evidence collection process in the country’s history. Ordeals were seen as a way for God to determine guilt and they can be found in other ancient justice systems (Medieval Europe, Burma) as well. Let us take a brief look at the five key ordeals enshrined in the various Hindu legal texts.

1. Ordeal by Balance (Tula) (Thakur) - The accused was weighed in a balance against other pans to determine their guilt (Sanket and Karkara).
2. Ordeal by Fire (Thakur) – The accused was to pull out a coin out of a boiling liquid or lick a red-hot ploughshare with his tongue and if there were no signs of burning, he was considered innocent (Sanket and Karkara).
3. Ordeal by Water (Thakur) – The accused was immersed in water and if for a certain period he was able to do that he was considered innocent (Sanket and Karkara).
4. Ordeal by Poison (Thakur) – The accused was provided poison in small quantities with his food and if the poison did not cause him any harm, he was considered not guilty (Sanket and Karkara).
5. Ordeal by Consecrated Water (Thakur)

Some other kinds were – Ordeals by Grain of rice (Tandula), hot piece of gold (Taptaniasha), ploughshare (Phala), Kosa, Lot (Dharma & Adharma), etc. (Thakur).

The administration of these ordeals was based on several factors such as the caste (Brahmins were not given ordeals by poison) (Thakur), gender (Ordeals of balance were reserved for women) and children, age, or any disease the person (Ordeals of water and poison for people with leprosy) may suffer from (Thakur).

As of today, ordeals are found to be present in some remote parts of the country either hidden away from the comparatively large effects of the legal system in the country or amongst people who may still follow these ancient rituals. However, such practices do not form a part of the evidence laws under the current legal system.

Relevance of Medical Evidence

Criminal investigations require an array of medical evidence to be collected and examined to deliver accurate judgements. Kautilya's *Arthashastra*, an ancient Sanskrit treatise of statecraft, political science and law, provides a list of various autopsy procedures determining the cause of death. He mentions various **Medico-legal and toxicology descriptions** (Prasad et al.), created to help in the process of evidence examination. The following are some examples:

Death by Suffocation – A corpse with inflated organs, swollen hands and legs, open eyes and ligature marks on the neck may be regarded as been killed by suppression of breathing or suffocation (Prasad et al.).

Death by Hanging – A person who has contracted arms and thighs as well as swollen hands, legs and belly coupled with sunken eyes and an inflated navel may be regarded to have been killed by hanging (Prasad et al.).

Death by Poison – “Dead person with dark coloured hands, legs teeth and nails with loose skin, hairs fallen, flesh reduced and with face bedaubed with foam and saliva, may be regarded as having been poisoned (Prasad et al.).”

Death by falling – Presence of fractures and broken limbs point towards death by being thrown down (Prasad et al.).

Death by Drowning - “Dead person with stiffened rectum and eyes, with tongue bitten between the teeth, and with belly swollen may be considered as having been killed by drowning (Prasad et al.).”

Medical evidence has also been recorded to be significant during British Rule in India (Mathiharan). Furthermore, forensics has emerged as an individual subject of study and research. Technological advancements in the field have brought about considerable changes in the way evidence is treated today. These changes would not have been possible without a historical antecedent discussed before.

Conclusion

The Indian Evidence Act, 1872, is a comprehensive document of rules that consolidates judicial proceedings under evidence laws many of which, as was previously discussed, have been borrowed from ancient legal systems. Even with such attributes, the act has been subject to several amendments such as the Indian Evidence (Amendment) Act, 2003 as well as the amendments by the formation of the Criminal Law (Amendment) Act, 2013 (evidence in cases of rape) (Lakshmi). Very recently an amendment in the Information Technology Act, of 2000 brought about a relatively recent practice allowing electronic records as evidence as well

(Lakshmi). All such changes to the statute highlight the ongoing evolution of evidence laws and provide an intriguing outlook for their future.

Works Cited

Lakshmi, S. Raja. "Law of Evidence - Study Material." *The Tamil Nadu Dr. Ambedkar Law University*, https://tndalu.ac.in/econtent/35_Law_of_Evidence.pdf.

Mathiharan, Karunakaran. "Origin and Development of Forensic Medicine in India." *The American Journal of Forensic Medicine and Pathology*, vol. 26, 2005, <https://doi.org/10.1097/01.paf.0000163839.24718.b8>.

Prasad, Penchala, et al. "Historical Evidences on Medicolegal Autopsy and Toxicological Descriptions in Kautilya's Arthaśāstra." *Bulletin of the Indian Institute of History of Medicine*, vol. 36, 2006, pp. 167–174., https://doi.org/https://www.researchgate.net/publication/5673848_Historical_evidences_on_medicolegal_autopsy_and_toxicological_descriptions_in_Kautilya's_Arthasastra.

Sanket, Yadav. "Impact of Improper Admission and Rejection of Evidence a Socio Legal Study with Special Reference to Indian Evidence Act." *University of Rajasthan*, Edited by G S Karkara, 2014, <https://doi.org/http://hdl.handle.net/10603/148732>.

Thakur, Amareswar. *Hindu Law of Evidence or a Comparative Study of the Law of Evidence According to the SMRTIS*. University of Calcutta, 1933.

