

BHARATIYA SAKSHYA ADHINIYAM (LAW OF EVIDENCE)

Objective of the course:

The Law of Evidence is one of the most important parts of the procedural law. The Law of Evidence plays a very important role in the effective functioning of the judicial system. The Law of Evidence is an indispensable part of both substantive and procedural laws. It imparts credibility to the adjudicatory process by indicating the degree of veracity to be attributed to 'facts' before the forum. This paper enables the student to appreciate the concepts and principles underlying the law of evidence and identify the recognized forms of evidence and its sources. The subject seeks to impart to the student the skills of examination and appreciation of oral and documentary evidence in order to find out the truth. The art of examination and cross-examination, and the shifting nature of burden of proof are crucial topics. **The Bharatiya Sakshya Adhiniyam, 2023 is a new criminal law in India that replaces the Indian Evidence Act. It introduces changes in provisions relating to electronic evidence, including definitions and admissibility procedures brought in to the Law of Evidence are significant parts of study in this course.**

After undergoing the study, the student will be able to understand the following:

- To design, implement and review a plan for establishing each legal element of a given case to the required standard of proof with admissible evidence.
- To plan and execute a witness examination that comports with evidentiary standards and that persuasively establishes a fact in issue in the case; anticipate and respond to evidentiary objections that may be raised during your examination.
- To identify, articulate and assert appropriate evidentiary objections while listening to a witness examination, and respond appropriately to questions from the judge.
- To draft and execute a witness examination for the introduction of a document or item of proof.

COURSE OUTLINE

Module I: Introduction to Evidence Law

- a) Historical Evolution of the Law of Evidence- Scope, Object and Applicability of **Bharatiya Sakshya Adhiniyam, 2023 - Comparative analysis of BSA and IEA - Indian Law of Evidence and English Law of Evidence**
- b) Constitutional Perspective of Evidence-Golden Rule Evidence- Kinds of Evidence
- c) **Definition - Facts -Facts in Issue- Presume- Relevant -Distinguish Between Relevancy and Admissibility**

d) **Relevancy of Facts - Closely connected facts** - Res Gestae -Occasion, Cause and Effect etc. -Motive, Preparation and Conduct- Facts Necessary to Explain or Introduce Relevant Facts

e) Proof of Conspiracy -When facts not otherwise relevant become relevant

Module II: Admission- Confession - Dying Declaration

- a) Admission- An Exception to Hearsay Rule-Requisites of an Admission-Party to the Proceedings-Kinds of Admission-Admission Regarding State of Mind or Body
- b) Oral Admission as to Content of Documents -Admission in Civil Cases-Evidentiary Value of Admission
- c) Confession-Conditions as to Confession -Kinds of Confession -Confession to Police - Retracted Confession-**Joint Trial** - Distinction Between Admission And Confession-Evidentiary Value of Confession
- d) Dying Declaration-English and Indian Law Difference On Dying Declaration – Essential Conditions for the Applicability of Dying Declaration -FIR as Dying Declaration
- e) Who can record a Dying Declaration -Multiple Dying Declarations -Evidentiary Value of a Dying Declaration-Difference Between a Dying Declaration and a Dying Deposition

Module III: Expert Evidence - Relevancy of Character

- a) Opinion of Third Person When Relevant-Expert Witness- Value of Expert Witness.
- b) Expert Opinion: Corroboration- Facts Bearing Upon Expert-Opinion.
- c) **Opinion as to Handwriting & Signature.**
- d) Opinion as to Existence of **General Custom or Right** - Opinion as to Usage, Tenets- Opinion on Relationship- **Grounds of opinion.**
- e) Character When Relevant- Relevancy of Character in Civil and Criminal Cases.

Module IV: Of Proof- Burden of Proof

- a) Facts which need not be proved - Modes of Proof - Oral Evidence - Hearsay Evidence.
- b) Exceptions to the Rule of Hearsay Evidence - Hearsay and Circumstantial Evidence - Difference Between Direct and Hearsay Evidence.
- c) Documentary Evidence - Primary and Secondary Evidence - **Admissibility of electronic Records** - Public and Private Documents - Presumptions as to the Documents - Exclusion of Oral Evidence by Documentary Evidence.

d) Burden of Proof - Burden and Proof Distinction - Burden of Proof and Onus Probandi.

e) Proof of Fact on Which Evidence Becomes Admissible - Burden of Proving Exception In Criminal Cases.

Module V: Presumption- Estoppel

a) Presumption - Kinds of Presumption - Proof and Presumption - Presumption as to Document - Presumption as to Survivorship - Presumption as to Death - Presumption of Certain offences.

b) Presumption of Legitimacy - Presumption in Suicide Cases - Presumption of Existence of Certain Facts - **Presumption in Prosecution of Rape Cases.**

c) Doctrine of Estoppel - Kinds of Estoppel - Essential Conditions for Estoppel - Promissory Estoppel - Exception to the Doctrine of Estoppel.

d) Estoppel by Tenants and Licensee - Estoppel of Acceptor of Bill of Exchange, Bailee and Licensee.

e) Distinction Between Estoppel and Res Judicata - Distinction Between Estoppel and Waiver.

Module VI: Witnesses - Examination of Witness

a) Witnesses - Categories of Witnesses - Dumb Witness - Evidence of Prosecutrix in Rape Case - Interested Witness - **Competency of Husband and wife as witnesses in certain cases** - Judges and Magistrate as Witness

b) Privileged Communications - Professional Communication - Order of Production and examination of Witness - Judge to Decide Admissibility of Evidence

c) Examination in Chief - Cross Examination - Re-Examination - Distinction Between Examination in Chief, Cross Examination and Re- Examination

d) Order of Examination - **Witnesses to character - Leading Questions** - Direction of Re Examination - Cross Examination of person called to produce as document - Question by party to his own witness

e) Question tending to Corroboration - Former Statement as Corroboration- Refreshing Memory.

Recommended Readings:

Books:

1. Criminal Manual along with comparison table, edited by Virag Gupta, Commercial Law Publishers (India) Pvt. Ltd. New Delhi, Edition 2024.
2. Sharath Chandran, Concise commentary on the Bharatiya Sakshya Adhiniyam, LexisNexis, 2024.
3. Saurabh kansal and vageshwari Deswal, Bharatiya Sakshya Adhiniyam, 2023 Law and practice, Taxmann Publication Private Ltd. 2024.
4. M. Monir, Law of Evidence, Universal Law Publishing Co. Pvt. Ltd, 2018.
5. Rattan Lal Dheeraj Lal, Law of Evidence, LexisNexis, 2018.
6. Avtar Singh, Principles of Law of Evidence, Central Law Publications, 2016.
7. Sarkar and Manohar, Sarkar on Evidence (1999), Wadha & Co., Nagpur 2017.
8. Hong Kong Law of Evidence, Mike McConville, Dmitri Hubbard, and Arthur McInnis, 2nd Edition, 2014, Blue Dragon Press, Hong Kong.

Journals/ Journal Articles:

1. Allen, R 1992, "The Myth of Conditional Relevancy", Loyola of Los Angeles Law Review, 25: 871-884.
2. Allen, R 1994, "Factual Ambiguity and a Theory of Evidence", Northwestern University Law Review, 88: 604-640.
3. Allen, R. and S. Jehl, 2003, "Burdens of Persuasion in Civil Cases: Algorithms v. Explanations", Michigan State Law Review, 4: 893-944.
4. Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent by Audrey Rogers Loyola of Los Angeles Law Review (Vol 31:1351).
5. Dr. Nirpat Patel, "The Role of DNA in Criminal Investigation – Admissibility in Indian legal system and future perspectives" IJHSSI Vol.2/Issue 7/July 2013/p. 15-21.

Further Readings:

Books:

1. Adrain Keane, Paul M.C. Keown, "The Modern Law of Evidence", 9th Edn, Oxford University Press.
2. Albert S. Osborn, "The problem of proof", 1st Indian reprint, Universal Law House, Delhi, 1998.
3. Bholeshwar Nath, "Cases and Material on Evidence Act, 1872", Eastern Books Publishers and Book Sellers, Lucknow.
4. Bridges, B.C., Vollmer, August and Monir M., "Criminal Investigation Practical Fingerprinting, Thumb Impression, Handwriting expert testimony Opinion Evidence", The University Book Agency, Allahabad (2000).

5. M. Monir C.J., Dr. H.K. Saharay, "Law of Evidence" (Vol. I, II), 14 Edn, Universal Law Publishing Co. Pvt. Ltd.
6. P. Murphy, Richard Glover, "Evidence" 12 Edn, Oxford University Press.
7. Philips Edward, "Brief Case on Law of Evidence", Cavendish Publishing Limited, London, (1st Edn, 1996).
8. R.L. Gupta, "Law relating to identification and Expert Opinion" 4th Edn, Eastern Book Co, Lucknow.
9. R.S. Pillai, "Criminal Law", Lexis Nexis Butterworths Wadhwa Co., Nagpur, 10 Edn.
10. Sir Rupert Cross and Nancy Wilkins, "An Outline of the Law of Evidence", 4th Edn, London Butterworth, 1975.

Journal/ Journals Articles

1. Allen, R. and A. Stein, 2013, "Evidence, Probability and the Burden of Proof", *Arizona Law Review*, 55: 557–60
2. Allen, R, 1991, "The Nature of Juridical Proof", *Cardozo Law Review*, 13: 373–422.
3. Garrison, A.H. (2000). A review of the behavioural science theory and its admissibility in criminal trials" *American Journal of Trial Advocacy*, 23, 591–657.
4. Kristina L. Needham, "Questioning the Admissibility of Non-Scientific testimony after Daubert: The need for increased Judicial Gatekeeping to ensure the reliability of all Expert Testimony" 1997 *FULJ* Vol. 25 Issue 3, Pg. 541-578.
5. Mathiharan K, "Emergency Medicare: its Ethical and legal aspects" *National Medical Journal of India*, Vol. 17, No.1 January/ Feb, 2004, 31-35 at p. 33.
6. Neeraj Tiwari, "Fair trial vis-a-vis Criminal Justice Administration: A critical study of the Indian Criminal Justice System *JLCR* Vol.2(4) pp. 66-73
7. Nivedita Grover, "Development of forensic science and criminal prosecution-India" *IJSRP* Vol.4 Issue 12
8. Sonia Dutt Sharma, "DNA-Dignity and Dissolution of Marriage", *Helix* Vol.2 : 101- 104 (2012).9. Subhomoy Sarkar, "The Constitutional Mandate on the Right Against Self Incrimination: A Comparative Study on the Legitimacy of Narco Analysis 2009" *Cr.L.J* Vol 2 Journal/166.
10. Tess M.S. Neal, "Expert Witness preparation: What does the Literature tell us? American Society of Trial Consultants. 2009, pg. 82.
11. Parliament of India Rajya Sabha, Department-Related Parliamentary Standing Committee on Home Affairs, 248th Report on the Bharatiya sakshya Bill Sanhita, 2023, Dec 2023.

Cases for Guidance

1. State of Maharashtra vs. Prafulla B. Desai (Dr.) (2003) 4 SCC 601
2. R. M. Malkani vs. State of Maharashtra, AIR 1973 SC 157
3. Mirza Akbar vs. Emperor, AIR 1940 PC 176
4. Badri Rai vs. State of Bihar, AIR 1958 SC 953
5. Mohd. Khalid vs. State of W.B. (2002) 7 SCC 334
6. Jayantibhai Bhenkerbhai vs. State of Gujarat (2002) 8 SCC 165
7. Bishwanath Prasad vs. Dwarka Prasad, AIR 1974 SC 117
8. Central Bureau of Investigation vs. V.C. Shukla, AIR 1998 SC 1406
9. Veera Ibrahim vs. State of Maharashtra, AIR 1976 SC 1167
10. Aghnoo Nagesia vs. State of Bihar, AIR 1966 SC 119
11. Nageshwar Shri Krishna Ghobe vs. State of Maharashtra (1973) 4 SCC 23
12. National Textile Workers' Union vs. P.R. Ramakrishnan (1983) 1 SCC 228, 255
13. CIT v. Podar Cement (P) Ltd (1997) 5 SCC 482
14. State v. S.J. Choudhary (1996) 2 SCC 428
15. SIL Import, USA v. Exim Aides Silk Exporters (1999) 4 SCC 567
16. Bodha and ors v. State of Jammu & Kashmir AIR 2002 SC 3164
17. Anwar PV v. PK Basheer and ors (2014) 10 SCC 473.
18. OPP Kumar vs. Mohan Thedani AIR 2003 SCC 2418.
19. Mangala Waman Karandikar (D) TR.LRS. vs. Prakash Damodar Ranad AIR 2021 SC 235.
20. Dr. Sunil Clifford Daniel vs. State of Punjab (2012), 11 SCC 205
21. Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal, 2020

Learning Outcome:

After completion of the course students will be able to -

- To identify, assert and support objections to items of proof, using appropriate evidentiary rules and tailoring objections to the facts at hand.
- To identify and use a range of legally specific research principles, methods and tools to make a coherent and persuasive argument for the admission or exclusion of a specific item of evidence, incorporating factual information and legal standards drawn from both evidentiary rules and substantive law.
- To research, analyse and apply evidentiary standards to complex issues and present a persuasive written and oral argument for the admission or exclusion of the evidence.
- Articulate the processes for the adversarial examination of evidence and differentiate between the roles of the district attorney and defence counsel in the presentation of evidence.
