Article

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Beyond the Frame of Practical Reason: The Indian Evidence Act and Its Performative Life

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Anyone familiar with decolonised societies, and I am writing of India here, is also familiar with the complaints of rulers of acute moments of unrest in these societies, what appears like near schizophrenia, violence of people on the streets, and therefore the sigh that there is no rule of law in these societies, people are disrespectful of law, and hence these societies are anarchic. There are stories of beatings and shoot-outs in the courts, heavy police arrangements that are required to keep the wheels of the judiciary running, and the whispers all around that law, justice, court, trial, punishment – all are parts of a pre-scripted drama to keep the society under control. People laugh when they are told that laws are rigorous and laws speak of scientific rationality. Yet people crowd the courts, love to see in narrative forms (stories, plays, films etc.) the arguments and counter-arguments in courts, the fates of those being tried, and watch the course that law can take. It seems therefore that a major step in studying the nature of governance in India can begin with an examination of how rule of law has come to signify in a society of unrest a combination of coercion, make-believe, a surrealistic notion of justice, and fables of emancipation. How could the legal process of justice acquire the nature of a fable? What is in the nature of the legal process, in particular, the post-colonial legal process, which always turns law into fable, reason into emotion, and science of jurisprudence into fury?

How shall we understand this other nature of law, law's other forms, other frames in which law appears in the popular mind? In this essay I propose to examine the question with some select issues relating to evidence and the Indian Evidence Act. The Indian Act of Evidence (1872) has been one of the founding pillars of the rule of law in India, in which rationality and drama were intermixed, in as much as liberal and colonial practices of law-making were deeply intermeshed in that process, so much so that post-colonial governance today cannot forge its tools without depending on the liberal-colonial heritage of law, law-making, drama, and dramatic effects. I shall try to show how the other forms and other effects were there in the making of the legal space called evidence in the justice system of the country.

This essay is divided in two sections. The first section presents a brief analysis of the origins of the Evidence Act. It suggests how in the conceptualisation of the legal measure there was always the possibility of a performative dimension defining the matter of evidence in the public mind.

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The second section discusses the performing aspect of law and of the judicial process relating to evidence. I shall present that together with all its dimensions the Act of Evidence almost suggests a cinematographic script, more accurately speaking a script for a performance.

I

One can cite these opening lines of one section of the Act that combine science with intrigue:

> A. A desires a Court to give judgement that B shall be punished for a crime which A says B has committed.
>
> A must prove that B has committed a crime.
>
> B. A desires a Court to give judgement that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies to be true.
>
> A must prove the existence of those facts.[1]

These seemingly simple and self-evident, but extraordinarily mischievous lines were among the formulations that laid the ground of rational rule by the colonial authorities in India. Appended at the end of Section 101 of the Indian Evidence Act, which says on the matter of burden of proof, 'Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence to facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person'; these and other lines in the Act on the question of evidence achieved a stupendous feat. They succeeded in setting up the individual as a legal category to be inspected, monitored, and judged on the basis of a code by a new form of power, the judicial power, from now on.

Promulgated in 1872, the Indian Evidence Act demonstrated the way in which colonial rule in India built up the notion of responsibility, which in turn made it one of the main pillars of rule. It also showed how the discourse of responsibility always succeeded in making the ruled continuously strive to become reasonable and civilised while it gave the ruler an intrinsic advantage in terms of legitimacy and governance (Samaddar, 2002a; 2002b). The ruler assumed the responsibility of providing good rule; the ruled would have to now assume responsibility of good conduct and of growing up. In the lines cited in the preceding paragraph we can see how the notion of responsibility was being framed. The State had brought a charge against the accused, it was responsible for furnishing the evidence; therefore it had the right to punish. The peasant had robbed the wealthy of land, the wealthy would prove that the land was his, and the court would order the land back to the possession of the wealthy. Rule of law meant being responsible to the law, and law meant due process. Thus, for instance, in the case of expounding the notion of responsibility in the form of the 'burden of proof' the Evidence Act did not stop only at that, as cited above. It explained with whom remained the burden of proof, the burden of proof as to particular fact, the burden of proving a fact relevant so that it could be not only be proved but also make evidence admissible. In fact the Act lay down the burden of proving in different possible situations. The principle of responsibility by defining the burden made elements like contract, law, individuality, due process, and transparency pillars of the new rule against which the individual, in the form of the accused as a criminal or wrecker of property, was now posited. Rule in this way was new, because it involved rationality. On the basis of reason a new form of power grew up, namely judicial power, which shaped the justice-seeking subject, the familiar character of modern cinematic drama. From now on the justice-seeking subject must appeal to justice not only on grounds of fairness, but also with

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reason, appeal, fury, frustration, and helplessness. In this sense practical reason was combined with physical elements – alien to it – from the beginning.

In this sense it is instructive to go back to the colonial era, because locating the criminal through categories and technologies was at the heart of the question of the stability of rule by the conqueror. To colonial rule in the middle of the 19th century, the criminal was still a spectral figure, beyond the surveillance of weak administrative machinery, and inhabiting the boundaries of morality and evil, much of which colonial rule was still labouring to understand. The criminal was within the 'native' society, which was marked by distinct patterns of caste and domestic violence, and in terms of everyday governance was in collision with a type of civic-mindedness that colonial rule was trying to cultivate in society. Colonial rule was not only responsible to the Crown, but also to its subjects – therefore its mission was to motivate the people and the 'society' to engage with the crime and the criminal. Laws therefore had to be public, the legislative process similarly public, trials had to be public, evidence was to be made public, and in this way judging criminality was a public process, which was only possible if the 'public' was there and present in the process. Therefore criminal legislation had to simultaneously operate in two different registers: on the one hand, it had to argue that criminality was occurring in the distinct cultural milieux of society and the communities (thus, the idea of criminal tribe etc.); on the other hand, the trial and the punishment process were to be public, non-communitarian, legal, and scientific. Thus questions such as who is a criminal, how criminal elements enmesh with the public, what methods are illegal, etc., were issues that not only defined the power of the sovereign authority, but also marked the everyday governmentality of rule that needed to cope with crimes unsettling society. The problem was acute because the 'native' society seemed to harbour criminality as simply one segment of a vast self-governing (in other words god-governing) cosmos. Moulavis and Qazis refused to pass death sentence on robbers unless robbery had been accompanied with murder; in some cases the robbers, upon being brought back to their villages, would be let off with fines and shaming. In this context one can for instance read *Louhakapat*, the famous five-volume series of the life world of the convicts serving jail sentences. *Louhakapat*, literally meaning (behind the) 'iron gate' is a Bengali non-fiction narrative of criminals serving jail sentences and in some cases waiting for execution at the gallows. The narrative gives us an idea of the morality of assigning the criminal a place under the sun, not excommunicating the criminal but appreciating the criminal's place in the cosmos – a kind of indulgence with which the hard protestant ethic was perhaps unfamiliar, and therefore the latter could only frown upon the former (Jarasandha, 1967).

In the 19th-century colonial world of India the conqueror had to know closely – a task that the fast developing print culture and the science of photography facilitated – the bodies of the poor, the troublesome and the criminal. While bodies in the early modern period were subject to inspection under many different circumstances such as theft, sexual intercourse, hard labour, punishment, marriage, amusement of the rich, duties in the service of gods and goddesses, etc., these acts of scrutiny now in the age of responsible democracy became public because they served a public purpose – that of identifying the criminal, the enemy of the public. The criminal had to be found quickly, investigated, interrogated, and sentenced – all in an objective and public way. The body was to be carefully described if the criminal had to be punished at all. And the need for the witness to carefully describe the criminal was partly because people were not what they seemed; in this oriental land the person facing the authorities was not how he appeared at first glance, men passed as women, women as men. They were magicians and sorcerers. The trans-sexuality of the holy men always baffled the colonial watcher.[2] And thus, the right body had to be discovered, that is to say the right identity had to be found, and piercing the milieu of concealment the rules of evidence would discover the 'real' person below the surface. All these made bodies, appearances and identities were problematic for the 19th-century colonial society. Detecting the crime and the criminal

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was important because the technology of detection was a miniaturised way of knowing the 'true' bodies of individuals or groups, as if that could lead to the unravelling of the mystery of the 'true' mind of the criminal individual and the group, namely, what kind of bodies harboured what kind of minds and what kind of minds called for what kind of bodily practices – and if such bodies were made visible, described and represented, the process of judgement had become public.

Therefore in the early 20th century when the government was struggling hard to control and suppress the revolutionary terrorists, it had to refurbish its armoury of evidence-collecting methods. Evidence had to tell the agencies of law and order the identity of the law breaker, and modern law could not free itself from the trap of the identity question, and always had to solve the question in its framing, operation and verdict, as to who could be the breakers, the culprits, their intentions, and given all these what was the gravity of any violation of law? No amount of objectivity could free law from these questions. So we find the colonial officials repeatedly asking, interrogating and examining the biographical background of the terrorist. H.L. Salkeld, a magistrate on special duty, and F.C. Daly, the Deputy Inspector General, Special Branch, Bengal, wrote on the procedure of investigation and reporting in exhaustive detail so that the government could break through the veil of secrecy and know who the deep dissenters were. Therefore each year the colonial administration produced history sheets of persons and organisations, detailed their caste identities, behavioural proclivities, and the dress, the look, the handwriting style, the manner of speaking … So we have in the government files the photograph of a baboo, a coolie, a terrorist-baboo, a raider (Samanta, 1995, I: 353), and then in a move, as if the government wanted to resolve once and for all its own sense of enigma as to who the terrorist could be, we find the government devoting pages to a terrorist's love of death. Thus for instance, the government wanted to know why Charu Chandra Bose, who was hanged in 1909 and had a lame hand, had joined the movement, why just a few days before he carried out the fateful act of assassinating the public prosecutor in the Alipur Conspiracy case he had gone to a studio to photograph himself; why he wanted to meet his relatives before his death, why he, a meek and silent person, had done 'this', and then possibly to solve once and for all the enigma: 'About mid-day today (16 February 1909) Superintendent Ellis accompanied by Mr. Percy visited the Alipore Jail, took three photos of the prisoner – one in his ordinary clothes, front – one in same, side and the third in his jail jangia (underclothes) bare body exposing his arms' (Samanta, 1995, IV: 1391–1397).

If proving the identity of the law-breaker was one of the ways in which evidence would be marshalled, this had two implications – first the proof that the particular person accused of breaking the law had broken the law, and second that this particular person had a record of breaking the law, and therefore was likely to break the law this time also, particularly if evidence circumstantially suggested so. At times quantum of punishment depended on that record. Thus a police station had to maintain *Village Crime Note Books* (VCNB), made of entries by the *darogas*, which would thus be instrumental in producing history sheets of the criminals and suspected criminals. Identity would be produced in this way. These VCNBs were instrumental in producing identities of villages, tribes, groups and persons, and acted as a crucial register of administrative memory (Samaddar 1998; Das and Chattopadhyay 1990). Again, *Louhakapat*, the multi-volume reminiscences of a jail official I referred to earlier, is an excellent testimony of the way criminal identity would be built up. Similarly reminiscences of the *daroga*s tell us of a similar process.[3]

In all these the key was the process of inspection; a good inspection led to good evidence, and therefore the act of crime and the criminal had to be watched closely – an act that would often involve relationships of unequal power. In the court therefore the criminal had to be present – the first step towards making the whole thing public. In the past the criminals and the accused were kept away from view for a variety of social and personal reasons, but the imperatives of modern rule ensured that the people were to be deprived of the right to keep their bodies private. For

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solving the riddle of the crime the person subjected to crime or the place or the document associated with the crime had to be equally well investigated; also particular audiences were needed for particular bodily knowledge (thus expert witness had to be summoned). Thus colour, shape, traits, position, speech pattern, diction, hairstyle, time, moment, etc. would become crucial. The ground for evidence collection and formulation was being laid in this way, and soon the physicality of the task of ruling would hinge upon 'the finger' – a part of the body never thought to be of lasting importance for the identification of a particular soul. The fingerprint was the clue to getting an understanding of the criminal self, the criminal's soul.[4]

But since evidence was a matter of inquiry, logic, proof and cross-examination, merely being public was not enough. It was necessary to draw conclusions, infinitely sophisticated and minute, from the fact that the process was *public*. Thus, for instance, the word 'confession' was left undefined in the Evidence Act. A confession was meant to be an admission made at any time by a person charged with a crime stating or suggesting the inference that s/he had committed the crime, while an admission was supposed to be a statement of fact, which waived or dispensed with the production of evidence by conceding that the fact asserted by the opponent was true. An admission could be oral or contained in documents. Although both the concepts appeared similar, a thin line demarcated the two specifically with regard to their evidentiary value, before a court of law. While a confession was a statement by an accused person, sought to be now proved against him in a criminal proceeding to establish the commission of an offence by him/her, an admission related to a transaction and comprised all statements amounting to admissions. A confession if deliberately and voluntarily made was to be accepted as conclusive of the matters confessed. But it was not a conclusive proof of matters admitted and the person admitting was prevented from taking a contradictory stand thereafter. While a confession went against a person making it, an admission could be used on behalf of the person making it under certain circumstances (as mentioned in Section 21 of the Evidence Act). The Act declared in Section 24, 'A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by an inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.' We can notice the liminality of the situation as envisaged in Section 24, or the following sections (up to Section 30). This was probably the reason why the authors of the Act did not provide any illustrations, which otherwise are to be found in numbers elsewhere. In fact we would need an analysis of the relevant case law over the last 125 years to see why the Act required such a fine distinction between admission and confession in the first place.

But what about when the inquiry faced silence from the accused? The law had to anticipate that condition too. Police questioning of the suspect/accused, its legitimacy, and its effectiveness had to be considered, and the right to silence and its consequences had to be deliberated upon – the silence of *Aakrosh*.[5] The law had to consider the situation, namely, the time when the police had questioned a suspect in the course of its investigation and the suspect had failed to disclose a matter that was subsequently relied upon in his or her defence. There was nothing to prevent the police from questioning suspects, and from thereby securing admissions or confessions, which might be admissible in evidence against the accused if the grounds for such admissibility were established. However, a court was not obliged to draw an adverse inference against a suspect, even where it was justified, and it would be open to a court to exclude evidence of what occurred during questioning if it was not satisfied that the accused was fairly treated. A Code of Conduct was subsequently promulgated in terms of the Police Act for situations where, for instance, upon arrest, a suspect was asked to account for objects, substances or marks found on or in the suspect's possession, or where

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upon arrest, the suspect was asked to account for his or her presence at the place where he or she was found. The reflections on silence thus led the law to draw a distinction between admissions (whether by words or by conduct) and confessions in determining the 'threshold' requirements for admissibility. Bearing in mind that an incriminating statement would be admissible only if it was established by the prosecution that the statement was made freely and voluntarily, while the person was in his or her sound and sober senses, and without having been unduly influenced thereto, the Act took the view that criminal procedure must have detailed procedures for defence disclosures, or the summoning of an expert witness, as the case may be, with of course the leave of the court. However there remained circumstances where the prosecution might withhold information because disclosure of the information could lead to the disclosure of the identity of an informer or state secrets; and where there was reason to believe that disclosure of the information would prejudice the course of justice. Law also obliged the presiding officer of the inquiry to inform an accused of the right to silence, of the consequences of remaining silent, and that he or she was not obliged to make any confession or admission, and to ask him or her whether he or she wished to make a statement indicating the basis of the defence. It also obliged the presiding officer to question an accused where the accused failed to disclose the basis of the defence.[6] The law had to consider both eloquence and silence in terms of the requirements of objectivity, that is, evidence.

One can see the evolving nature of the truth game. Wherever and whenever it was a question of finding out the truth (here truth of the crime and the criminal), the game of reason, examination, analysis, and counter-arguments would commence immediately; and it was on the site of evidence that the game would be played. Thus even though the equation of truth and evidence or equating evidence with truth is a more modern thing in terms of morally ruling a society, the elements were all there, only the government had to reorganise with reason the various elements in place in order to bring about the most ruthless yet the most popular form of truth game of our age.

As I have indicated briefly earlier, ruling a society in this way may seem to be laborious, so why was such a laborious process needed, invented and improvised? Laborious process meant inventing constraints, and putting these constraints on passions. The working of these constraints also signified that they might require labour to be put in place, but if these were deep enough they would work as strong buffers to passions. And what better constraint could be in place than the one created by the labour of 'interest', or to be precise labour of 'self-interest'? Self-interest if properly encouraged, instituted and made to work strategically, could moderate society, reduce crimes or at least made them controllable. Thus, not only did submitting to law have its origin in the secret history of self-interest, in the actual legal process of judging a crime the witness would answer truthfully due to enlightened self-interest, or the member of a gang would turn approver because self-interest would motivate him towards being an approver, or the guilty would confess again on a calculation of gain and loss, and the question of motivation would appear again and again in the judgement of evidence produced before the court, because motivation was the sign of self-interest. Self-interest meant calculation, comparison and clarity of outlook; examination of evidence therefore often involves questions regarding calculation, comparison and opinion, because interest as Hume was to remark long ago was formed in many cases by opinions. Thus imperial reformers such as Adam Smith, Bentham, the Mills and others repeatedly stressed the virtue of submitting to order because only through such submission could people be saved from anarchy – the result of unbridled passion. Awareness of self-interest would draw people from passions which were listed as: animosity, enmity, attachment, love, the relish of telling others what to do and thus getting involved and the relish of being told so, excessive pride, megalomania, dejection, vilification, extreme indignation, primordial inertness or restlessness, delight in conflict, hatred, the obsessive desire to break rules, too much identification with the victor or the victims.[7] These led to crimes. Crimes could be controlled and punished by awakening self-interest in society. Self-interest was

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reason, practical reason; but as we have seen, it was also procedurally a ruthless and a deadly game. In arousing self-interest the matter of procedure was found to be important. Reason by the same logic was first of all a matter of appropriate procedure, and this from day one was clear to the makers of the Indian Evidence Act. Act 2 of 1855 and the Select Committee's draft report (1871) took cognisance of the role of procedure in law as distinct from substance. Bentham in England had suggested some years before a division of law between substantive law and adjective law; adjective law included rules of procedure and rules of practice. It was by this that civil and criminal procedure laws were separately made and developed. Evidence was above all a matter of procedure – the procedure of arriving at the truth. The formation of the justice-seeking subject made sense only when the matter of procedure was kept in mind. The particular procedure was like the apparatus that shaped the subject.

In fact, the dilemma before the Select Committee was clear: it wanted to consolidate the elements of an English Law of Evidence for India, but the question was how to achieve that in a situation compounded by the double absence of any law of evidence and the absence of standard practice in courts which followed at least three systems – Hindu, Muslim and the English. Modifications were necessary; these modifications were aimed at gradually introducing a full-scale law of evidence, which would stress individual depositions freeing them from the supposed threads of kinship, coercion and family linkages. Indeed just as preparations dating from 1841 preceded the passage of the Indian Evidence Act, the Act was followed by several amendments also: there were at least 15 occasions of such amendment – 1872, 1887, 1891, 1899, 1919, 1926, 1927, 1934, 1949, 1951, 1953, 1983 and again in 1983. Then of course revisions took place on an entire scale in the form of anti-terrorist legislations such as the TADA (Terrorist and Disruptive Activities Prevention Act, 1986) and POTA (Prevention of Terrorist Activities Act, 2002) where rules of evidence production were completely changed (Singh, 2007). Yet again, some of the amendments were necessitated by the Prevention of Dowry Act. All these amendments show the continuing necessity of tailoring the laws of evidence according to the political and governmental priorities of the State.

The Select Committee had observed long ago (15 July 1871) in taking note of the inadequacy of the earlier efforts to draft a suitable legislation:

> Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil, the object is to ascertain some right of property or of status, or the right of one party, and the liability of the other, to some form of relief.
>
> All rights and liabilities are dependent upon and arise out of facts and facts fall into two classes, those, which can, and those, which cannot be perceived by the senses. Of facts, which can be perceived by the senses, it is superfluous to give examples. Of facts which cannot be perceived by the senses, intentions, fraud, good faith, and knowledge may be given as examples. But each class of facts has, in common, one element, which entitles them to the name of facts – they can be directly perceived either with or without the intervention of the senses. A man can testify to the fact that, at a certain time, he had a certain intention, on the same grounds as that on which he can testify that, at a certain time and place, he saw a particular man. He has, in each case, a present recollection of a past direct perception. Moreover, it is equally necessary to ascertain facts of each class in judicial proceedings and they must in most cases be ascertained in precisely the same way. (cited in Woodroffe and Ali, 2001: 24)

If that is how the heirs of Hume and Bentham were defining facts, and how law was bringing into existence 'facts', what was the other associated category called 'proof'? The Select Committee went on in this significant note:

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> This introduces the question of proof. It is obvious that, whether an alleged fact is a fact in issue, or a collateral fact, the Court can draw no inference from its existence till it believes it to exist; and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to object and nature of the proceedings in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an alibi in favour of A. It may be an admission or a confession of a crime; but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned by the same or similar facts. If for instance, the Court required the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.
>
> … These general considerations appear to us to supply the groundwork for a systematic and complete distribution of the subject as follows:
>
> 1. Preliminary;
> 2. The relevancy of facts to the issue;
> 3. The proof of facts according to their nature by oral, documentary or material evidence;
> 4. The production of evidence; and procedure. (cited in Woodroffe and Ali, 2001: 24)

One can see the strength and dilemma of the entire discourse. On one hand true to the theory of adjective law, the Select Committee tried to erect an independent law of procedure. That was its strength. It wanted to define categories or concepts in their own terms. But the Committee was only too aware of the relational nature of these categories: fact, proof, evidence. Relations between these three categories, relations between the process and the substance, relations of all these with law and power – clearly the later half of the 19th century was laying down the most objective process of domination possible through laying down objective standards of defining the relation between law, facts, and decision. This was how judicial power took shape, it was rational; hence it could reinforce domination with power. This was judicial power at the behest of a State and its governmental task of maintaining the daily order of the society; and at the heart of this particular form of power was the essence of law, legality and objectivity.

But to be objective required suitable technologies. We have mentioned photography and the development of print culture as two instances. We can see in this context something more relating to appropriate technology. In fact the Evidence Act stands at the intersection of developments such as the development of criminal procedure, various anthropometric measurement techniques which would soon include fingerprinting, evolution of the colonial systems of classification, machineries of law and order, hardening rules of criminality, the advent of photography and print techniques. These gave form to what Vinay Lal calls the 'epistemological imperatives' of a state, in this case the colonial state (Lal, 1995). After the conquest of territories, faced with the necessity of settling them and endowing them with proper administration, meaning the introduction of a regime of law and order, the task was to know the Indians well. But since every Indian could not be known, and that was scarcely necessary given the fact that the 'Indians lived in communities only', the task was actually to know each and every collective as much as possible. That was how anthropometry and anthropology came into an alliance for producing knowledge of the group, and by virtue of that the criminal group, and by a short route the criminal mind. The emergence of fingerprinting in India was marked by this context. Vinay Lal mentions in this context the crucial role of Edward Henry appointed in 1901 as the Inspector-General of Police for the Lower Provinces. Simon Cole (2001,

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2004) has noted that the impetus behind the development of biometric criminal identification technologies in the late 19th century was complex, including such factors as rapid urbanization; the increasing anonymity of urban life; and the dissolving of local networks of familiarity in which individuals were 'known' by their neighbours; growing migration of individuals from city to city, country to country and continent to continent; and the necessity of governing imperial possessions populated by large numbers of people whom it was necessary to monitor, control and identify. Cole also details how, in the 1880s, two new technologies emerged which promised to solve the problem of aliases by linking criminal records, not to names, but to some representation of the criminal's body. Such a system required that criminal records be filed according to some bodily property rather than by name. One of these systems, fingerprinting, is familiar to us today. The other, anthropometry – the measurement of the human body – has largely been forgotten. The two systems battled for dominance until well into the 1920s. Today, of course, anthropometric identification, with its meticulous skull measurements and attention to body size, evokes the pseudo-sciences of phrenology, craniometry and their contributions to racist science. Fingerprinting and anthropometry – both were closely tied to biologically determinist efforts to find bodily markers of character traits like intelligence and criminality.

But lest we should think that this was mainly a colonial feature only, we can for a moment note this tradition continuing until this day. In 2002 the government set up the Malimath committee, headed by a former High Court judge, with a broad mandate to 'examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence', and suggest amendments. The committee's questionnaire asked: (a) Should we not dispense with proof of guilt beyond reasonable doubt? (b) Should we not abolish the rights of the accused to silence and thus against self-incrimination?

In this, we can see how interpretation has acted as the great tool by which the right to silence has been considerably broken down. Thus, a confession outside the court either to a police officer under POTA or the magistrate is admissible. The accused is expected to explain every adverse circumstance to the Court at the conclusion of evidence with the Court having the power and the jurisdiction to draw an adverse inference while formally 'appreciating' the silence of the accused on the evidence against him. Breaking the silence of the accused therefore has been accompanied by a strategy of silencing the defence. There is the truth, and if discovery of truth has obstacles that have to be removed, there is the other side also, namely that truth must have its victims. Therefore the accused though given the formal right of silence before the executive cannot be allowed to remain silent before the judiciary, and that silence must be broken. This is a system which created legends, and legends out of lawyers. The crime and the criminal, the litigant and his cause, recede into the background and the lawyer occupies centre-stage (Kannabiran, 2003). Truth, fearless speech, inquiry and silence – all become subordinate to the protocol of justice, which is the other name of the power of procedure, power that is inherent in a procedure. The Evidence Act organises the relation between truth, evidence and punishment in a particular way, and therefore each time the Act has changed due to amendment or case law, the relation has also been reorganised.

Kehar Singh as we know was hanged in the Indira Gandhi murder case. Many held that while he was not present at the scene of murder and there was no direct evidence of his association with the murder, his name was dragged into the case in bizarre ways, because his name was not mentioned as a co-conspirator and apparently the only fact was that the conspirators had met at his house. The punishment in the form of death penalty was an ironic commentary on the principle of proportionality.[8] Yet more than any other case the trial of Kehar Singh showed how the truth constituted its own relation with evidence and punishment. Here not only the 'particular' evidence (of the conspiracy) makes Kehar Singh a criminal – an object of punishment – it also makes the matter of studying the particular mode of the 'objectivation' of the subject an essential task, meaning thereby

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that we study the methods and techniques used in a particular institutional context to categorise an individual or a group to shape, direct, modify their way of conducting themselves, to impose ends on their inaction or fit it into overall strategies … This is what government is, and it was in this way the Evidence Act aimed to control the population suspected of committing crimes. The Evidence Act was one of the earliest instances in the country of the phenomenon of what Foucault was later famously to call 'governmentality'.[9]

And this is exactly what plagued the minds of early legislators and the jurists in colonial India, namely how to govern subjects in terms of laws and processes, which would make governable categories out of those subjects. Procedure was therefore important, and the significance of procedure was not lost upon the pragmatic colonial rulers. Truth was nothing if there was a lack of procedure, and procedure had to be marked by evidence, because evidence signalled fairness. This was why, looking back on the amazing range of issues covered in the Act (namely, fact, evidence, relevance, strict proof, presumption, inference, conclusive proof, admissibility, explanation, omission, commission, waiver, dissimilar fact, motive, preparation, subsequent conduct, conduct, conspiracy, common design, facts showing state of mind and body, negligence, facts bearing on the question whether the act was accidental or intentional, hearsay and opinion, inducement, threat, promise, confession otherwise relevant not to become irrelevant because of promise of secrecy…), the early colonial jurists in India commented: 'Possibly no enactment in such few words brought so much assistance to the administration of justice' (Woodroffe and Ali, 2001: 112–113).

Thus while one needed a definition in legal procedure, one must understand that the definition also required concrete situation-wise understanding, coupled with a certain transcendental reasoning. Thus the authors of the famous law book, Sir John Woodroffe and Syed Amir Ali, themselves two of the most famous jurists in the second half of 19th-century India, followed the even more famous jurist, Sir James Fitzjames Stephen who had almost single-handedly drafted the Evidence Act, in classifying facts: (a) any part of the fact alleged or any fact implied by the fact alleged, (b) any cause of the fact, (c) any effect of the fact, and (d) any fact having a common cause with the fact in issue (Woodroffe and Ali, 2001: 117). And if this was a fact, then, what was a relevant fact? What are its rules? We can note the way ideology was working in the framing of rules. They said:

> Rule 1: No fact is relevant which does not make the existence of a fact in issue more likely or unlikely.
> Rule 2: Facts which are a cause of a fact in issue, or are an effect, or which show the absence of what might be expected as an effect of fact in issue, or which are effects of a cause of a fact in issue.
> Rule 3: Facts, which affirm or deny the relevancy of facts, alleged to be relevant under Rule 1 are relevant.
> Rule 4: Facts relevant to relevant facts are relevant.

We must not think however that colonial rule looked to evidence and the Act as Adam Smith's invisible hand guiding the crime control world from behind, and steering society to rationality. Evidence production and proof took place in a real world of bloody conflicts and property wars; and this was both a result of the social struggles (in England law, evidence and the widening of the notion and the institution of jury were the primary means by which the educated class wanted to capture the juridical world; see Hay, 1975) and the efforts of successive governments in India to govern the society and control crime by newer means. Nineteenth-century jurists' ideas of what knowledge meant and their incorporation in the Evidence Act and the commentaries implied three characteristics: (a) the idea of scientific evidence developed through a host of cases in the colonial

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time, and writings of jurists such as Stephen's own writings; (b) it replaced an autopsy of heart with autopsy of mind; and (c) it erected a line or chain of logically explainable successive steps of a 'criminal' doing the act. Mind controls passion, law detects the mind, and justice lays down the way in which an errant mind is to be punished. For all these the criminal had to be monitored and investigated closely. His actions, intensely stark and physical, had to be known; only thus would his mind be knowable. Thus evidence had to be there as to where he had gone, how he slept, how he ran, how he attacked, what was the physical distance between him and the victim, whom he had talked with prior to and after the act … The evidence was the real thing, it was not there; it had to be *produced*.

The science of evidence emerged in a delinquent milieu in this way as the 'efficient and rational' way of governing society. It was a tool to understand the reality about crime, criminology, criminality, trial and punishment. The tool to control the extremes had been found out. It now depended on a range of performance aimed at proving truth, the virtue of restraint and the futility of passion as inspiration against law. We shall now speak of the performative element.

II

Ideology of course played an important role in projecting the Evidence Act as a narrative and imagery of reason. David Ray Papke (2001) has shown how cinema has glorified over the years lawyers, courtroom trials and the rule of law in general, thereby depicting a cinematic ideology. But to be effective in that, law, in this case the Evidence Act, therefore had to turn itself into an enclave, a self-sufficient domain – physical of course, but more importantly, a virtual-emotional domain defined by certain boundaries and rules of entrance and exit. This proved to be central to the operation of the law that would normalise the emotional dimensions of the practices of truth telling.[10] Legal ethics, legal education and other issues of legal culture – indeed the manifold practice of law had to appear as self-sufficient in terms of projecting reason, and making the element of passion as virtual. First of all, truth telling in the projection of law through the Evidence Act became an ethical act of the person giving evidence; similarly it was also the signature of the event now being turned into a matter of adjudication, in which deterrence for untruth formed a whole strategy in service of law. A negative power of deterrence combined with the positive power of truth to make what was an incident (of crime, illegal possession, etc.) into an event of truth. Adjudication based on rational argument was a prophylactic in a society used to cunning and negotiations. The strategy was to be directed not only at past events, but to future, a preventive future. The irony in this strategy was and still is to the effect that in internalising all the dualities around truth and untruth the process of justice was emptying itself of any political substance – and going so far as to turn into its opposite, where law would be termed as 'blind' (in Hindi cinema it would be called *andha kanoon*, blind justice). Therefore in the popular lore on the justice-seeking subject, the subject hereafter will be first going to the court for justice, then will come out of the court in frustration, and will take up the flag of instant justice; or in a variant of the theme will produce new evidence by extra-legal means to force the court to recognise where justice lay.

The retrospective interrogation of an event as we know is essentially carried out with the help of information submitted as evidence. Just as the discipline of political economy was formed as a machine to produce value, the signs of wealth, but not wealth itself, so the whole system of deposing information was designed as an immense machine to produce the event (to be adjudicated) as a sign of truth and therefore justice, as an exchangeable value to be traded in the universal market of spectacle and catastrophe – in short, to produce a process, a non-event. The abstraction of information is here thus the same as abstraction of the economy.

In the operation of the Evidence Act, the virtuality of the event in question, thus, is not a metaphor, but a literal passage from reality into fiction, from an event into a virtual process of truth

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verification – the process in this case being defined in legal terms. What is then the reality principle in this particular operation of law? We may say, reality develops exponentially through evidence, examination, and cross-examination, it will have no principle any more; it will have devoured its own utopia to become a cog in the operation of truth. In short it will operate beyond its own end. As one looks at the operation of the truth verification procedure in the court and as prescribed by the Act, one can almost visualise a script, which equipped with a legal lens would be able to examine the role of the legal process, of the lawyers, judges, jury or a specific doctrine. One can also visualise the operation of the procedure whereby a 'norm' would be established only to prove that the said 'norm' has been violated and thus violation deserves punishment. The classic instance will be when 'norms' are made and then harmonised in practices (two such instances being the harmonisation of different practices – legal and administrative – with regard to protection, or laws on property). We can also note how supplementary arguments are made, or the norms on what constitutes a 'fair trial', or a 'legal personality' (for instance, when does a group become a legal personality?). The question remains un-answered: What makes a certain behavior or a certain resolution a norm? Why do we think that legal insights are sacrosanct in understanding norms, or what makes legal norms on the basis of which the Evidence Act built itself?[11] Finally, we can recall the entire process of trial, examination and cross-examination of evidences, culminating in grand judgment, whereby a spectacle is produced, and can ask: What is the relationship between a norm and a spectacle, between performance and legal norms? And, lastly, what is the relation between truth and rhetoric?

As a general answer to all these questions we can of course say that the Evidence Act problematises these relationships because of its nature as a dual site of rational argumentation and performance of roles assigned by truth procedure, that contradictorily also admits passion, emotion, possibilities of ambiguity, and contingency.

I think the first problem here is with the structural origin of the Evidence Act. The Act was based on the divide between the white colonial class and the rest of the people, brown or black in colour. This racial division of the subjects of law made some immune from the procedure of rule of law and civil jurisdiction of law, and made impunity or semi-impunity an integral part of judicial culture, which still thrives today in independent India (Kolsky, 2010). On the other hand this situation has another structural division in it. This was the division between on the one hand rationalists and rational imperial administrators like Bentham, Macaulay, Curzon, etc. and on the other hand the powerful white society consisting of sections like Army generals, colonels, soldiers, the white planters, ship owners and managers, police officials, and mill owners and their assistants. If the former argued that imperial administration could survive only on the basis of equality before law, and therefore the promise of colonial justice must include promise of equality before the eyes of the law, the latter argued that any extension of civil jurisdiction over the Whites would spell doom for colonial society, and therefore the practice of colonial power required immunity for Whites. Both these divisions provided elements of drama, protest, nationalist outrage. Countless films would be made playing on these divisions, which in turn would become an abiding part of our judicial heritage. Kolsky speaks of 'judicial scandals' that would become perfect material for narratives of various kinds. In some situations one case would provide an entire dramatic narrative of several sequences of protests, actions, violence, rumors, and at times open lawlessness; in other cases these divisions would become the standard material for radical illegalities.

The second problem is around the compulsory presence of rhetoric in the judicial process around evidence. Rhetoric began if we recall not with the task of finding out the truth, but with professing and canvassing what it holds to be true. Rhetoric was therefore alien to a philosophy of truth. This was what the *Mahabharata* had taught us, truth free from passion and argumentative skill (Samaddar, 2010: 3–38). Yet from Cicero in Rome to Nehru and other leaders in India in the nationalist time – persons with legal background had employed rhetoric as argumentative

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technique in senates, court rooms, legislatures, public assemblies, manifestos and writings of tracts. While reason played some role, a different kind of relation with truth was present in the deployment of rhetoric. This is once again one factor why the operation of the Evidence Act appears as a screenplay where truth is not being established (unless it is a crime and suspense story) but being propagated in different ways. The rear windows are always present there – for the director to frame, for the actors in the judicial process to peep in. The truth procedure in the judicial process is not therefore free speech or frank speech, but achieving a position of truth telling through certain procedures or modes, which we can call rhetoric. The Evidence Act presupposed that with human relations to truth being complex and multifarious, reason would have to work its way to reach truth. Indeed that procedure of working through – the procedural activity – was the truth. Speech activity around evidence thus always assumed dissociation between belief and truth. The Evidence Act was lodged in this kind of paradoxical epistemic framework. There would be no individual risk here in spelling out the truth, and in any case the process guaranteed safety of the person deposing before the court.

We may ask, in lieu of the normal question like how law is reflected in cinema, the opposite one, namely, why indeed law is structured (and I am speaking here of the Evidence Act) in a cinematic way, by which I mean all the features mentioned earlier, such as responsibility, burden of proof, the focus on the body, norm, emphasis on live deposition, supposed conduct of the accused, the deployment of rhetoric in speech activity, an event being reduced to virtuality, the ideological nature of the process, the value of expert advice and deposition, the role of passion and other dramatic elements in the process that appears as a script, the particular way in which truth is produced, which is not strictly legal in its original nature but presupposes the presence of several non-legal elements, etc.? I think to find that answer we have to interrogate the nature of what is termed ‘judicial truth’.

Countless cinema shots depict vividly the problem of confession as a form of judicial truth telling. In fact, judicial truth telling is an activity with a specific nature, which problematises the issue of evidence (of truth) by agreeing to take into consideration all that can spoil truth, that is the untruths, and is prepared to engage in confrontation with these possible untruths. The problematisation of truth thus happens through staging an encounter between possible truths and various impurities and untruths present in the world of truth. This kind of problematisation is the mark of modern rationality, which prides itself on practical reason. The 19th century was not the time for a theory of legal pluralism, and imperial reason dictated that the legal system to be introduced should be established on the basis of a particular notion of truth and reality. So the second problem posed by the Evidence Act and requiring performance was around the relation between truth telling and evidence.

Now to my third and last point: the role of special knowledge called ‘expertise’ in deciphering truth, to the extent that truth discovery became less an act of speaking and arguing, but more a process of marshalling expert evidence on the basis of techniques like fingerprinting, DNA analysis, medical knowledge, psychological and behavioral analysis, deployment of other branches of forensic sciences, etc.

Yet this is not enough to understand why the knowledge produced through a process of legal examination of what is called ‘the fact of the matter’ would have such a performative element inbuilt to it. One may ask in this respect: Why the close similarity between legal truth and what can be called performative truth, let us say ‘cinematic truth’? Partha Chatterjee (2002: 237–257) in his introduction to the fascinating account of the case of imposture speaks of the analogy of the legal procedure and the procedure of historical examination of a matter in question, the case being one of the most extraordinary legal cases in Indian history, and says that the narrative method of recounting has much to offer us as distinct from the analytic. This is true, and the *Princely Impostor* is a superb demonstration of the art of narrative irrespective of the legal resolution of the issue of

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identity of the supposed impostor, the half-naked and ash-smeared sannyasi, the ascetic, as none other than the Prince (the Second Kumar) of Bhawal – a man believed to have died twelve years earlier, at the age of twenty-six, before the ascetic has appeared claiming the identity of the Prince. Chatterjee's narrative history gives us the story of a courtroom drama replete with accounts of sexual debauchery, family intrigue and squandered wealth. He presents us with the testimonies along with the resultant twists and turns in the account to finally tell us that notwithstanding the final legal decision there is no final proof of identity – particularly against the background of the dynamics of a western legal system being introduced into an alien social and cultural framework. In fact he argues convincingly that judicial process had little to do with the notion of 'fairness', and judicial process in this case was actually a complex negotiation between competing notions of truth. Thus the procedures of law and historiography can be compared; both need procedures for proof, which are not completely objective, but are also not arbitrary. The point however remains, namely that only with a narrative procedure could the similarity be demonstrated, where law would appear like history. That is the point: Why does a scientific procedure such as examination of evidence become subjected to a narrative style? This is where the performative element comes in. Through the courtroom procedure it becomes a drama, a spectacle – to become a matter of public interest, scandal, gossip, rumour, etc. The fact that a legal dispute could turn out to be a matter of history ensured that it would be amenable to the procedure of a narrative – the final commentary on Bentham's theory of adjective law.

In Vijay Tendukar's play, *Silence! The Court is in Session* (in the original Marathi *Shantata! Court Chalu Aahe*, and first staged in 1967) we find a perfect stage of this double displacement, when in the play another play, a mock court, is to be staged. The play ends with the play – the mock court – within the play also ending, but not before extracting as sacrifice the woman by the name Leela Benare, accused of killing her unborn child, produced out of her affair/s with amorous male lovers who would subsequently deny any close relation with her. Evidences of the 'free nature' of the woman are brought out, composed, verified, and the aporia in which the judicial system finds itself when faced with a feminist interrogation of power, marks the play. But we are not allowed to forget, all this is in the form of play, a mock court, and a play within a play, and therefore the chiaroscuro of life and death, evidence and opinion, authority of the judge and the persuasive power of the judicial style, and sentiment and logic. The audience and the spectators listen to her passively as the world listens passively to the power of the verdict of the judge. Evidence is the sword by which this domination is achieved.[12] Or, we can also say that evidence is the script carrying law's unconscious. Hence its double capacity – to be the site of reason as well as the performative site of the unconscious.

In this way law would combine the normative and the performative – science of inquiry and the unpredictable script of outcome, procedure and the spectacle built around live deposition and the hermeneutic power of the image, rational considerations and emotion, virtuality and the event, serious business in the court and the element of drama. We may henceforth give the injunction, at the cost of little exaggeration, to see what law is go to the cinema; to see what cinema is go to the court.

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Notes

1. Illustration for Section 101, Chapter 6, Part 3 titled 'Production and Effect of Evidence' of the Indian Evidence Act 1872.
2. On magicians and their hypnotic skill, Sumanta Banerjee (2011) gives us an account of their impact on 19th-century British society on their arrival in England.

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3. Sikander Ali, a Bengal police official, in his memoir Amar Pulish Jiban (Dhaka: Globe Library, nd; but the account suggests that the chronicle may be have been compiled around the 1940s) speaks of the early decades of the 20th century in Bengal when a daroga would identify a criminal as 'habitual' or not with the help of these crime notebooks maintained in the thana; and tells of incidents when for instance a person convicted of a very minor offence entered the jail as a 'petty thief', would become 'associated' with dacoit gangs in jail, and then on release would get involved in the activities of the gang outside, and would re-enter the jail later as a 'dacoit' – the transition in identity being again helped by direct evidence, but with the help of the notebooks maintained by the daroga. Construction of evidence was dependant to a great extent on these notebooks and inspection procedure, apart from diaries and the FIRs (pp. 82–83).
4. For a different account of exhibiting the bodily features of criminals, see Morgan and Rushton (2005).
5. It is a famous Hindi film (1980) in which the accused does not speak or reply to interrogations. There were subsequently other films with this name. Based on an incident reported on page 7 of a local newspaper, the film was a scathing commentary on the trial system and the victimisation of the underprivileged by the powerful.
6. It is interesting to see how the Indian Evidence Act was a trendsetter in this respect. As late as 2002 the South African Law and Justice Ministry was considering proposals along similar lines to an Act passed more than a century ago. See for discussions there, http://www.law.wits.ac.za/salc/salc.html.
7. Stephen Holmes (1995: 57–58) lists these on a consideration of words in circulation in the 17th and 18th centuries – words denoting the antonyms of self-interest as defined by David Hume and Adam Smith.
8. On the details of the Kehar Singh case, see indiankanoon.org/doc/667073/.
9. Foucault's exact words were: 'We can recall these power relations characterize the manner in which men are "governed" by one another; and their analysis shows how, through certain forms of "government", of madmen, sick people, criminals and so on, the mad, the sick, the delinquent subject is objectified. So an analysis of this kind implies not that the abuse of this or that power has created madmen, sick people, or criminals where there was nothing, but that the various and particular forms of "government" of individuals were determinant in the different modes of objectivation of the subject.' This text was first written by Foucault as a retrospective view about his work for the introduction to his book History of Sexuality, it was then given by Foucault, under the pseudonym 'Maurice Florence', as the article for the entry 'Foucault' in Dictionnaire des philosophes (1984: 942–944).
10. On the relevance of the idea of enclave to the operation of law, see Almog and Reichman (2004).
11. On the question of norms that produce and mark law, and make the legal norms easy to be reproduced in cinema, see Reichman (2007).
12. In the play a group of teachers plan to stage a play in a village. It turns out that one of the members of the cast does not show up. A local stagehand is asked to replace him and a rehearsal is arranged and a mock trial is staged to make him understand the court procedure. A mock charge of infanticide is lodged against Leela Benare, a female member of the cast. Then the pretended play suddenly turns into a grim game, when one witness says that Benare had killed her illegitimate child by Professor Damle, the missing member of the cast. The charges are leveled in the absence of Damle. Benare is thrown into the dock and remains there. She tries to extricate herself, but cannot. Witness after witness, charge upon charge is heaped on her. Benare tries to escape the court but finds all doors automatically bolted from outside. She is trapped, she cannot escape. She is dragged into the process, and then she dies. The formal charge is of infanticide. The informal charge, as one witness says, 'How could you remain unmarried till the age of thirty-four?'

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