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Unfairly Prejudicial Evidence: No Law in Indian Jurisdiction

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ABSTRACT

Being the root, Courts always use common law as a source to fulfill the gaps in the Indian Legal system. The same has been done in the case of unfairly prejudicial evidence against any accused. The courts are using the foreign tests to conclude the prejudice level of the evidence in the Indian system, completely ignoring the fact that the use of common law in the Indian system is itself prejudicial due to the presence of several differences in the same. The same has been highlighted in this paper taking into account the use of a balancing test to determine the probative values of evidence. Another pfenning test has also been analysed according to the Indian legal system, and a conclusion has been drawn on the suitability between these two tests.

Keywords: *Balancing Test, Pfenning test, prejudicial, substantive law, common law, Law commission.*

I. INTRODUCTION

Admissibility of evidence is the largest field of the issue in the law of evidence. There are many question marks on the admissibility of the evidence, and the prejudicial nature of the evidence is one of them. There are different reasons to bar the unfair prejudicial evidence, but all are leading to the same cause. The main cause behind the question mark of prejudicial evidence is it's being unfair to the accused as the evidence will create biasness or will influence the mind of the justice giver.

The paper has been designed in an essay format. Firstly, there is a small part briefly describing the law in the field and the working of different jurisdictions on the unfairly prejudicial evidence. Secondly, there is a section of tests that are being used to judge the unfairly prejudicial evidence. An analysis has been drawn to the ongoing balancing test and an unfamiliar Pfenning test with respect to Indian jurisdiction and has linked the tests to the working of the Indian legal system. Thirdly and lastly, a brief analysis is there on the 'discretion' that a judge has in the field of excluding unfairly prejudicial evidence. Two

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different concept categories are placed and then commented on with respect to Indian jurisdiction.

The main point which is argued in the whole paper is - Having a substantive law counting discretion to the court and precedents referring to common law tests does not suffice the fairness to the accused in the field of unfairly prejudicial evidence.

The admissibility of the evidence is the matter of the court to decide, and hence where there is no specific substantive law for the admissibility of evidence, the judge has the discretion on the same, following any rules designed for the discretion itself or any principle in the field. Different jurisdictions have different statutory rules which are taking this into account, and rules work on different principles. The term 'prejudicial' before 'evidence' is not the problem as rightly viewed by the courts that virtually any evidence will either be prejudicial or will not matter in court.[2] The problem comes when the prejudicial evidence is acting unfair to the accused. There are jurisdictions that contain rules explicitly barring unfairly prejudicial evidence, like the Federal act.[3] There are jurisdictions that do not have an explicit written rule but have the provisions or wide principles incorporated in the statute itself, which can be used in excluding the unfairly prejudicial evidence like the Singapore system of 'interest of justice'.[4] However, the definition of 'unfairly prejudice' or 'probative' has not been defined in any of these types, but scholars have tried to do so.[5] Some may put India in the second type taking the view of some provisions from the Indian Evidence Act,[6] but it will not suffice the conditions of the second type. In India, the rule to exclude evidence on being its unfair prejudice to accused comes from the precedents and not from the statute. Indian courts have termed the whole concept of not admitting the evidence on the ground of its being unfair to the accused as 'caution.[7] The Law Commission has also taken the exclusion of unfairly prejudicial evidence while proposing amendments to the Evidence act.[8] But the proposals made were the addition of substantive law to exclude evidence if the sane is unfairly prejudicial to the accused and has not commented on the procedures of exercising the powers under that substantive law.

The question of exclusion of unfairly prejudicial evidence only comes when the evidence is otherwise admissible under the usual laws of the country. Merely having a certain substantive

[2] Mikva M, "An Indelicate Balance: Rule 403 of the Federal Rules of Evidence" (2003) 30 Litigation 36 <https://www.jstor.org/stable/29760393> accessed August 24, 2021
[3] Rule 403, Federal Rules of Evidence
[4] Section 32, 47, Singapore Evidence Act 1893
[5] Andrew K Dolan, 'Rule 403: The Prejudice Rule in Evidence' (1976) 49 S Cal L Rev 220
[6] Section 54, Indian Evidence Act, 1872
[7] R. M. Malkani vs State Of Maharashtra AIR 1973 SC 157
[8] Ministry of Law, Review of The Indian Evidence Act, 1872 (Law Com 185, 2003)

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law in this field cannot suffice as the judge have to use certain principles and have to exercise discretion to exclude evidence. These two concepts of how one should exercise discretion and on what grounds one should judge the admissibility of the evidence being it unfairly prejudicial, are something that must be additions to that substantive law. The answers to these two questions have been given differently in different jurisdictions and hence, are different because of the different needs of jurisdictions.

II. TEST/PRINCIPLE TO DETERMINE THE EXCLUSION OF UNFAIRLY PREJUDICIAL EVIDENCE

The discretion on the admissibility of evidence in case it's being prejudicial to the accused is being executed by using the balancing test in England. This test mainly took its birth in the R v. Christie[9] case, where the court has used the comparison between the probative value of evidence and its prejudicial effect. The concept is based on which part contains more weight, the probative value of evidence (Logically helping to reach the judgment) or its unfair prejudicial effect (unfair influence on the justice giver) on the accused. In India, however, there is no law regarding the use of such a test, but there are various instances of Indian courts using the same.[10] But due to the lack of any law in the field, the courts are not bound to use this test but have recognized the discretion over the issue of unfairly prejudicial evidence.[11] This way, the Indian system is providing another discretion to the courts on the use of the balancing test itself. As it is not mandatory to solve the dilemma using a balancing test, and hence court can directly exclude or include the unfairly prejudicial evidence without using the same test. Moreover, this is a problem lies in the balancing test itself. As the probative value and the prejudicial nature have not been defined anywhere but a judge is using the test hence the problem arises when the judge is unable to determine the value, and it is not possible to weigh the two evidences in the weight boxes. The case of *Law Society of Singapore v Tan Guat Neo Phyllis*[12] is an excellent example of the same where the court has got a problem of being unable to take out the probative and prejudicial value of the evidence and therefore were of the view that there are cases where the law cannot be used. Hence this test mandates to mark the prejudicial and probative values and then to weigh them.[13]

Unlike the jury system, in the Indian system, there is a trial judge who will use the balancing

[9] 1914] AC 545 at 559.
[10] Ram Bihari Yadav v State Of Bihar & Ors AIR 1998 SC 1850
[11] R. M. Malkani vs State Of Maharashtra AIR 1973 SC 157
[12] Law Society of Singapore v Tan Guat Neo Phyllis [2007] SGHC 207
[13] Jeffrey Pinsler, Admissibility and the Discretion to Exclude Evidence (2013) 25 SAcLJ 215

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test and then later will lay out the judgment. The judges in this system are well trained in their field, and the bad character/nature of the evidence does not necessarily mean that the judge is going to get influence by the same. Therefore the judge does not need to draw a comparison between probative and prejudicial value over every piece of evidence at the time of their admissibility; they can draw emphasis or can assign appropriate weight to any evidence before making a judgment call.[14]

In addition, because of the usual tendency of the Indian courts and the law commission to refer to common law while filling the gaps of the Indian system, sometimes the fulfillment of jurisdiction needs lack behind. There is another test that prevailed in Australia, known as Hoch/Pfenning test, which originated from the cases *Hoch v The Queen*[15] and *Pfenning v The Queen,*[16] which worked on the 'no rational explanation' test. This test has been overruled by the commission of Australia on the ground that the test excludes evidence that should be left to the consideration of the jury. However, considering the no jury system in India and a single-step system, this test can also be taken into account. There is also another point strengthening the point of the relevance of the Pfenning test in the Indian judiciary system, which comes from the famous case of *R v Ellis.*[17] While applying emphasis on the Pfenning test, the court has opined that the trial judge must have to apply the same test as the jury would have applied on the admissibility of particular propensity evidence and have to ask whether a rational view about the evidence exists that is consistent with the guiltlessness of accused. The special procedure mentioned here is the usual procedure in the Indian system and hence must be taken into account. Moreover, the scholars also defines the term 'prejudicial effect' as an irrational response or unjustified by logical reasoning[18] or persuading the justice giver by other than the logical force[19] and the 'probate value' as a logically or rationally probative[20] which links them to the Pfenning test approach in the field of prejudicial evidence.

If we compare the way of these two tests, then the way of balancing test is a bit longer than the Pfenning test. The main question inside the court is whether the evidence is admissible or not. The Pfenning test answers the question by judging the evidence according to 'no national

[14] Chen Siyuan, The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction: Singapore (2013) 6 NUJS L Rev 361
[15] (1988) 165 CLR 292.
[16] (1995) 182 CLR 461.
[17] R v Ellis (2003) 58 NSWLR 700,
[18] Jeffrey Pinsler, Admissibility and the Discretion to Exclude Evidence (2013) 25 SAcLJ 215
[19] Colin Taper, 'Proof and Prejudice' in E Campbell and L Waller (eds), Well and Truly Tried (Law Book Co., 1982) 204
[20] Chen Siyuan, The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction: Singapore (2013) 6 NUJS L Rev 361

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explanation,' which involves the application directly and only on evidence and its rationale. Whereas in the balancing test, the answer to the question involves two steps – first to find the probative and prejudicial value, which is, however, a direct application on the evidence but the second step, i.e., to make a comparison between these two values is not a direct application. Hence Pfenning's approach seems a little simpler approach compare to the balance test.

III. DISCRETION OF THE JUDGE

There can be two different grounds to exercise discretion in the case of unfairly prejudicial evidence – In the first scenario, when the evidence is admissible and held to be relevant, the trial judge may exclude the same on the ground that the prejudicial tendency outweighs its probative value in the eyes of him/her. In the second case, the ground for the exclusion of the evidence would be that the reception of the same would operate unfairly with respect to the accused. These two grounds seem to have similar outcomes but are different grounds to exercise discretion.[21]

This distinction has also been touched by the Law Commission of India in the field of illegally procured evidence[22] but has not been looking in the field of unfairly prejudicial to the accused. The difference in the above two formulations can be traced from the cases in England. In the case of *Kuruma v The Queen*,[23] the court has opined that if the strict admissibility of the evidence is operating unfairly against the accused, then the court always has the discretion to exclude the same. But in the case of *R V. Payne*,[24] the court has ruled according to the first formulation mentioned above and viewed it as a classical duty of the trial judge that evidence having high prejudicial value and little probative value should not affect the mind of the jury. The Indian courts are using the *Kurma*[25]case in the field of unfairly prejudicial evidence, which indicates the 'fairness to accused' approach, but another approach has not been seen in the Indian judgments.

The difference in these two grounds comes on the basis of the room these have to exclude the evidence. The first approach is more inclined toward the influence on the judge and the second approach is more towards the fairness to the accused. The whole discretion is given to have the fairness procedures for the accused, and hence the second ground to the discretion should be

[21] Livesey B, "Judicial Discretion to Exclude Prejudicial Evidence" (1968) 26 The Cambridge Law Journal 291 <https://www.jstor.org/stable/4505246> accessed September 2, 2021
[22] Ministry of Law, Evidence Obtained illegally or improperly: proposed section 166A, Indian Evidence Act, 1872 (Law Com 94, 1983) 35
[23] [1955] AC 197
[24] [1963] 1 WLR 637
[25] [1955] AC 197

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followed. However, it has also been argued that the ground of 'fairness' is too loose to work without guidance, especially where the judge has to exercise discretion to oversee all the already accepted principles under the code.[26] This counter holds its worth in Indian jurisprudence; as already stated, in spite of not having any determined principle or law in this field, the Indian courts are more towards the second formation approach, i.e. the fairness to the accused.[27]

Therefore, by just granting the discretion to the judge without these inner guidelines/principles, it would not fulfill the fairness requirements because the judge then can use any approach that he/she finds fit. The above-mentioned gap of the statute on the use of tests in this concept also highlights the same problem of wide discretion. Because of this problem of wide discretion in the second formulation, it has also been suggested to limit the discretion only to the first formulation, i.e. exercising the same only when the evidence is going to deceive the mind of the jury/judge.[28] As the Indian system works on the no-jury system and the one who will judge the case will be the only one who will judge the admissibility of evidence, and therefore the suggestion of keeping the former approach over later does not holds good. Hence, the jurisdiction of India demands the second formulation approach, i.e. the 'fairness to accused' (which the Indian courts are already having) with a condition of having some principles already incorporated in the rule of discretion.

IV. CONCLUSION

The statute on the unfair prejudicial evidence contains a blank space, but Indian courts are recognizing the rules through the judgments. The courts are using the common law principles and rules in the Indian jurisdiction, which is in itself a wrong procedure. Hence the very first conclusion would be to fill the statute with the appropriate law in this field.

Secondly, after analyzing the different scenarios and conditions of the rules and principles in the field, it can be concluded that merely having a substantive law of one line is not enough to fill this gap in the system. There are tests that are needed to reach a conclusion, and hence must also be taken into account while designing the substantive law according to the difference of the judiciary system in the context of the Pfenning test more fitting in the jurisdiction than the balancing test. There must be a principle on which the discretion must be based on so that the 'interest of justice' or the 'fairness to the accused' can be achieved. Hence, combining the

[26] Livesey B, "Judicial Discretion to Exclude Prejudicial Evidence" (1968) 26 The Cambridge Law Journal 291 <https://www.jstor.org/stable/4505246> accessed September 2, 2021
[27] R. M. Malkani vs State Of Maharashtra AIR 1973 SC 157
[28] Victor J Gold, 'Limiting Judicial Discretion to Exclude Prejudicial Evidence' (1984) 18 UC Davis L Rev 59

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second part in one line, there must be procedural laws in addition to a substantive law for the exclusion of unfairly prejudicial evidence.

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