

AMURCON 2021  
AmurCon 2021: International Scientific Conference**THE ROLE OF WITNESS TESTIMONY IN INDIAN CIVIL  
PROCEEDINGS DURING COVID-2019**

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**Abstract**

This article examines the performance of the witness testimony institution in Indian civil procedure in the context of expanding worldwide pandemic of Covid-19 coronavirus infection, which places certain restrictions on the ways of actualizing the current law of civil procedure. The scope of persons who may give evidence as a witness, the part of testimonial evidence in Indian civil procedure law is defined. The types, peculiarity, competence of evidence, as well as procedural requirements (relevancy, admissibility, credibility, and sufficiency) advanced as a form of evidence are seen. Types of public-private best rights (privileges) are reviewed: the privilege of keeping legal consultant's professional secrecy; the privilege of communicating between marital partners; privilege against self-incrimination; the privilege of the conclusion of an amicable agreement; other privileges of privacy. Particular attention is paid to litigation practice on the applied and used witness testimony. In conclusion, the authors summarize that India's current statutory concept for witness testimony needs to be reformed. In particular, it is proposed to deprive the Indian courts of the right to choose the evidence which can be applied legislatively. It is also suggested to omit the statement if the fact is considered in a trial, it does not need to be proven.

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## **1. Introduction**

In general law legal systems, oral judicial proceedings are the most significant principle of civil proceedings. The trial procedure promotes all conditions for judges to be able to hear directly all persons who are accessories to the dispute. Moreover, the court often compels the claimant or defendant to provide written evidence credibility through witness testimony. In particular, this principle is stated in the following regulation: “any facts other than the contents of a document may be proved by testimony”, which comes to the conclusion that testimony plays a major part in Indian civil litigation.

The findings of the present study can be applied to make Indian civil law more perfect. The materials of this study may be used as educational objectives.

## **2. Problem Statement**

The witness testimony institution in India’s civil proceedings is unable to fully perform the rights of litigants during coronavirus infection. This is due to the restrictive measures taken by the Government of India to reduce the incidence. These events and circumstances do not exclude the importance and necessity of presenting, examining and applying evidence, so the judiciary is trying to strike the right balance between the exercise of civic rights by the people of India and their sanitary and epidemiological safety.

## **3. Research Questions**

The current challenges caused by the global pandemic Covid 2019 have an impact on the performance of all global communities. In particular, India has been also directly affected by the hot phase of the pandemic. For example, the situation in the country is still quite problematic in terms of meeting the basic needs of the population (Khotynska-Nor et al., 2019). So this fact has brought about changes in the Indian judicial proceeding as well. The changes have also influenced the trial testimony covered in this study, which protocolary had not taken the most important part in Indian civil procedure. However, the more complicated the epidemiological situation in the country, the much more important part of such testimony evidence is and the allegiance of judges when they handle and lead such evidence, which is also confirmed in the context of the study.

## **4. Purpose of the Study**

The purpose of the paper is to complete the following objectives:

To rank witness testimony in Indian civil legislation;

To examine the types and special features of witness testimony in Indian civil law;

To review the Indian case materials in a civil action to determine the real importance of witness testimony in civil proceedings, including the changes that have been brought about by the Covid-2019 pandemic.

To develop proposals to address the problems identified in the judicial review.

## 5. Research Methods

The methodology of the research is based on the general scientific cognition method. The general scientific cognition method system includes the following methods: general logical method, methods of empirical and theoretical research, and methods of systematization of scientific knowledge. The study of codified rules of procedural law, judicial acts of India, is carried out by the methods of special research, logical and statistical analysis.

The methodological foundation of the study consists of general theoretical and generally scientific methods of knowledge, including abstraction and concretization, analysis and synthesis, modelling and comparison, as well as systemic, logical and functional analysis. The scientific novelty of this study is based on a comparative analysis of the practical performance of witness testimonies in Indian civil proceedings during the Covid 2019 pandemic, as well as a comparison of using witness testimony in the pre-pandemic period, and a comparison of the factual performance of the legally formalized rules.

## 6. Findings

The status and characteristics of witness testimony in civil proceedings in India

### 6.1. Character and reference of witness testimony in Indian civil proceedings

Originally, witness testimony should be presented to the court and the opposing civil litigant in written form early in the course of the trial. And the witness must come to the court trial to provide his/her evidence and answer the questions (Korobeinikov, 1986).

The admissibility of witness testimony in Indian civil proceedings has much to do with the question of who can be an affiant in legal contemplation (Frolova & Rusakova, 2021). as provided for in Item 1, Article 222 of the Indian Evidence Act to question and take evidence in Indian civil proceedings, the disputing parties face the charges as competent affiants, i.e., they may and must bear witness (Zakon..., 1872).

In Indian civil proceedings, testimony is allowed to be evidenced by legal subjects who correspond to the following conditions:

- Compellability to evidence testimony,
- Competence.

In general, any person can be called as a witness by having been served a subpoena, except those who are legally privileged to be discharged as a witness (Ermakova et al., 2018).

A competent witness is a person who is legally allowed to give testimony. At present, common law has a regular assumption of competence of any person who can be aware of the meaning of his /her acts and words (Monir, 2010.)

Article 120 of the Indian Evidence Act states that in civil proceedings, all persons are competent except those who were found unable to understand the questions asked by the court or being unable to give a reasonable answer on account of age, mental or physical condition or other similar reasons

(Zakon..., 1872). Thereby, in Indian law, there is an assumption of witness competence. The inability of a person to witness is a matter of proof of legal fact.

The witness has to testify within the examination held by the parties to the proceedings and to provide documents and objects on his own (Ermakova et al., 2021). Meanwhile, under certain conditions, Indian law provides an option not to testify, which is called 'privilege'.

As some civil lawyers note, one should distinguish between a private and public law privilege (Puchinsky, 2007).

In particular, the public-law privilege excludes the relevant fact from the subject of proof altogether. Private privilege only grants the witness the right to refuse to answer part of the questions, not to provide a document or an item. Although, the fact itself as an element of the subject fact to be proven is present, and it can be established through other sources (Puchinsky, 2007).

Indian civil procedure law applies the category of 'public interest immunity to privilege, which is declared as follows (Abrams & Ryzhkova, 2020):

- Article 125 prohibits the presentation of unpublished official documents relating to affairs of state in court or disclosing confidential information (Zakon..., 1872);
- Article 126 of the Act prohibits a public servant to disclose confidential information that he or she learns while performing his or her duties (Zakon..., 1872);
- Article 123 provides that judges and magistrates (magistrate judges) cannot be questioned as witnesses in relation to their actions during proceedings or to circumstances that have been found out and related to the performance of their professional duties (Zakon..., 1872).

Private privilege, unlike public law privilege, excludes only certain sources of evidence. Private privileges include the following:

A legal professional privilege has two forms:

- 1) Legal advice privilege.
- 2) Litigation privilege.

Each form of privilege has its own subjective and objective limits. The legal advice privilege does not allow the advisor to pronounce the information that he or she became familiar with while communicating with the client.

The privilege is valid till the client wishes to abrogate it by himself/herself. However, as required by law, the privilege does not apply if the client and the legal adviser talk about committing illegal actions, false pretences or an act of crime.

Criteria for legal advice privilege:

- Confidentiality of communication and the focus on obtaining legal advice. Information is confidential if it is not going to be disclosed to third parties by the operation of law. However, the presence of an interpreter, assistant, expert and other persons under the control of the legal adviser is not considered a breach of confidentiality. The privilege covers all of them.
- The focus of communication is on obtaining legal advice. Legal advice should not be limited to a simple explanation of the law to the client. It should include advice on what action the client should take in a particular situation.

The subjective endpoints of judicial privilege also include a third person who has special non-legal knowledge in a particular field that the consultant needs to write a legal opinion (such as doctors, independent accountants, etc.) (Postanovleniye..., 2021a).

The objective endpoints of judicial privilege are characterized by the purpose of communication. A client or a legal adviser may be knowledgeable about any information and documents from third parties. However, they will only be privileged if the main purpose of obtaining them was to prepare for current or future legal proceedings.

2) The privilege of communication between spouses. The main purpose of this privilege is to protect the secrecy of communication between spouses. The privilege applies to communication in any form, whether verbal, written or by the commission of an action.

Under Article 122 of the Indian Evidence Act, as a general rule, spouses are regarded as competent witnesses and are required to provide testimony (Zakon..., 1872). Meanwhile, they are privileged not to disclose details of conversations between spouses.

But this privilege is of a limited origin. It applies only to spouses, not to children or other close relatives. The prohibition on revealing details of a conversation between the spouses also allows for questioning the spouse on other grounds unrelated to the communication between them.

3) The right not to be a witness against himself.

Under Article 134(1) of the Indian Act, a witness is not allowed not testimony evidencing not because his answers may:

- catch him in crime;
- result in the imposition of fine;
- result in asset seizure;
- or admit a debt or give rise to an action against himself by his answers.

4) The privilege of the conclusion of amicable agreement without prejudice privilege.

According to Article 23 of the Indian Evidence Act, an extrajudicial confession cannot be established if a party has made it on the condition that it would not be held against it in court. The content of this rule is interpreted by jurisprudence as the legislator's desire to encourage the parties to settle an out-of-court agreement of their dispute (Rusakova & Frolova, 2021).

5) Other privileges are private by nature (Abrams & Ryzhkova, 2020):

- Article 132(1) of the Indian Evidence Act states that a witness who is not a litigant may not be compelled to provide his or her title papers (on ownership of the property); papers on certainty/pledge and mortgage; documentary evidence given may accuse that witness criminally (Zakon..., 1872).
- It is prohibited to obtain bank books from a bank that is not a party to the case unless there is a court-ordered request otherwise.

## **6.2. Review of jurisprudence in Indian civil proceedings on the application and the use of witness testimony**

To consider the actual application of witness testimony in practice, it seems necessary to consider certain examples from litigation practice illustrating the contemporary approach to witness testimony in

Indian civil procedure during the Covid-2019 pandemic. Thus, in S.A.No. 675 (Postanovleniye..., 2021a), the defendant filed an appeal against a judgment already passed. The complaint was based on the fact that during the trial the court had not taken into account the oral testimonies of the witnesses and the courts had only taken into account the written evidence. The appellant also clarified that the subject matter of the case could not be examined based on the witness statements but the court relied on the written evidence and decided the case following the said rule.

The High Court dismissed the complaint on the ground that the court had the right to examine, request evidence based on its convictions. The fact that the court accepted the written evidence as evidence but not the witnesses' testimony might only mean that the court considered such evidence to be more convincing than the evidence provided by the witness. So based on the written evidence, the court found out a particular fact, which did not need to be disputed or confirmed by the court. In addition, the court questioned whether the witnesses could have seen the subject matter of the dispute in person.

The above example proves that at this stage in Indian civil litigation, written evidence is more valid to decide disputes. It is because courts invoke the rule against hearsay evidence to justify this position, as well as the statutory right to admit evidence based on personal beliefs and not to have to prove facts that the court has also found established by other evidence. In this case, to prove facts that are not established by other evidence. The above example illustrates the great power of judges to admit evidence and the very small part of witness testimony as evidence for decision making.

Next, let us consider another example from the case law that directly affects the relationship related to oral testimony. Thus, in C.M.A(MD)No.12 of 2021 (Postanovleniye..., 2021b), the plaintiff approached the Court of Appeal to appeal against the decision of the court below in respect of the amount of monetary compensation awarded for the death of her husband. During the first instance trial, witnesses were invited to testify orally about the circumstances of the case, to justify the amount of compensation. However, all witnesses for the plaintiff were invited and therefore, during the trial, the court found it unfair towards the defendant. In addition to the fact that all the oral evidence was from the defendant, the written evidence of ten documents were also demandant's.

In the instant case, the court recorded 50% negligence on the part of the defendants as they had not provided any evidence in the case. Given that no witnesses were called to testify in the case on behalf of the defendants, the court considered it fair not to hear the plaintiff's witnesses and to consider only the evidence that was submitted in writing. The plaintiff's attorney resented this fact because the witnesses had provided important information for the award of the necessary compensation, but the court referred to its discretion in admitting the fact in no need to prove it. The court also questioned whether the witnesses had seen what happened with their own eyes and whether the witnesses could have influenced the compensation payment because they could not see the need for such compensation.

Because of the said circumstances, the court decided in awarding 50% of the amount of compensation sought, i.e., the plaintiff sought an amount of Rp.1750120 and the court awarded 50% of that amount- Rp.875060 due to the negligence of the defendant and misled the plaintiff in respect of evidence.

The Court of Appeal held that the evidence could be admitted by the court on its own and the decisions were also taken according to personal conviction, thereby dismissing the complaint and the first judgment of the trial court without any change.

The case law under consideration clearly illustrates that the overall part of witnesses and their testimony in court proceedings is extremely small. In case the court does not want to take into account any of the witness testimony, it can formally find many reasons that will be within the legal boundaries.

However, in some cases, because of the Covid 2019 pandemic, courts have focused on the importance of witness testimony as evidence of specific facts and given secondary weight to written evidence. It is since in today's realities taking of evidence is difficult and could lead to the outbreak of the disease, thus worsening the epidemiological situation in the country. Courts are therefore forced to accept testimony, sometimes instead of written evidence. It is important to note that the worse the epidemiological situation in a country is, the more the courts are replacing written evidence with oral evidence through video conferencing in court proceedings.

For example, in the divorce proceedings about the case C.R.P. (MD) No.6 of 2021 (Resheniye..., 2021) a witness is the plaintiff's lawyer, who confirms the separation of the spouses for the required period for the divorce. In this case, it is not enough testimony of one witness, who is a lawyer at the same time and an interested party for the court. So the Court requires evidence of the separation from the respondent. However, it points out that due to the epidemiological situation it is impossible to obtain documentary evidence of the separation. On the opposite, the applicant's lawyer has been the family lawyer since 2015 and his words about the separation are true.

The court accepts the lawyer's testimony about separation within the legal period of one year and grants the married couple's divorce application.

The example given illustrates the real possibility of changing the status of witness testimony and makes them more supporting in practice towards written evidence.

It appears that, in fact, Indian judges generally think evidence of little account as its admission and consideration depends not on the particular circumstances of the case but the moral conviction of the judge himself. The case studies on the use of evidence in Indian civil proceedings show that judges most often prefer written evidence to oral evidence and legal background is the legislative admissibility of the judge to determine whether a particular fact is proven or not. However, the recrudescence of the Covid 2019 pandemic in India does allow taking oral witness testimony as primary evidence, although Indian judges are little committed to it. It corroborates the narrative that testimony is principal in Indian civil procedure, although subject to a proviso that Indian courts have been holding such a view most recently.

Before that, documentary evidence was more important and oral evidence was secondary (Rusakova et al., 2019). Up to now, the situation has changed totally during the pandemic. A great deal of effort is required to obtain written evidence and, in the time of the new coronavirus, such conduct is inadmissible as it is dangerous. Therefore, in video conferences, courts have succeeded in questioning witnesses and bringing in objective verdicts, sometimes with no written evidence (Rusakova, 2020).

This trend is positive for witness testimony as evidence in the common law system which involves India too. However, when the pandemic ends, the courts are likely to reestablish the secondary character of witness testimony because of its inconvenience to the court itself as listening to witnesses requires

time, analyzing their words and taking notes in some cases can certainly delay the civil proceedings. Indians, by their mentality, are not keen on wasting time on something not quite interesting and monotonous, unlike, for instance, the Chinese mentality. Hence there is a will to use written evidence, which can be examined and concluded immediately.

## 7. Conclusion

To sum up, the problem of non-valuation and non-application of testimony as basic evidence is more due to Indian mentality, but because of the pandemic, the courts have gone against their mentality and have started accepting testimony as basic evidence. It seems that there is a need to stop infringement of testimony as evidence in Indian civil proceedings and legislatively deprive Indian courts of the choice of evidence that can be applied, also redact from the provision that if the fact in question has been accepted by the court, then it does not need to be proved. These are the regulations that the court appeals when it does not admit the testimony as evidence in the case, so the sources of misuse of right need to be eliminated. Another way is to adopt an amendment whereby the court's acceptance of a particular fact does not constitute grounds for not admitting testimony in court proceedings. Such a change would set up an effective mechanism for using testimony in practice. Since, theoretically, testimony is essential in India but in practice, the courts refuse to use it in the normal course of events regardless of a pandemic. Courts accept such evidence as essential during the pandemic, but the pandemic will end sooner or later, and courts will neglect witness testimony again, though it is inadmissible and should be removed.

In addition, the mandatory provision in Indian civil law states that witnesses give evidence in writing first and then corroborate it verbally, makes up a single piece of evidence. So let us clarify that in this case, it is a complex matter of witness testimony including its written interpretation.

To conclude, we note that a special feature of the Indian rule of evidence is the rule prohibiting hearsay evidence by law and on court practice. This rule prohibits relying on written or oral statements of persons who are unable or refuse to appear in court to corroborate what was said before.

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