# PRESUMPTIONS UNDER INDIAN AND COMMON LAW

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## ABSTRACT

The operation of presumptions is a largely unexplored area under the Indian Evidence Act, 1872. However, its application has huge consequences for the manner in which we understand the 'burden of proof' of the prosecution and defence. Recent penal legislations have seen a dramatic rise in the inclusion of 'reverse onus' clauses, which have placed a persuasive burden of proof on the accused. At the heart of such clauses lies raising a presumption of guilt. However, the questions of when and how such a burden shifts and when such clauses are valid remain unresolved.

The Thayer-Morgan debate on presumptions provides some insight into the working of presumptions in civil proceedings. However, there is no detailed study on how they would apply in criminal proceedings, quite possibly because they were not contemplated then. Nevertheless, criminal presumptions are a reality today and the dearth of authoritative case law in the Indian context necessitates a detailed study of the Indian Evidence Act, 1872. This paper attempts to revisit this complex issue, to look for answers on the operation of presumptions in criminal cases in light of this background.

**Keywords:** Presumptions, Burden of Proof, Transformative Indian Law.

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## INTRODUCTION

The law on 'presumptions' has been considered to be a conundrum despite volumes of academic debate on it. Most advanced pieces of legal writing on the topic begin with a caveat, highlighting the complexity of the issue. As the operation of presumptions also affects the burden of proof on the parties, both evidentiary[1] and persuasive[2] , it assumes greater significance in the appreciation of evidence in criminal trials in jurisdictions that follow the adversarial system. Moreover, the interpretation of presumptions could also have an effect on substantive rules of law such as the 'presumption of innocence' in a criminal trial. Despite this, some scholars have gone as far as to state that 'presumptions' is an empty concept and their conditional nature makes them no different from 'burden of proof'.[3]

Two of the most detailed yet divergent expositions on this complex area are by Professor James B. Thayer[4] and Professor Edmund M. Morgan[5] . Their debate resulted in what are popularly referred to as Thayer presumptions and Morgan presumptions, which went on to form the basis of the Federal Rules of Evidence in the United States. However, the drafting of the Indian Evidence Act, 1872 ["IEA"] by James Stephen pre-dated the debates regarding presumptions and a perusal of the statute would indicate as much. No subsequent legislation has further discussed or clarified the nature and operation of presumptions in India. Consequently, there is minimal nuanced discussion in India on the operation of presumptions.

The debate between Thayer and Morgan arose out of a difference of opinion regarding instructions on presumptions to the jury. However, this aspect of the debate has little bearing on this issue as the jury system which has since been abolished in India. Nevertheless, a study of the IEA suggests that the text and interpretation of this statute favours Morgan's approach. Therefore, a persuasive burden is placed on the party against whom the presumption operates to rebut the presumption. It will also be argued that the limited exhaustive case law

[1] When a burden is evidential in nature, the opponent may rebut the presumption by introducing evidence against the presumed fact sufficient to amount to a prima facie case, upon which the presumed fact will be decided according to the applicable rule as to the burden and standard of proof as any other fact in the case.
[2] When a burden is persuasive in nature, the opponent may rebut the presumption only by disproving the presumed fact to the appropriate standard of proof.
[3] C.A. Harwood, Burden of Proof and the Morgan Approach to Presumptions, Vol.19, WILLIAMETTE L. REV. 361, 390 (1983). However, this would not apply to conclusive presumptions and is limited to rebuttable presumptions.
[4] James B. Thayer, Presumptions and the Law of Evidence, Vol. 3(4), H LAW. REV., 141 (1889).
[5] Edmund M. Morgan, Presumptions, Vol. 10(3) RUTGERS LAW REV., 512 (1955-56).

discussing this issue indicates that courts in India have gravitated towards the standard of proof of 'preponderance of probabilities' once the persuasive burden shifts, irrespective of the nature of the proceedings.

## PRESUMPTION

A 'presumption' as defined by Thayer is "a rule of law that courts and judges shall draw a particular inference from a particular fact or from a particular piece of evidence unless and until the truth of such inference is disproved."[6] Some statutes or provisions, like the Indian Evidence Act, 1872, could also provide that the court may draw an inference from a particular fact or piece of evidence. Often, presumptions have an evidential effect which is in excess of the true probative worth of the basic fact as they cause an inference to be drawn from a basic fact and thus gives it a 'preternatural weight'.[7] These presumptions which can be used to draw an inference must be differentiated from a different kind of presumption which operates to allocate the burden of proof in a criminal trial such as the presumption of innocence or a presumption of sanity.[8] In the latter, the distinction between the inference (presumed fact) and the particular fact or particular piece of evidence based on which the inference is drawn (basic fact) does not exist.

Common law has recognized different categories of presumptions such as presumptions of law and fact, as well as rebuttable[9] and conclusive presumptions.[10] The uncertainty surrounding presumptions arose from differences in decisions on whether the judge or the jury should draw the presumption.[11] The ambiguity between the judge's and the jury's role gave rise to the debate on when and how a presumption operates and how the burden to displace it should shift. A rebuttable presumption always arises only on the proof of certain basic facts, subsequently requiring the opposite party to displace it by adducing contrary evidence.

[6] Supra note 4, at 154.
[7] CROSS AND TAPPER ON EVIDENCE, 123 (Colin Tapper ed., 9th edn, 1999).
[8] Ian Dennis, THE LAW ON EVIDENCE, 511-512 (5th edn, 2013).
[9] They could be of two kinds, that is, 'may presume' and 'shall presume'.
[10] James Fitzjames Stephen, THE INDIAN EVIDENCE ACT: WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE, 131, 132 (1902). Stephen followed this categorisation as early as 1872, however, he does not name them specifically.
[11] S.L. Phipson, LAW ON EVIDENCE, 662 (Rolan Burrows KC ed., 8th edn., 1942).

In order to displace such a presumption, the opposite party might have to meet a persuasive or an evidentiary burden. The result of a shifting of a persuasive burden is that the presumption can be rebutted only by meeting the appropriate standard of proof. On the other hand, a shift in the evidentiary burden (or where a tactical burden is created[12] ) could require contrary evidence sufficient to prima facie create a reasonable doubt to be adduced by the party against whom the presumption operates.[13] However, no clear formula has been established on the appropriate standard of proof required to discharge an evidential burden.[14]

English scholars opined that the standard of proof would be different depending on the kind of presumption,[15] while American scholars argued that there is a universal principle that applies to all presumptions.[16] Professor Thayer and Professor Morgan, both American scholars, disagreed on these core issues of which burden would shift and which standard of proof would be sufficient to displace a presumption.

## BURDENS OF PROOF AND PRESUMPTIONS IN TRANSFORMATIVE INDIAN LAW

The institution of Untouchability is rooted in Hindu culture and religion. It derives from the systems of varnas, or castes, into which Indian society was theoretically divided in traditional Hindu law.[17] Three of the four varnas, the Brahmin, the Kshatriya, and the Vaishya, command the highest ritual standing. Members of these three varnas, by virtue of their investment with the "sacred thread," were regarded as "twice born. The fourth varna, the Shudra, was considered socially inferior to the other three. Persons falling outside of these

[12] Supra note 7, at 125-126.
[13] Peter Murphy, A PRACTICAL APPROACH TO EVIDENCE, 80 (3rd edn., 1988).
[14] Supra note 7, at 152. Cases in the UK have held that as a general rule "such evidence as, if believed, and if left uncontradicted and unexplained could be accepted by the jury as proof" is required to discharge an evidential burden. Here, 'proof' could mean beyond reasonable doubt, a preponderance of probabilities or even a prima facie standard. It is only admitted that the standard of proof in criminal proceedings must be higher than what is required to be discharged to displace an evidential burden in civil proceedings.
[15] However, Stephen's view seems to have been different as the Indian Evidence Act, 1872 does not indicate a difference in standard of proof depending on the type of presumption. This will be discussed in greater detail in the section on the Indian Evidence Act.
[16] Supra note 13, at 80.
[17] Throughout this short treatment of Untouchability in Indian society, I will spare the reader detailed footnotes. References used in constructing this overview include S.K. Aswathi, *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* (1992); Marc Galanter, *Law and Society in Modern India* (1989); Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (1984); J. Michael Mahar, (ed.), *The Untouchables in Contemporary India* (1972); and M. N. Srinivas, *Caste in Modern India and Other Essays* (1966).

four groups, or in some regions, persons in or at the bottom of the Shudra caste, were considered ritually impure and were subject to severe social and political disabilities. Individuals falling into these categories and treated in this manner came to be known as Untouchables.

While the disabilities enforced against so-called Untouchables, and the precise composition of the groups on which they were imposed, varied from region to region, those disabilities tended to include: denial of access to public facilities such as wells, bathing facilities, schools, roads, post offices, and courts; denial of access to temples and other sacred places, including places of religious learning; exclusion from large classes of employment and educational opportunities; segregation into the most menial, dirty occupations; residential segregation; and denial of access to private shops and services.

During the period of colonial rule, the British made no active effort to eliminate the caste system, although the establishment of a colonial legal order which failed to institutionalize caste distinctions necessarily destabilized them to some extent. In the absence of official government action to enforce caste distinctions, private actors systematically engaged in self-help in the form of boycotts and reprisals, to enforce traditional caste disabilities.

Untouchability came under intense indigenous attack during the Indian Independence Movement. Mohandas Gandhi vigorously decried the injustice worked by the institution of Untouchability, and called for a purified varnashrama dharma, in which the Untouchables would be reabsorbed into the Shudra. Bimrao Amedkar, an Untouchable himself and the architect of what would become the Indian Constitution, advocated the abolition of the varna system in its entirety.

After Independence, the institution of Untouchability was formally eliminated by the Indian Constitution of 1950. Although numerous provisions are implicated in its disestablishment, the most directly applicable is found in Article 17, which provides:

Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.

This provision, like other anti-discrimination provisions of the Indian Constitution, prohibits the enforcement of civil disabilities not only by the state, but by private actors as well.

This Constitutional prohibition was soon reinforced by the Untouchability (Offences) Act (UOA) of 1955. The Act as -originally passed prohibited the imposition of disabilities on the ground of Untouchability in the provision of professional or commercial services, the right to practice a particular trade or occupation, or to use particular utensils, or in access to public accommodations, water, resources, charitable benefits, hospital or other health services, educational opportunities, housing, or places of worship. Discrimination in employment was added as a prohibited practice by amendment in 1976.[18] Untouchability, although not actually defined in the Act, is generally interpreted as referring either to membership in a Scheduled Caste, as defined in Clause 24 of Article 366 of the Indian Constitution, or membership in any other group which by local custom or usage is regarded as Untouchable.

The Untouchability (Offences) Act, renamed the Protection of Civil Rights Act by the 1976 amendments, is a criminal statute. Penalties for its violation include imprisonment for a term of one to six months; fines between one hundred and five hundred rupees, the cancellation or suspension of professional or trade licensing, and/or the suspension or revocation of government funding grants.

That aspect of the Act most relevant to our present inquiry is found in Sections 12, which provides:

Presumption by courts in certain cases. - Where any act constituting and offence under this Act is committed in relation to a member of a Scheduled Caste as defined in clause (24) of article 366 of the Constitution, the court shall presume, unless the contrary is proved, that such act was committed on the ground of “untouchability."

Thus, under Section 12, once the prosecution succeeds in proving that an act which, assuming requisite culpable intent, would constitute an offence when committed in relation to a member of a scheduled caste, the court is obliged to presume, until the contrary is proven by the defendant, that the act was committed on the ground of untouchability.

[18] The Untouchability (Offences) Amendment and Miscellaneous Provision Act, 1976 (No. 106 of 1976), Anand Mohan Suri, (ed.), *The Current Indian Statutes*, 1955 (January - December), 836-44.

That the phrase shall presume signals a shift of the burden of persuasion on the issue of grounds to the defendant, and not merely a burden of coming forward with evidence, becomes clear by reference to the definition of that phrase in Section 4 of the Indian Evidence Act and to its interpretation by the Indian Supreme Court. Section 4 of the Indian Evidence Act provides, in relevant part:

**S.** 4. **"MAY PRESUME".** – Whenever it is provided by this [Act] that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

**"SHALL PRESUME".** – Whenever it is directed by this [Act] that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved...

Presumptions of the first type are referred to as "presumptions of fact," those of the second, "presumptions of law."[19]

Under Indian law, these two types of presumptions have distinctly different effects. As the Indian Supreme Court noted in Syad Akbar v. State of Karnataka, "presumptions of fact merely affect the burden of going forward with the evidence. Presumptions of law, however, go so far as to shift the legal burden of persuasion so that, in the absence of evidence sufficient to rebut it on a balance of probability, a verdict must be directed."[20]

In the language of American evidence law, the Indian presumption of fact functions somewhat like a Thayer "bursting bubble" presumption, as institutionalized by Federal Rule of Evidence 301. A presumption of fact, like a Rule 301 presumption, merely shifts the burden of producing evidence to the party against whom the presumption is raised. Assuming that evidence is produced, the ultimate burden of persuasion on the issue remains with the party upon whom it was originally placed. An Indian presumption of law, on the other hand, functions more like an American "Morgan presumption" shifting the burden of persuasion

[19] M.C. Sarkar, S.C. Sarkar, & Proabhas C. Sarkar, **1** *Sarkar's Law of Evidence* 66 (13 ' ed. 1993), While the definitions of "may presume" and "shall presume" con- tained in Section 4 refer to the use of those terms in the Indian Evidence Act, the terms are accorded the same meaning elsewhere in Indian law, including in the Protection of Civil Rights Act. See, S. K. Awasthi, *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989,* 320 (1992 ed.), (defining the terms "shall presume" as used in Section 12 of the Protection of Civil Rights Act as it is defined in Section 4 of the Indian Evidence Act).

[20] AIR 1979 S.C. 1848 (1979 Cri. L. J. 1374).

on the relevant element of liability, not only the burden of producing evidence, to the party against whom the presumption has been raised.[21]

Accordingly, in a case brought under the Protection of Civil Rights Act, once the prosecution has demonstrated that the complainant is a member of a Scheduled Caste, and that conduct specified in the Act was directed at such member of a Scheduled Caste, the burden of persuasion shifts to the defendant to prove, by a preponderance of the evidence, that the conduct was not taken on the grounds of untouchability.[22]

## CONCLUSION

The extended debate between these two stalwarts of the law of evidence would appear to have a limited impact on the Indian position today. While the debate was instrumental in the drafting of many evidence statutes in the United States of America, from the text of Section 3, it seems that Stephen made a choice much before the discussion on presumptions took on the significance that it did in the 20th Century. In India, the application of a standard of preponderance can be seen even in cases where a jury had to be instructed. This choice made matters of instructions to the jury much simpler, thereby solving one of the core points of contention between Thayer and Morgan.

Admittedly, this clarity in position may also be due to the dearth of case law that thoroughly examines such an issue and even the 185th Law Commission Report did not comprehensively deal with the law on presumptions. This lack of engagement becomes more prominent in light of the discussion on cases under Sections 113A and 113B, where the report barely scratches the surface of the potential legal issues that were discussed threadbare by Thayer and Morgan. This becomes particularly significant in criminal cases where there is little margin for error. Therefore, the importance of understanding presumptions, burdens of proof and how they shift can hardly be overstated, and a survey of decisions by Indian courts on this issue, specifically in criminal cases, obviates the need for clarity.

[21] For a discussion of the Morgan/Thayer debate and its resolution in Federal Rule of Evidence 301, see Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence*, Vol. 21, §5122, 552-73.

[22] See generally, S. K. Aswathi, supra n. 8, at 320. Offenses charged under Section 7 of the P.O.C.R.A., involving the offering of "insult" to a member of a Scheduled Caste, appear to be analyzed somewhat differently. At least one court has held that, in "insult" cases, before the burden of persuasion shifts to the defendant the prosecution must also prove that the insult was "of a species" that had a "nexus" with untouchability. Laxman Jayaram v. State of Maharashtra, 1981 Cr L J 387 (Bombay)."

This is where an understanding of the nuanced discussions on presumptions by Thayer and Morgan could be helpful as it would provide a principled basis for the decisions of courts on how presumptions should work. However, as it stands today, the conclusion that one would reach on an analysis of the law on presumptions would be that anyone "…would do great service to our law who should thoroughly discriminate, and set forth the whole legal doctrine of burden of proof…"[23]

[23] Daniel M. Reaugh, *Presumptions and the Burden of Proof*, Vol. 36 III. L. REV. 703 (1941).