

Law Commission of India

185th Report

on

**REVIEW OF THE INDIAN EVIDENCE
ACT, 1872**

March, 2003

Dear Sri Arun Jaitley,

The Law Commission has great pleasure in submitting its 185th Report on Review of the Indian Evidence Act, 1872, along with a draft Bill. It is one of its most comprehensive Reports on the Indian Evidence Act, 1872.

By the letter of the Ministry of Law, Justice & Company Affairs (Government of India) issued with the approval of the Minister of State for Law, Justice & Co. Affairs in D. No. 3273/95-9 dt. Sept., 28, 1995, the 69th Report submitted by Justice P.B. Gajendragadkar and other Members dt. 9.5.1977 was sent back to the Law Commission only on the ground of lapse of time before it was implemented. By subsequent letters of Jan. 1, 2001, DO No.15/1/2001(ii) dt. 19/22 June 2001, and FNo. 7(11)/83-IC dt. 2.5.2002, reminders were sent. The Commission has taken up reconsideration consequent to these letters.

Law of Evidence is one of the most important laws administered by our civil and criminal courts. Since 1872, when the present Act was enacted, there has been a sea-change in human rights jurisprudence all over the world. Seventy years later, basic principles governing human rights were enunciated in the Universal Declaration of Human Rights, 1948. This was followed by the International Covenant on Civil and Political Rights, 1966. The said Convention has been ratified by India in 1976. Our Constitution came into effect from January 26, 1950. Art. 20(3) of our Constitution declares the fundamental right against self-incrimination. Art. 21 guarantees liberty and a right to procedure established by law which after Maneka Gandhi, requires the procedure to be just, fair and equitable. Principles of evidence which are applicable to criminal law have to necessarily satisfy the basic requirements both of Art. 20(3) and Art. 21. Nor can the procedure be discriminatory or arbitrary, otherwise it may offend Art. 14. Special protection is necessary for women who are victims of crime. Transparency in governmental functioning is an essential feature of democracy. Press freedom has to be protected and its boundaries delineated.

The proposed amendments are intended to conform to these new standards.

We may very briefly highlight a few of the important recommendations made in this Report. Admissibility or otherwise of confessions is covered by sections 24 to 29. We have proposed amendment to sec. 27 to conform to the several judgments of the Courts. Sarkar in his commentary on the Evidence Act, 1872 (15th Ed., 1999, p.534) has stated that while sec. 27 requires to be amended, only a person of the eminence of Sir James Stephen can make an attempt. Such was the magnitude of the task under sec. 27. Sec. 27 is now proposed to be an exception to sections 24 to 26. By the introduction of the word ‘or’ it applies to facts discovered from statements by those in custody and not in custody. The words ‘distinctively’ and ‘so much of such information’, are proposed to be deleted. Under sec. 27, it is further proposed that facts discovered from statements can be admitted in evidence only if the statements have not been made under threats, cruelty, violence or torture. Facts discovered by inducement or promise will still be relevant.

We had to differ totally from the recommendation in the 69th Report to incorporation of sec. 26A to make all confessions to senior police officers admissible irrespective of the nature of the offences, a recommendation which according to us, goes contrary to the views of the Supreme Court and in particular, the views expressed in Kehar Singh’s case. What can be sustained under Art. 14 or 21 as an exception in the case of terrorist’s confessions or of those involved in organized crime, cannot be made a general rule and applied to the admission in evidence of every confession made to a senior police officer, in the context of every other offence. This would, as per the statement of the law by the Supreme Court, violate Art. 14 and 21 and all considerations of proportionality. While not accepting sec. 26A as proposed in the 69th Report, we have however proposed amendments in regard to accomplices’ evidence, conspiracy, hostile witnesses, compellability of accused and witnesses to give evidence.

Under sec. 59, which deals with oral evidence, we have dealt with video-conference and video-recorded evidence. We have referred to recent developments in USA, New Zealand, Australia and UK. We have, however, given reasons as to why we are not making a separate provision.

Regarding 'affairs of State' and production of unpublished government records and 'confidential communications' to a public officer, amendments are proposed to sections 123, 124 and 162, taking into account changes in the law as declared in S.P. Gupta. We have accepted the recommendation in the 69th Report and the 88th Reports which are identical in this behalf. We have, however, proposed one change. Instead of an appeal, as proposed in the 88th Report from orders of subordinate Courts on questions as to affairs of State decided under sec. 123, we have proposed that there should be a 'reference' to the High Court on the said question by the subordinate Court.

With reference to proof of paternity, in sec. 112, apart from the sole exception of 'non-access', other exceptions by way of blood-group tests, DNA have been proposed but subject to very stringent conditions. Further, the benefit of the presumption as to paternity in case of those born during the continuance of a marriage or within two hundred eighty days of dissolution, is now extended not only to children of voidable marriages which are avoided but to children of void marriages where a declaration of nullity is obtained, provided such children are, under their respective personal laws, treated as legitimate.

Compulsorily calling an attester to prove documents required to be attested is proposed to be dispensed with as done in UK in 1938, except in the case of wills. Sections 68 to 71 are proposed to be modified and made applicable to wills only.

Presumption of genuineness of ancient documents is proposed to apply, in sec. 90, to documents 20 years old rather than 30 years old as done in other countries. It is also proposed to introduce subsection (2) to sec. 90 to include registered documents the originals of which are twenty years old, as done in UP by 1954 Amendment. Sec. 90 raises presumption as to execution, handwriting and attestation. Sec. 90A is proposed, as done in UP in 1954, in respect of registered documents, the originals of which are less than twenty years old, to raise only a presumption of execution.

With reference to persons whose whereabouts are not known, presumption under sec. 108 is modified. As to presumption of death by a particular date, we propose to clarify, while not accepting the view of the Privy Council that, at the end of 7 years, the death must be presumed, unless the person who wants to prove the person was alive after 7 years, is able to

prove that fact. Of course, if a party contends that the person died by any particular date within 7 years, he has to prove the same. The proposed amendment helps persons to take decisions in respect of remarriage or succession.

A new provision 108A in respect of simultaneous deaths is proposed and a special provision therein covers cases where both spouses die in the same accident or calamity. This was proposed in the 69th Report. Similar provisions are there in other countries. It is proposed that, where claims are made to the estate of one spouse, the other spouse, even if he or she is the younger one, should be presumed to have predeceased, so that the heirs of the younger one do not take away the property of the other spouse, in every case of simultaneous death. This is the position in UK and USA. There is a further exception proposed by us, where the younger spouse is the sole heir or one of the heirs.

Quite a good number among the proposed amendments concern proof by primary and secondary evidence. Special provision for communications during marriage (sec. 122) are proposed following recent ruling of the English Courts.

Sec. 132A is proposed to protect the media from being compelled to disclose the source of their publication, except in cases where the publication affects the sovereignty, integrity of India, security of State, friendly relations with foreign State, public order, decency, morality or contempt of Court. We have surveyed the law in UK and elsewhere and in particular the recent decision of the European Court in Goodwin's case. We have also referred to the recommendations made in the 132nd Report by Justice K.K. Mathew.

We have proposed sections 132B, 132C covering privilege in regard to communication with patent and trademark agents as in UK.

Regarding questioning a woman about her previous character, we found that the proviso added below sec. 146(3) by the recent amendment of 2002 is narrow and we have enlarged the privilege as recommended in the 172nd Report. These proposals as to questions relating to character are contained in sections 53A and 156(4).

A host of other amendments, in all, more than one hundred are finally suggested.

As to the applicability of these proposals, we have proposed that the proposed amendments should apply to civil proceedings where the examination of witnesses has not yet commenced on the date of commencement of the proposed Amending Act. (Some Explanations introduced, we felt, could however be retrospective.) So far as criminal proceedings are concerned, we have proposed that the amendments shall apply only if the offences concerned are those committed after the commencement of the proposed Amending Act. We are grateful to Sri Vepa P. Sarathi, former Member of the Law Commission for scrutinizing our first draft of the Report and giving his valuable suggestions.

The 69th Report submitted in 1977 was returned to the Law Commission in 1995 only on the ground that several years had lapsed before it could be taken up for implementation. We hope, at least, that the present Report which is an exhaustive study running into more than 950 pages, and prepared over a period of nearly one year, will not go in vain but will be taken up for legislation at an early date. To facilitate early law reform, we have annexed a Draft Bill to this Report running into ninety-nine sections.

With regards,

Yours sincerely,

(Justice M. Jagannadha Rao)

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