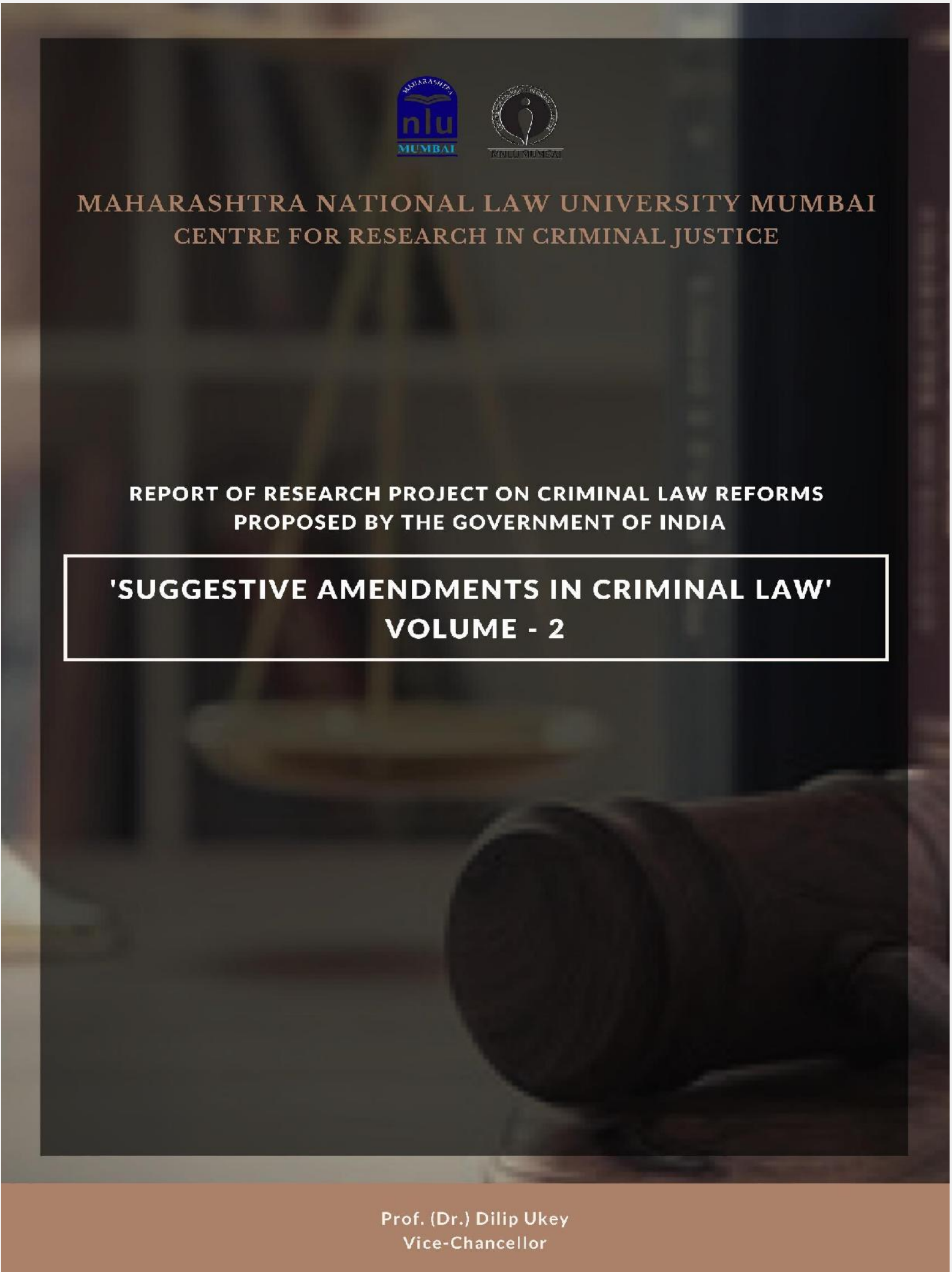

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI
CENTRE FOR RESEARCH IN CRIMINAL JUSTICE

REPORT OF RESEARCH PROJECT ON CRIMINAL LAW REFORMS PROPOSED BY THE GOVERNMENT OF INDIA

'SUGGESTIVE AMENDMENTS IN CRIMINAL LAW' VOLUME - 2

Prof. (Dr.) Dilip Ukey
Vice-Chancellor

This report is produced by Centre for Research in Criminal Justice, Maharashtra National Law University Mumbai and is intended for information purpose and Private Circulation only.

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[Volume 2]

Published By: Maharashtra National Law University Mumbai

Publisher's Address: 2nd and 6th Floor, MTNL Building, Technology St, Hiranandani Gardens, Powai, Mumbai, Maharashtra 400076

ISBN No. 978-93-5457-340-8

REPORT OF RESEARCH PROJECT ON CRIMINAL LAW REFORMS PROPOSED BY THE GOVERNMENT OF INDIA

'SUGGESTIVE AMENDMENTS IN CRIMINAL LAW'

[Volume 2]

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MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

Maharashtra National Law University Mumbai, established under the Maharashtra National Law University Act 2014 is one of the premier National Law Universities in India. The Act envisaged establishing National Law University in Maharashtra to impart advanced legal education and promote society-oriented research in legal studies for the advancement of the social life of the people in the country. The prime goal of the University is to disseminate advanced legal knowledge and processes of law amongst the students and impart in them the skills of advocacy, legal services, law reforms and make them aware and capable to utilize these instruments for social transformation and development. To attain this goal, it has started its first academic endeavour on 1st August 2015. Hon'ble Mr. Justice S. A. Bobde, Chief Justice of India is the Chancellor of the University who not only guides but also inspires the institution with his novel ideas and rich experience in the law field. Prof. (Dr.) Dilip Ukey a renowned academician in law has varied experience in teaching and research is the Vice-Chancellor of Maharashtra National Law University Mumbai and is guiding and leading the University to achieve newer heights.

The University offers BA., LL.B.(Hons.) five years integrated program, a One-year LL.M. program in Constitutional Law, Corporate and Commercial Laws, Criminal Law, Maritime Law and an M.A (Executive) in Mediation and PhD Programme. Since its inception in 2015, the University has made serious and sincere efforts to excel in the field of legal research and education. Within five years the University has been able to traverse an arduous yet, promising path filled with lots of possibilities for the future. Prof. (Dr.) Anil G. Variath serving as Registrar of the University. His dynamic vision coupled with excellent administrative and academic skills is enabling the university to make newer strides in the field of legal education. In recent years the University has taken long strides in areas of research and has established Research Centers. The University is steered by distinguished judges, senior advocates, eminent academicians, seasoned and senior bureaucrats as members of governing bodies and they guide our students with their rich and valuable experience. Cognizant of this changing paradigm of learning MNLU Mumbai has signed MoUs with some leading Universities and premier Institutions in India and abroad for a more sustained and engaged exchanges of ideas related to law and allied subjects and society in modern times

CENTRE FOR RESEARCH IN CRIMINAL JUSTICE

The Centre for Research in Criminal Justice (CRCJ) was established to promote and advance national and comparative research and scholarship in the area of Criminal Law and Criminal Justice, Criminology, Victimology, and Human Rights. The Centre was inaugurated by Hon'ble Justice Naresh Patil (Judge, Bombay High Court) and Hon'ble Justice A. S. Oka (Judge, Bombay High Court) in the presence of Shri. Ashutosh Kumbhakoni (Advocate General, State of Maharashtra), Dr. Milind Sathe (Advocate and President, Bombay Bar Association), and other legal luminaries from Bar and academia on 13th January, 2018. Following are the key objectives of the Centre:

- To carry out coordinated research into the efficacy and adequacy of the Criminal Justice System in India and communicate the findings and recommendations to the agencies of Government concerned with the same.
- To research, analyse, and critically examine the laws, policies, and programs related to criminal laws and disseminate the findings through publications, workshops, seminars, and other means. Further, the Centre also undertakes specific research programs in many areas.
- To organize various training programs, webinars, seminars, for stakeholders in these fields like students, academicians, researchers, etc.
- To organize a student-centric initiative in the form of an outreach program.
- To provide an interactive platform for exchanging thoughts about current events and interesting topics in the field of criminal law and human rights.

With many more objectives in the core, CRCJ has started Criminal Justice Talks on YouTube to have a discourse on the legal issues of contemporary relevance, CRCJ Quizzical, a quiz competition for the young minds and Advance research work in areas such as 'Amendments in criminal laws', 'Revisiting the law and policy of Prison Administration in India', etc. by involving the experts in the field of law. To realise these aims and objectives, CRCJ has introduced two P.G Diploma courses, 1) Crime Investigation, Medical Jurisprudence and Forensic Science and 2) Litigation Lawyering and Law Firm Management to bridge the gap between the theoretical and practical aspects of the Legal Profession.

MESSAGE FROM VICE-CHANCELLOR

Criminal Laws in India have colonial roots as many of them, including the Indian Penal Code and the Evidence Act were enacted by the Imperial regime. The Indian Penal Code in 1860 at the time of its enactment has focused on crimes against the state and crimes against property. Though there was a chapter on crimes against the human body, there was no emphasis given to crimes against women as it were days when women were considered as property. The Constitution of India gives us the right to equality and also provides for substantive equality under Articles 14 and 15. It provided for the right to freedom under Article 19 and the right to life and liberty under Article 21. Unfortunately, till date, there have been no wide-scale changes made to the criminal laws to reflect the changing social, cultural and political values of the country.

There had been suggestions and recommendations from different corners including the Law Commission of India for revamping the criminal justice administration. However, for long there had been no serious efforts in that direction. At the same time, we have an accused centric adversarial criminal justice dispensation system, where very little concern is shown to the rights of the victims. The nature and magnitude of the crimes have increased to such an extent to render the existing provisions of law insufficient or inefficient to address the issues. On the one hand, there are complaints about highhandedness and misuse of law, on the other, we can see many criminals go scot-free through the loopholes of the system. This itself points towards the need for bringing systemic changes in our criminal justice administration. Now the Government of India has taken up the task of bringing large scale reforms in the criminal justice system, which is indeed a great initiative.

The Hon'ble Union Home Minister Shri. Amitji Shah vide his Office letter dated 06.01.2020 (*Annexed on page vii*) sought suggestions regarding the amendments to the criminal laws. On receipt of the letter, I had requested the Centre for Research in Criminal Justice (CRCJ) to conduct a study on this issue and submit a report thereto. The CRCJ team undertook the research project as early as the month of February 2020. However, the project was

unfortunately hampered by the COVID 19 pandemic. But I am happy to say that the team of student researchers rose to the occasion and reactivated themselves into the project along with the process of unlocking.

Volume 1 of the Report was submitted by the team of CRCJ in February 2021 to Hon'ble Union Home Minister Shri Amitji Shah. Volume 1 comprised of Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Prevention of Corruption Act, 1988 and Armed Forces Special Powers Act, 1958. We are glad that the report consisting of recommendations for change of core criminal laws was appreciated by the Union Home Ministry.

The team have undertaken a serious academic review of other legislations which were not covered in volume 1 and suggested some changes, which they would like to bring in respective areas of criminal law. In Volume 2, CRCJ Team is covering the laws like Indian Evidence Act, 1872, Indecent Representation of Women (Prohibition) Act, 1986, Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994 and The Unlawful Activities (Prevention) Act, 1967. The entire research project was driven by our students under the supervision of the CRCJ. I take this opportunity to congratulate each one of them and the Director of the Centre Dr. Anil G. Variath for their sincere and dedicated works. This is the first major research project undertaken by the Centre. I am sure that more such projects will be taken up by the centre in the coming days. I take the privilege of submitting Volume 2 of the Research Project Report to the Union Home Ministry for consideration by the Government.

Prof. (Dr.) Dilip Ukey
Vice-Chancellor

अमित शाह
AMIT SHAH

गृह मंत्री
भारत
HOME MINISTER
INDIA

06 JAN 2020

Prof. (Dr.) Dilip ji,

This year we are celebrating 70th anniversary of the adoption of our Constitution. The Preamble of the Constitution bestows upon us the responsibility to make justice accessible to all. The Government of India, under the leadership of Prime Minister Shri Narendra Modi, with its mantra of '***Sabka Saath - Sabka Vikas***', is committed to ensure speedy justice to all the citizens of India, especially to the weaker and backward sections.

In conformity with these constitutional and democratic aspirations, the Government of India has resolved to make fundamental changes in criminal law framework of India to provide accessible, affordable and speedy justice to all. The experience of seven decades of Indian Democracy suggests the need to review our criminal laws, especially Indian Penal Code (IPC), The Code of Criminal Procedure (CrPC), Indian Evidence Act, Narcotic Drugs and Psychotropic Substances Act (NDPS act) and adapt them in accordance with contemporary needs and aspirations of our people. The Government of India intends to create a legal structure which is citizen-centric and prioritizes to secure life and to preserve human rights.

National Law Schools and Judicial Academies have played an important role in the field of law education for the youth of the country. The Law schools not only produced skilled jurists to the democratic society, but they also create a class which is sensitive towards the judicial system which is effective in maintaining the social and constitutional values. These institutions work as a fertile land for law-related brainstorming, creating innovative thoughts along with legal acumen and knowledge.

Contd.....on page 2/-

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This endeavor of paradigm shift in the criminal justice system by Government of India will actually be an enormous exercise of public participation which can be successful only with the participation of the leading law institutions and all other stakeholders. In this regard, I have requested Chief Ministers of States and Administrators of UTs to send their suggestions. The Ministry of Home Affairs has also constituted a committee of experts to prepare draft of a new law, which will discuss various issues with all the stakeholders.

In this exercise of public participation, yours as well as law teachers' and law students' contribution will be important. The prestigious law institutes can provide a platform for comprehensive discussion on the initiative of the Government of India for providing quick justice to each citizen. Your thoughts and deliberations will be invaluable for us for bringing above fundamental changes in the criminal laws. Therefore, I earnestly request you to send your valuable suggestions to the Home Secretary, Government of India at the earliest.

With regards,

Yours sincerely,

(Amit Shah)

Prof. (Dr.) Dilip Ukey
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"Truth does not pay homage to any society ancient or modern. But society has to pay homage to truth or perish"

- **Swami Vivekananda.**

INTRODUCTION

The evolution of criminal laws and material developments in their application is central in ensuring the effective administration of justice in the Criminal Justice System. Rapid changes in society further present renewed complications in the equitable application of criminal laws. In such situations, maintaining adaptivity and flexibility in important criminal legislations becomes greatly significant in preserving their relevance. Crime-fighting laws and policies must evolve in tandem with society's evolving dynamic and our criminal justice system should be reformed in a way that is principally directed at serving the common good. To maintain stability and balance between the shifting dynamics of social alterations and criminal jurisprudence, revisiting and recalibrating the criminal legislations of the country is indispensable.

Reforms in criminal laws require tracing the gaps in the practical application of legislations and delving into the alternatives available to enhance the efficient implementation of criminal laws. Criminal law reform entails not only making the system more effective and transparent but also protecting human rights regardless of the position of the individual. Alternatives that further the importance of transparency and individual rights deserve due consideration and analysis to ensure the maximum possible efficiency and equity in criminal justice delivery.

This report is the Second Volume of a project which traces the criminal law reforms required in Indian legislations. This report examines the amendments required in the Indian Evidence Act 1872, the Unlawful Activities Prevention Act 1967, the Indecent Representation of Women (Prohibition) Act 1986, the Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994 and the Juvenile Justice (Care and Protection of Children) Act, 2015.

The scope of research in criminal law reforms is inexhaustive and cannot be specifically listed. This project is an attempt to address the pressing modifications required in this criminal legislation to enhance unambiguousness, fairness, proficiency and smooth functioning of the criminal justice system.

ACKNOWLEDGEMENTS

After the successful completion of part - 1 of this project, our Vice Chancellor, Prof. (Dr.) Dilip Ukey and Director of the Centre for Research in Criminal Justice, Prof. (Dr.) Anil G. Variath undertook the next step by allowing us to work on more Criminal Law Legislations, which were not covered in the first part. These suggested amendments in Criminal Laws are guided specifically by the urgency, due to specific occasions of extreme violence in the society. This wonderful opportunity given by the Government of India should be used to make as many suggestions and comments as possible, which can help to make our legislations better. I would like to express my gratitude to Hon'ble Minister, Hon'ble Vice Chancellor and our Director, to give us the opportunity to do in-depth research and suggest the amendments which can be carried out in the criminal laws in India.

With the efforts of Co-Investigator, Ms.Gauri Rane, whose friendly guidance and expert advice have been invaluable throughout all stages of the work, the research team members of Centre for Research in Criminal Justice conducted the work with full dedication. I am thankful to Ms. Simran Dhinoji (Co-Convener, CRCJ) and Mr. Utsav Saxena (Joint Convener, CRCJ) whose analysis and framing of the whole project gave it the final shape. Further, five Research Teams were formed who worked on the suggestive amendments related to Indian Evidence Act, 1872; Pre Conception and Pre Natal Diagnostic Techniques Act, 1994; Unlawful Activities Prevention Act, 1967; Indecent Representation of Women's Act, 1986; Juvenile Justice (Care and Protection of Children) Act, 2015. These Acts were chosen after the deliberations on their usage and amendments that have been carried out after their formation. Mr. Preetraj Dhok, Ms. Isha Akat, Mr. Shubham Dhamnaskar, Ms. Manisha Katyal and Mr. Utsav Saxena worked with the other team members to provide their valuable suggestions regarding suggestions in the above-stated legislation. A special thanks to all the professors who have taught us the subjects related to criminal law and the interpretation of statutes as our knowledge in these subjects have been an indispensible tool in carrying out this research.

The shortcomings in the previous part were taken care of, but definitely, we are looking for further improving in the upcoming projects. We look forward to the Government of India and

Maharashtra National Law University Mumbai for giving us more opportunities related to research in the criminal law as well more upcoming areas.

Mr. Yashaswi Pande

Co-Investigator &

Research Coordinator

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Student Co-ordinators: Simran Dhinoji, Utsav Saxena

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C: Unlawful Activities Prevention Act, 1967..... C1 - C34

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D: Indecent Representation of Women's Act, 1986..... D1 - D30

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E: Juvenile Justice (Care and Protection of Children) Act, 2015..... E1 - E30

- Manisha Katyal

A: INDIAN EVIDENCE ACT, 1872

CONTENTS

PART – I

INTRODUCTION

Criminal laws in India are vested in three principal legislation: The Indian Penal Code, 1860[1], the Code of Criminal Procedure, 1974[2] and the Indian Evidence Act, 1872. The objective of this research is to peruse one of these statutes, namely the Indian Evidence Act, 1872 and identify the lacunae therein. The Indian Evidence Act, 1872[3] is an act documenting the rules that command the admissibility of evidence in the Indian courts of law. Before the codification of the Indian Evidence Act and the rules therein, admissibility of evidence was based on the regulations prescribed in the traditional legal systems of diverse social groups and communities and differed for individuals based on their caste, community, religion and stature. With the advent of the Indian Evidence Act, a uniform set of laws were applicable to all citizens, which was a revolutionary step in the field of judiciary. Sir James Fitzjames Stephen[4], who laid the groundwork for this exhaustive law, may be called the founding father of the Indian Evidence Act, 1872.

The inception of the Indian Evidence Act, 1872 finds its roots in the colonial era and is thus influenced by the society of that period. It is prudent that the law be amended in confluence with the ever-developing jurisprudence of India. This provides a luminating segue for the extensive scrutiny and resultant discovery of a multitude of loopholes in the Indian Evidence Act.

PREVIOUS COMMITTEE REPORTS ON THE INDIAN EVIDENCE ACT, 1872

In furtherance of this determination to strengthen the legislations of India, various committees have been set up to examine the Indian Evidence Act.

[1] The Indian Penal Code, 1860.
[2] The Criminal Procedure Code, 1974.
[3] The Indian Evidence Act, 1872.
[4] John Roach, *James Fitzjames Stephen*, 1, The Journal of the Royal Asiatic Society of Great Britain and Ireland, Apr. 1,16 (1956).

The 69th Law Commission Report: Submitted in May, 1977, the 69th Law Commission Report[5] was prepared by a committee headed by Justice P.B. Gajendragadkar, the then Chairman[6] of the Law Commission of India. Justice Gajendragadkar highlighted the necessity of the revision of the Indian Evidence Act in the 69th Law Commission Report saying that *"…. with the passage of time, it has been disclosed that there has been a difference of judicial opinion on some relevant and important points and, in making its recommendations, the Commission has taken into consideration this aspect of the matter. After the Act was passed in 1872, some new juristic principles have been evolved and have received acceptance from the jurists and these have been kept in view by the Commission in making some of its recommendations.[7]"* Despite the report being an extensive document spanning over 2,000 pages, the Central Government proved unsuccessful in considering the amendments mentioned therein, citing that a multitude of changes in the law of evidence had been witnessed and the aforementioned amendments could not possibly cater to these new developments.

The 74th Law Commission Report: The 74th Law Commission Report[8] on the admissibility of certain statements made by witnesses before commissions of inquiry and other statutory authorities was published in August 1978. The then Chairman[9] of the Law Commission of India, Justice H.R. Khanna, headed the committee responsible for the said report. A 7-page document, the 74th Law Commission Report pertains to S. 32[10] and 33[11] of the Indian Evidence Act read with Ss. 6[12], 8B[13] and 8C[14] of the Commission of Inquiry Act. This report differs from other Law Commission reports in that it was a proposal to the then Ministry of Law, Justice and Company Affairs as opposed to a document of recommendations.

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[5] Law Commission of India, *The Indian Evidence Act, 1872*, Report No. 69, 1 (May, 1977).
[6] Member Secretary, *Post-Independence Developments*, Law Commission of India, https://lawcommissionofindia.nic.in/main.htm.
[7] Law Commission of India, *The Indian Evidence Act, 1872*, Report No. 69, 2 (May, 1977).
[8] Law Commission of India, *Proposal to Amend the Indian Evidence Act, 1872 so as to Render Admissible Certain Statements Made by Witnesses Before Commissions of Inquiry and Other Statutory Authorities*, Report No. 74, 1 (August, 1978).
[9] Member Secretary, *Post-Independence Developments*, Law Commission of India, https://lawcommissionofindia.nic.in/main.htm.
[10] The Indian Evidence Act, 1872, §32.
[11] The Indian Evidence Act, 1872, §33.
[12] Commission of Inquiry Act, 1952, §6.
[13] Commission of Inquiry Act, 1952, §8B.
[14] Commission of Inquiry Act, 1952, §8C.

The 185th Law Commission Report: The 185th Report of the Law Commission of India[15] is perhaps the most exhaustive review of the Indian Evidence Act, 1872. An iconic publication in the year 2003, the report was spearheaded by Justice M. Jagannadha Rao, the then Chairman[16] of the Law Commission of India. It provides a detailed review of the Indian Evidence Act, 1872 and contains a legion of references to the jurisprudence of other countries such as the United States of America, New Zealand, the United Kingdom of Great Britain and Northern Ireland, and Australia. A precise yet comprehensive report, the 185th Report of the Law Commission of India analyses every section of the Indian Evidence Act, 1872 in lieu of jurisprudential developments and case laws.

It should be noted that there are several other reports of the Law Commission of India that audit the Indian Evidence Act, 1872. However, the aforementioned reports are the most relevant, expansive and recognised in the field of law.

RELEVANCY

'Relevant' fact as defined under Section 2 of the Evidence Act reads as follows:

"*One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."*[17]

The word relevant means "*that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other*."[18] It, therefore, refers to anything which is admissible as evidence. The provisions relating to the relevancy of facts are provided under Chapter II of the Indian Evidence Act from Section 5 to Section 55. Section 5 of the Act provides that evidence can be given of only the facts in issue or which are relevant to a fact in issue and Sections 6 to 55 provide for what facts can be considered relevant to a fact in issue.

[15] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 1 (March, 2003).
[16] Member Secretary, *Post-Independence Developments*, Law Commission of India, https://lawcommissionofindia.nic.in/main.htm.
[17] The Indian Evidence Act, 1872, §2.
[18] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 11 (27TH ed. LexisNexis 2020).

The presumption of innocence of an accused in a criminal trial sits at the heart of the process of administration of justice in the common law system of India. Due to this, the burden of proving the guilt of the accused beyond reasonable doubt lies with the prosecution represented by the State. The Indian Evidence Act of 1872 has been designed and subsequently interpreted and amended keeping in mind the high standards of proof required in a trial. These high standards of proof restrain the admissibility of hearsay in a criminal case.

Hearsay evidence is an out of court statement which is inadmissible as evidence in a court of law. As per Lord Normand, *"The rules against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."*[19] Such statements are inadmissible mainly due to the lack of trustworthiness and no scope of exposing fallacies through cross-examination by the other party in the trial. Moreover, a direct statement from an eye-witness or a witness who has knowledge or expertise regarding the facts in issue or relevant facts under oath is preferred in the interest of a fair trial as the witness would be deterred by the threat of perjury. Also, the court would be able to analyse the competency of the witness as well as his reliability by observing his behaviour. Thus, oral evidence must be direct[20].

However, there exist certain exceptions to the rule against hearsay. These exceptions are mentioned under S. 32 and S.33 of the Indian Evidence Act. These exceptions are driven by necessity in cases where no better evidence could be produced. Also, in certain cases, if hearsay evidence is not admitted it would create a risk of losing valuable information. However, despite the development in evidence law, there exist some lacunas in the structure and application of these sections.

[19] *Teper v. The Queen*, [1952] 4 AC 980.
[20] The Indian Evidence Act, 1872, § 60.

ADMISSION AND CONFESSION

An admission, as defined by the 69th Report is any statement that is made by a party irrespective of whether the party, by making such statement, was acting against its own interest.[21] Admission is a statement of fact that waives or dispenses along with the evidence by accepting that the fact asserted by the opponent is true.[22] The definition of term admission as used in the Indian Evidence Act, 1872 will be clear by reading four sections viz., Ss. 17 to 20 together.

Courts in various cases have led down the scope and ambit of admissions by interpreting S. 17 of the Indian Evidence Act, 1872 and observed that there is no distinction between an admission made by a party in a pleading and other admissions. Under Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true. All the statements made in the plaint can be admissible as evidence. The Court is, however, not bound to accept all the statements as correct. The Court may accept some of the statements and reject the rest.[23]

An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter[24] or by a "reference"[25]. Admission is the best evidence against the party making the same unless it is untrue and made under the circumstances which do not make it binding on him.[26]

A statement when consists of an admission of guilt become a confession.[27] Confession is not statutorily defined, however, in the scheme of Ss. 17 to 31, it is a species of admissions. The concept of confessions as laid down in the Indian Evidence Act, 1872 is related to the Fundamental Rights as enshrined in Articles 20(3)[28] and 21[29] of the Constitution. The growth

[21] Law Commission of India, *Indian Evidence Act, 1872* Report no. 69, 173 (May 1977).
[22] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 137 (27TH ed. LexisNexis 2020).
[23] *Basant Singh v. Janky Singh*, (1967) 1 SCR 1.
[24] The Indian Evidence Act, 1872, § 18.
[25] The Indian Evidence Act, 1872, § 20.
[26] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 139 (27TH ed. LexisNexis 2020).
[27] *Pakala Narayan Swami v. King Emperor*, [1939] UKPC 2.
[28] The Constitution of India, 1950, Article 20(3).
[29] The Constitution of India, 1950, Article 21.

of custodial violence and the excessive police force used for investigations demand a need for more safeguards to protect the Fundamental Rights of the accused and witnesses.[30]

EXPERT EVIDENCE

This report also focuses on the aspect of expert evidence which is dealt with in Sections 45 to 51 under Chapter II of the Indian Evidence Act, 1872. Section 45 of the Act defines an expert-

> *"When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts."*[31]

Section 45 of the Indian Evidence Act deals with the opinions of experts and has a very wide scope. It specifies who an expert is and the manner in which this expert can assist the court, which is mainly scientific in nature. The court is not bound by law to follow or adhere to the opinion of the expert. The experts are admissible as witnesses and their opinion is not conclusive, but merely advisory in nature. This section mentions the areas where expert opinion can be sought, admissibility and reliability of expert opinion and who can qualify as an expert.

Section 45A deals with the opinion of the examiner of electronic evidence. Electronic evidence is any piece of evidence that is crucial and is contained in a digital or electronic form. This section was inserted by the Information and Technology (Amendment) Act, 2008. This section was inserted to extend the status of an expert to the statutory office of Examiner of Electronic Evidence, created under section 79 of Information Technology Act, 2000. For the purposes of this section, an Examiner of Electronic Evidence is deemed to be an expert.

[30] Karthikeyan K. & Ms. Roja, *A Critical Analysis on Confession Under Indian Evidence Act 1872,* 120 Interntaional Journal of Pure and Applied Mathematics, 1217, (2018).
[31] The Indian Evidence Act, 1872, §45.

> "When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 (21 of 2000) is a relevant fact." [32]

The Explanation clause of section 79A further articulates that the "Electronic Form Evidence" means any information of probative value that is either stored or transmitted in electronic form and includes evidence, digital data, digital video, cell phones, digital fax machine etc. To notify the Examiner of Electronic Evidence, the Ministry of Electronics & Information Technology (MeitY) came up with a scheme, the objective of which is to ascertain the competence of all the desiring Central Government or State Government agencies and to qualify them to act as Examiner of Electronic evidence as per their scope of approval through a formal accreditation process. Once notified, such Central or State Government agencies can act as the "Examiner of Electronic Evidences", and provide an expert opinion of digital evidence before any court.

Section 46 of the Act states that "*Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant*."[33] This section is based on the principle that the opinion of an expert is open to corroboration or rebuttal.

Section 47 deals with when opinions as to handwriting can be relevant. It states that when the Court has to give its judgment on the person by which the document has been written or signed, a non-expert's evidence may be relevant when the person knows somebody's handwriting, if they having at any time seen the party write or have a receipt of written communication or observed, in the ordinary course of business, documents purporting to be in that person's handwriting.

According to Section 48, when there is a need to form an opinion about the existence of a general custom or right, the court can ask the persons who are well aware of the existence of the customs. A custom is a traditional and widely accepted way of behaving or doing something specific to a particular society, place, or time. One cannot attach any value to the

[32] The Indian Evidence Act, 1872 §45A.
[33] The Indian Evidence Act, 1872 §46.

broad general statements made by witnesses who endeavour to assist the party by whom they are called by asserting general rules of succession, but are unable to refer to precedents in support of their assertions. Evidence of this nature is of no value and is easily procurable. [34]

This section is further supported by Section 73 which provides that the Court may, for its satisfaction, order the comparison of the handwriting admitted as evidence with writing made in the presence of the court or admitted or proved to be the writing of the person and Section 67 which lays down the "Modes of proof of handwriting".

This report will primarily analyse Sections 45, 45A 46, 47, 47A and 48 of the Act by explaining the status quo of the law, finding lacunas, specifying the amendments required, and then finally giving recommendations.

EXAMINATION OF WITNESSES

Examination of witness is dealt in chapter X of the Indian Evidence Act, 1872 and it includes 32 sections ranging from section 135 – Section 167. Section 138 explains the order in which the witnesses must be examined[35]. A distinct manner of examination has been created in three ways namely examination-in-chief, cross-examination and re-examination. These manners of examinations have been defined under Section 137 of the Indian Evidence Act, 1872. It states that "*The examination of witness by the party who calls him shall be called his examination-in-chief.*"[36] Similarly, cross-examination is defined as "*the examination of a witness by the adverse party*" and re-examination has been explained as "*the examination of a witness, subsequent to the cross-examination by the party who called him*."[37] Section 138 lays down that a witness must first undergo his examination-in-chief, then, cross-examined if the adverse party wishes to and lastly re-examined, if required, by the party that first called him.[38] The section also mentions that the examination-in-chief and the cross-examination must be related to the relevant facts of the case but there is no compulsion to limit the cross-

[34] The Indian Evidence Act, 1872 §48
[35] The Indian Evidence Act, 1872, § 138.
[36] The Indian Evidence Act, 1872, § 137.
[37] The Indian Evidence Act, 1872, § 137.
[38] The Indian Evidence Act, 1872, § 138.

examination to the facts that the witness has testified to in his examination-in-chief.[39] In addition to this, the section also states that if a new matter is introduced in the re-examination, the adverse party may be granted permission to cross-examine the witness on it.[40]

Section 144 mentions that the opposite party may create a compulsion on the witness to produce the concerned document when he has been questioned regarding the inclusion of any contract, grant or any disposition of property in a contract and if he has answered in affirmative. If not produced, the adverse party may object to such evidence given until such document has been produced or till the point the party who called that witness gives any secondary evidence for it.[41] However, the explanation of this section mentions that the section does not forbid a witness from giving oral evidence of statements as to relevant facts, made by other persons, about the contents of any documents[42].

Section 145 provides for cross-examination as to previous statements in writing[43]. Under Section 145, a witness is cross-examined as to any statements made by him on a former occasion, in writing or reduced into writing, without showing the writing to him or proving the same. However, if it is intended to contradict him by the writing, his attention must be called to the writing. The object of this provision is either to test the memory of a witness or to contradict him by previous statements in writing.[44] The statement may be either written by the witness himself or was reduced into writing by someone else.[45] Admissions should be tested by cross-examination.[46] Such writing may be documents, letters, depositions, police diaries, etc. It must be noted that the previous record should be in writing.[47] Statements that are not fully recorded or statements that are recorded in the form of the memorandum are statements falling within the ambit of this section.

Section 146 extends the power of cross-examination far beyond the limits of Section 138, paragraph 2, which confines the cross-examination to relevant facts, including of course the facts in issue.[48] Under Section 146, a witness may be examined not only as to the relevant

[39] The Indian Evidence Act, 1872, § 138.
[40] The Indian Evidence Act, 1872, § 138.
[41] The Indian Evidence Act, 1872, § 144.
[42] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[43] The Indian Evidence Act, 1872, § 145.
[44] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[45] *President, SVV Mandal v Yellaiah*, AIR 1969 AP 148 .
[46] *Sitaram v Ram Chandra*, AIR 1977 SC 1712.
[47] *Majid v State of Haryana*, AIR 2002 SC 382.
[48] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).

facts but also as to all facts which reasonably tend to affect the credibility of his testimony. However, no such cross-examination under Section 146 is legitimate unless it has some reasonable bearing on the credibility of the witness.[49] This is generally spoken of as cross-examination to credit since a large part at any rate of the facts which are relied on for the purpose are facts that touch the credit and good name of the witness. Cross-examination to credit is relevant in a case where everything depends on the judge's belief or disbelief in the witness's story.[50]

Section 147 only applies to the question referred to in clause (3) of the preceding section – Section 146. It refers to "*matters relevant to the suit or proceeding*." The following section, i.e. Section 148, refers to "*matters not relevant to the suit for proceeding*."[51]

The intention of Section 148 is to protect a witness against improper cross-examination, a protection which is often required. The object of this section is to prevent the unnecessary raking up of the history of a witness when it throws no light whatsoever on the questions at hand in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. Under this section, a witness cannot be compelled to answer irrelevant questions however even if the witness chooses to answer them, the witness cannot be contradicted by other evidence as per Section 153.[52]

The questions being asked for cross-examination as under S. 148 are qualified by S. 149 as questions asked on 'reasonable grounds'. According to the section, the cross-examiner must have reasonable grounds to believe that the imputation made against the witness is well-founded. The scope of reasonable grounds which justify these questions are given in the illustrations under Section 149.[53]

Section 150 prohibits lawyers from asking questions without 'reasonable grounds' during cross-examination. This section also prescribes a penalty in case of such questions where the lawyer asks questions aimed at character assassination of the witness without any basis whatsoever. The Court, under the power given by S. 150 can report the matter to the High Court or the Bar Council for appropriate disciplinary action.[54]

[49] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[50] *Bombay Cotton Co v Raja Bahadur Shivlal Motilal*, (1915) 17 Bom LR 455.
[51] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[52] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[53] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[54] DR. V. NAGESHWARA RAO: THE INDIAN EVIDENCE ACT (3rd ed. Lexis Nexis 2020).

Section 156 and 157 of the Indian Evidence Act, 1872, deal with the corroboration of witnesses. Through corroboration, the testimony of a witness is double-checked by drawing support from other relevant facts. As a general rule, the Court does not need the support of corroborative evidence. However, in some situation corroboration is required by a mandatory provision of law.[55]

As per Section 156, to ascertain the accuracy of witness evidence, any question can be asked as to surrounding circumstances though they are not immediately connected with the relevant fact.[56] The frame of this section, in particular, indicates what questions are to be asked in examination-in-chief.[57] This section is the opposite of the "contradiction" of a witness.[58] The section paves the way for cross-examination, which if successful brings out contradiction but if fails would eventually lead to corroboration.[59]

Section 157 deals with the nature of the evidence that may be given to corroborate the testimony of the witness. As per this section, any former statement made by a witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact can be used to corroborate the testimony of a witness.[60] For example, an FIR is not a substantial piece of evidence but it can be used to corroborate the statement of the maker.[61] By virtue of this section, prior statements which otherwise would have become inadmissible because of the rule against hearsay can be used to lend credibility to the witness and in particular, can be used to rebut any suggestion of recent fabrication.[62] This section is based on the principle that consistency is the ground for belief in a witness's veracity.

Section 159 of the Indian Evidence Act, 1872[63] concerns itself with the refreshing of the memory of a witness. It is fundamentally bifurcated, one part dealing with a general witness and the other dealing with expert witnesses. The first three paragraphs and the proviso pertain to general witnesses and the last (fourth) paragraph deals with experts. To further explain the section, the first part elaborates on the three types of 'writings' which may be referred to by a witness to refresh his memory. Briefly, the first kind of writing is such as made by the

[55] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 763 (May 1977).
[56] The Indian Evidence Act, 1872, § 156.
[57] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[58] Law Commission of India, *Review of Indian Evidence Act, 1872,* Report No. 185, 499 (March 2003).
[59] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[60] The Indian Evidence Act, 1872, § 157.
[61] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[62] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 764 (May 1977).
[63] The Indian Evidence Act, 1872, §159.

witness himself during or soon after the transaction in question. The second kind is any writing made by a person other than the witness in the aforementioned time period. Such writing must be verified by the witness to be correct and accurate. The third and last kind is a copy of a document in cases where there is sufficient reason to believe that the original cannot be produced. The second part allows experts to refresh their memories by referencing professional treatises.

Section 160 of the Indian Evidence Act, 1872 provides for the use of a memorandum, where the witness has no present recollection.[64] It is important to differentiate between Section 159 and Section 160 in this regard. Section 159 refers to a document in order 'to revive a faded memory' which is tantamount to the witness swearing from an actual recollection of facts as evoked by the said document. However, there is no recollection in Section 160. Any writing admissible under this section is not because of recollection of memory by the witness at the time of the submission of evidence but rather because he swears to the fact because of his confidence in the correctness of his record.

Section 161 of the Indian Evidence Act, 1872[65] calls for any writing under Sections 159 and 160 to be shown to the opposite party and allows for such party to cross-examine the witness thereupon. The reasons for the same have been articulated as-

"(i) to secure the full benefit of the witness's recollection as to the whole of the facts;

(ii) to check the use of improper documents;

(iii) to compare his oral testimony with his written statement.

The opposite party has a right to look at any particular writing before or. at the moment when the witness uses it to refresh his memory in order, to answer a particular question ; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness."[66]

Section 162 of the Indian Evidence Act, 1872 pertains to four matters related to the production of documents. The first part is the duty of the person summoned to produce a document, the second is the power of the court to rule on its admissibility, the third is the

[64] The Indian Evidence Act, 1872, §160.
[65] The Indian Evidence Act, 1872, §161.
[66] *Empress v. Jhaboo Mehton,* (1882) I.L.R. 8 Cal. 739.

procedure to be followed when exercising the aforementioned power and the fourth is the translation of the document.[67]

Under Section 165, the judge may 'in order to discover or to obtain proper proof of relevant facts ask any question he pleases, in any form, at any time, of any witness or of the parties about any fact, relevant or irrelevant'.[68] The premise of this section lies in the importance of unfolding the truth in the event of an inefficacious examination of a witness. A judge may ask any question that he pleases about any fact, material or not if he does so in order to discover or to obtain proper proof of the relevant facts.[69] It is appropriate to say that the object of allowing the judge to ask irrelevant questions under this section is to obtain 'indicative evidence' which may lead to the discovery of relevant evidence.[70]

Section 166[71] deals with the powers of the jury or accessors with regard to asking questions to the witnesses. It also touches upon the powers of a judge in the same regard.

METHODOLOGY

The present report is based upon a critical analysis of the chapters of the Indian Evidence Act, 1872. It is a detailed study based upon both primary and secondary sources of information. The research team has relied on existing academic and research work on the given legislation, as well as judicial precedents and various Law Commission Reports. To analyse the core of the issue, the team relied on: i) The Constitution of India, 1949, ii) The Indian Evidence Act, 1872, iii) The Criminal Procedure Code, 1973, iv) Personal Data Protection Bill, 2019, v) Information Technology Act, 2000, vi) Law Commission Reports with special emphasis on the 69th and the 185th Law Commission Reports; vii) Judicial precedents; viii) International Legislations and other sources of law, ix) Academic Literature like papers on the Evidential Jurisprudence of foreign nations, publications by International Organisations and Commentaries on the Indian Evidence Act, 1872.

[67] The Indian Evidence Act, 1872, §162.
[68] The Indian Evidence Act, 1872, §165.
[69] *Queen Empress v. Han Lakshman,* I.L.R. 10 Bom. 185.
[70] *K. L. Krishna Ayyar v. T. Balakrishna Iyer,* AIR 1934 Mad. 199(2).
[71] The Indian Evidence Act, 1872, §166.

PART – II

ABOUT THE ACT

The Indian Evidence Act, 1872, recognized as Act No. 1 of the year 1872, is a Catholic Legislation on Evidentiary Law containing 11 chapters and 167 sections. It came into force on 1 September 1872[72]. Although drafted and implemented in the period of the British Raj, the Indian Evidence Act, 1872 is still in force and is largely similar to its original form except for the changes made by the Criminal Law Amendment Act, 2005[73]. The jurisdiction of the Indian Evidence Act, 1872 extends to the whole of the Republic of India.[74] It applies to all judicial proceedings in or before an Indian court of law inclusive of the court-martial.[75] However, it does not apply to affidavits[76] presented before the Court or to any officer, nor to proceedings before an arbitrator. The Indian Evidence Act, 1872 is neither a procedural nor a substantive law, but rather an adjective one. This means that it is inclusive of both the rights of an individual as well as the procedures via which substantive laws are enforced.

LACUNAS

RELEVANCY AND ADMISSIONS

1. The Scope of Section 11 is Very Wide in its Application

Section 11 of the Indian Evidence Act, 1872 lays down such instances wherein facts not otherwise relevant, become relevant. It provides as follows:

"Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

[72] The Indian Evidence Act, 1872, §1.
[73] The Criminal Law (Amendment) Act, 2005.
[74] The Indian Evidence Act, 1872, §1.
[75] The Indian Evidence Act, 1872, §1.
[76] The Code of Civil Procedure, 1908, §30 (c), Schedule I, Order XIX ; The Code of Criminal Procedure, 1974, § 295, §297.

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable"

Clause (2) of Section 11 is very wide in its application. The Law Commission in its 185th report elucidated upon the scope of Section 11 and stated that the facts which though logically relevant are not legally relevant come under two rules of exclusion – Facts which would come under hearsay and facts which would come under those transactions between two parties that ought not to operate to the disadvantage of a third. Therefore facts which come under one of these two rules of exclusion are irrelevant. However, if they are inconsistent with the fact in issue or make the existence of the fact in issue highly probable or improbable they become became relevant because of Section 11 despite being legally irrelevant.[77] It is therefore recommended that the scope of Section 11 be restricted.

2. Scope of Section 12 is required to be Expanded

Section 12 of the Indian Evidence Act, 1872 enables the Court to admit those facts which can help it to determine the amount of damages which out to be awarded in a suit for damages. The section provides that "*In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.*"[78]

Therefore, the facts which tend to increase or decrease the amount of damages to be determined by the Court become admissible under this section although the said evidence may not be expressly involved 'in issue'. The Law Commission of India vide its 69th report noted that there is a distinction between the terms 'compensation' and 'damages' with the latter being confined only to civil cases. Since the legal system may require the criminal courts to deal with claims for 'compensation' as well, the scope of Section 12 is required to be expanded.

[77] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 71 (March, 2003).
[78] The Indian Evidence Act, 1872, § 12.

3. Section 19 and Section 20

Section 19:

"*Admissions by persons whose position must be proved as against party to suit.—Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.*"[79]

This section refers to the statements made by a third person against his or her own interests when it affects the position or liability of the person and when that position or liability has to be proved against a party to the suit and is relevant against the party. Nevertheless, ordinary statements made by strangers to a proceeding would not amount to an admission. This is a general exception to the rules of the statement made by the third parties which hold no relevance in proceedings.[80] If such liability of a person is depended upon the liability of a stranger to the suit, then an admission by a stranger in respect to his liability amounts to an admission.

Section 20:

"*Admissions by persons expressly referred to by party to suit.—Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions*."[81]

This section applies only when both parties to a suit jointly agree to seek an opinion of a third party. Here, both parties automatically agree to be bounded by the opinion of the third person.[82] It also forms another exception to the general principle of admission made by strangers to the suit.

Ss. 19 and 20 are the two exceptions to the general rule laid down in S. 18. Under this Section, the parties to the proceedings may use the statement of the third person if the statement of the third person contained an admission against his own interest, and could have

[79] Indian Evidence Act 1872, § 19.
[80] *Appavu vs. Nanjappa*, 25 Mad L.J 329
[81] Indian Evidence Act 1872, § 20.
[82] *Hirachand Kothari vs State of Rajasthan* 1985 SCC 17.

been used against him if he is sued or was sued in connection with the matter involving the positions or liability affected by that admission. S. 19 means that the admissibility of a statement made by a third person depends upon the proof of his position as against the parties to the suit or proceeding. An admission by the third person is relevant only up to his liability. As S. 20 is the second exception to the general rule which is laid down in S. 18 - dealing with one of the classes of vicarious admissions. Where a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person making the reference.

4. Insufficiency in the language of Section 21

The relevancy of admissions as laid down in S. 21 has two branches, viz., positive branch and negative branch.[83] The positive branch deals with the circumstances when the admissions can be proved against the person making them and their representative in interest. The negative part describes that admissions cannot be proved against the person making them except for three cases specified in clauses (1), (2) and (3).[84] When the language of the positive part is looked at, it appears to be incomplete as the preceding sections provide that statements made by an agent, by persons with joint interests, by persons whose position must be proved as against a party to the suit and by a referee are admissions.[85]

5. Section 22 should be Re-drafted for more Clarity

Section 22 of the Indian Evidence Acts deals with the relevancy of oral admissions as to the contents of documents. Under this section, the contents of a document which is capable of being produced as evidence "*must be proved by the instrument itself and not by oral evidence*".[86] It is important to note that Section 22 departs from its counter-part under the English law wherein "*admissions are receivable to prove the contents of the documents without notice to produce and without accounting for the absence of the originals."*[87] The

[83] Law Commission of India, *Indian Evidence Act, 1872* Report no. 69, 182 (May 1977).
[84] The Indian Evidence Act, 1872, § 21.
[85] Law Commission of India, *Indian Evidence Act, 1872* Report no. 69, 182 (May 1977).
[86] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 159 (27TH ed. LexisNexis 2020).
[87] *Slatterie v. Pooley*, (1840) 6 M & W 669.

oral admission under this provision is not relevant until the general conditions for the admission of secondary evidence are satisfied.[88]

Although the section does not require any substantive changes, the language of the provision is required to be made clearer to ensure that the scope and intent of the same are clearly spelt out.

6. Language of Section 23 is required to be amended

Section 23 lays down that the admission in civil cases is not relevant in two cases[89]:

(1) When the admission is made upon an express condition that the evidence of it is not to be given, or

(2) when it is made under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

This section deals with the principle of 'offers without prejudice' and acts as a bar on the admission of such concessions that are made during some negotiations aimed at settling a dispute.[90] The Law Commission of India in its 69th report noted that the scope of Section 23 was limited to admissions which are 'expressly made' or 'which can be implied from the circumstances'. It is recommended that the language of Section 23 be amended so that its scope and intent are more clearly laid out.

7. Section 24

S. 24[91] refers to a ''*confession caused by inducement, threat or promise, when irrelevant in criminal proceedings*''. It states:

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 any inducement, threat or 2 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

[88] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 385 (May 1977).
[89] The Indian Evidence Act, 1872, § 23.
[90] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 115 (March, 2003).
[91] Indian Evidence Act, 1872, §24

gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

The Law Commission of India in its 185th report[92] recommends the amendment of S. 27 of the Evidence Act. The report has made a distinction between ''inducement and promise'' and ''threats, violence, coercion or torture''. It has observed that the admissibility of statements made by inducement and promise whilst excluding the latter part, thereby balancing the human rights of the defendants with that of the public interest. In that light, it would be appropriate to take a look at S. 24. The report also mentions that permitting of statements obtained through torture, threats, coercion or violence would encourage police to resort to such means to extract confessions.[93]

In ***R. v. Baldry[94],*** Lord Campbell C.J. observed-

''The reason is not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury.'' The admission of such evidence would naturally lead the agents of the police, "*while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession*.''

In the case of ***Gyanesh Rai And Another vs State Of U.P.***[95], the Allahabad High Court observed:

"*Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No. society can permit it.*"

[92] Law Commission of India, *Review of the Indian Evidence Act 1872, 185th Report, 122, 166 and 167 (March 2003).*
[93] Law Commission of India, *Review of the Indian Evidence Act 1872, 185th Report, 151 (March 2003).*
[94] *R v. Baldry,* (1852) 2 Den 430 per Erle J.
[95] *Gyanesh Rai and Another v. State of UP and Ors*, AIR 2015

In ***Fisher v. State***[96], the court said:

"Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

8. Safeguard for Confession under Section 26

The doctrine of poisonous tree[97] establishes that the evidence obtained unlawfully are not admissible and excluded at the time of the trial. In the case of ***Westover v. United States***[98], the confession, which was a result of a thorough fourteen hours interrogation, was held to be hit by the doctrine of the poisonous tree and therefore, invalid.[99]

In India, the exclusionary principle for inadmissibility of confessions is for cases only when the confessions are made to the police[100] or in police custody.[101] The doctrine of "excluding the fruit of a poisonous tree" has been included in the scheme of Ss. 24, 25 and 26.[102] S. 26 provides that a confession made in police custody is not a valid confession as the presence of police attracts the possibility of a compelled confession.[103] Further, if such confessions are made in presence of a Magistrate (in the police custody), the confessions are considered as valid as the presence of Magistrate negates the possibility of any compelled testimonies by the accused, thereby making it a voluntary and credible confession.[104] The right against self-

[96] *Brown v. State*, 161 So. 465, 465 (1935)
[97] *Nardone v. United States*, 308 U.S. 338, 341 (1939).
[98] *Westover v. United States*, 384 U.S. 436, 496 (1966).
[99] *Commonwealth v. Spoffard*, 343 Mass. 703, 180 N.E. 2d 673 (1962).
[100] The Indian Evidence Act, 1872, § 25.
[101] The Indian Evidence Act, 1872, § 26.
[102] *Selvi and Others vs. State of Karnataka*, (2010) 7 SCC 263.
[103] Batuk Lal, 'The Law of Evidence' 247 (22nd edn, Central Law Agency).
[104] Zwing Lee Ariel v. State of MP, AIR 1954 SC 15.

incrimination[105] stands as a privilege against involuntary confessions at any stage of a criminal investigation and trial.[106]

However, the case of ***Selvi v. State of Karnataka***[107], raises the question of *Miranda* warning[108] in Indian Law. The court observed that. "In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda* warnings[109]. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).110"

Miranda[111] warnings never explicitly became one of the pre-requisites for obtaining the fruits of the confession. Therefore, it becomes extremely important to remove all the possibilities that makes the confession an involuntary confession.[112]

9. Obsolete terms should be removed from the language of Section 26

Section 26 of the Evidence Act provides as follows –

"*No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Explanation. — In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George *** or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).*"

There is an evident need for an amendment to this section, as certain parts of it are no longer relevant to present times.

[105] The Constitution of India, 1950, Article 20(3).
[106] *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424.
[107] *Selvi and Others vs. State of Karnataka*, (2010) 7 SCC 263.
[108] *Miranda v. Arizona*, 384 U.S. 436 (1965).
[109] *Miranda v. Arizona*, 384 U.S. 436 (1965).
[110] The Constitution of India, 1950, Article 20(3).
[111] *Miranda v. Arizona*, 384 U.S. 436 (1965).
[112] *Umar v. Empress*, 51 P.R. 1887 (Cr.).

9. Amendments in Section 27 vis a vis Section 24, 25, 26.

Section 27 of the Indian Evidence Act lays down the scope of how much information received from an accused may be proved. It is founded on the principle that a confession made by the accused can when supported by the discovery of a fact may be presumed to be true.[113]

Section 27 reads as follows

"*How much of information received from accused may be proved. —*

Provided that*, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, sin the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved*."

While this section starts with the words 'provided that', it is prima facie unclear as to which sections among 24, 25 and 26 is it a proviso to.[114] It is therefore recommended that the language of the section be amended so as to remove this ambiguity.

10. Ambiguity in the admissibility of facts in issue Under Section 32

As per S. 3 of the Indian Evidence Act, 1872, *"fact means and includes - (1) anything, state of things, or relation of things, capable of being perceived by the senses; (2) any mental condition of which any person is conscious"*;

"Relevant- One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.";

"Facts in issue means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows."

Facts in issue are facts out of which a legal right, liability or disability arises. Matters which are alleged by one party and denied by the other may be classified as facts in issue.[115]

[113] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 159 (27TH ed. LexisNexis 2020).
[114] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 142 (March, 2003).
[115] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE (27TH ed. LexisNexis 2020).

The opening lines of S. 32 of the Indian Evidence Act, 1872 state:

"Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases…"

As per the wording of the section, it pertains to the admissibility of statements *"of relevant facts"* only. However, the various illustrations of the section pertaining to situations dealing with facts in issue as well, for example, illustration (a), (i) and (k). These illustrations are as follows:

"(a) The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or the question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(i) The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact."

In ***Patel Vandravan Jekisan v. Patel Manilal Chunilal***[116], the question before the Court was whether, in the Maratha country, a Hindu widow could adopt a son without the permission of her husband and the consent of her kindred. The statement of the widow saying that such adoption could be done as per a custom was held inadmissible. As per the Court, S. 32 was not applicable to a situation where the evidence was required to prove a fact in issue and not merely a relevant fact.

[116]*Patel Vandravan Jekisan v. Patel Manilal Chunilal,* (1890) 15 Bom. 565.

The issue was also discussed in ***Jadavkumar Liladhar Mainthia v. Pushpabai Mainthia***[117] In this case, it was held that statements of facts in issue would be admissible under S. 32. *"Take for instance the dying declaration under sub-clause (1) of S. 32, which refers to the cause of the death of a person making the statement. If a murdered person had made a dying declaration stating that his death was caused by the accused shooting him with a revolver, and such a statement was sought to be used in the trial of the accused for murder, such a statement would certainly fall under sub-cl. (1). But that would not be a statement of a relevant fact but of a fact directly in issue because the cause of the death is a fact in issue in a trial for murder of the person against whom the statement is sought to be used, and one of the illustrations to Section 5 of the Evidence Act, itself says that such a fact is a fact in issue. Further if one were to look at the illustrations to S. 32, it is clear that many of the illustrations there are of statements of facts in issue and not merely of relevant facts."*[118]

This anomaly has also been pointed out by the Law Commission, in its 69th and 185th reports.[119] Accordingly, the Law Commission has suggested an amendment to S. 32 include "facts in issue" as admissible.

11. Vagueness surrounding "Circumstances of the Transaction" under Section 32 (1)

The words "circumstances of the transactions" (resulting in death) in S. 32 (1) has caused confusion on two accounts. The first is that to what extent a statement in a dying declaration revealing the motive of the person who caused death can be admitted under circumstances of transactions under S. 32 (1). There have been contradicting interpretations with respect to motive by different high courts. In ***Emperor vs Somra***[120] before the Patna High Court, the deceased declarant had in the first information report expressed the motive of the accused persons and subsequently, in the dying declaration, he stated that he had been assaulted by the accused persons because of "*enmity caused by my acting as a wizard*" (the motive stated in the first information report). These statements were held to be circumstances of

[117] *Jadavkumar Liladhar Mainthia v. Pushpabai Mainthia,* AIR 1944 Bom 29.
[118] *Id.*
[119] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 230-231 (May, 1977); Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 195 (March, 2003).
[120] *Emperor v. Somra*, AIR 1938 Pat. 52.

transactions resulting in death. On the other hand, in a case before the Madras High Court[121], statements by a deceased person showcasing motive were held inadmissible.

It is of utmost importance to clarify the meaning and purpose of the words "circumstances of the transactions" with respect to the motive. The perception of a deceased declarant as to the motive of a person that resulted in his death should not be admissible because in many cases, what is considered to be motive and how it is expressed in words by the declarant may be extremely subjective. Moreover, the defence will have no opportunity to cross-examine a statement which could be based on misunderstandings or misgivings. The Supreme Court, in ***Munnu Raja v State of Madhya Pradesh***[122], has stated that law to the effect of dying declaration should be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination

The second point of confusion stands with respect to whether and in what circumstances can the dying declaration of one person be proof of facts relating to the death of another person under the meaning of "circumstances of the transactions". There seem to be diverging views of different High Courts. In ***Nga Hla Din v. Emperor*** [123], the statement in the dying declaration of the wife could be used as "circumstances of the transactions" leading to the death of her husband when their murder was committed by two different persons at the same time. The rationale behind this judgment was explained through a possible instance that had the husband not been attacked, he would have gone to his wife's assistance. Thus, the husband was a part of the transaction which led to the death of his wife. The view that "circumstances of the transaction" can include the death of another person and the dying declaration of said person can be admissible is shared by the Patna High Court[124] and the erstwhile Travancore High Court[125]. However, this wide view is rejected by the Allahabad High Court[126]. The 69th Law Commission Report[127] states that the words "circumstances of the transaction" give a wider scope to the section. It further states that emphasis should not be laid on "his death". The circumstances of the transaction encompass all the circumstances connected to the death of the declarant.

[121] *In re. Beggam Appalanarassayya*, AIR 1941 Mad. 101.
[122] *Munnu Raja v State of Madhya Pradesh*, AIR 1976 SC 2199.
[123] *Nga Hla Din v. Emperor*, AIR 1936 Rangoon 187 (D.B).
[124] *State v. Ramprasad*, AIR 1953 Pat. 354.
[125] *Lukka v. Travincore-Cochin State*, AIR 1955 Trav. Cochin 104.
[126] *Kunwar Pal Singh v. Emperor*, AIR 1948 All. 122.
[127] Law Commission of India, *Sixty-ninth Report on the Indian Evidence Act, 1872*, Report No. 69, 236 (May 1997).

The lack of explanation as to the relation of motive and death of another person to circumstances of transaction cause discrepancies and contradictions.

12. Ambiguity in the interpretation of Clause 3 of Section 32

Cl. 3 of S. 32 relates to the relevance of statements made against the proprietary or pecuniary interest of the person making such statements, or if the statements so made would expose the maker to criminal prosecution or civil action. As per this clause, all such statements are relevant facts.

"The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true."[128] Further, for such a statement to be admissible, it must be shown that the person making it knew that it was against his pecuniary or proprietary interest. *"…with respect to admissibility of statements under Section 32(3) of the Indian Evidence Act, we may add that the question whether the statement was made consciously with the knowledge that it was against the interest of the person making it would be a question of fact in each case and would depend in most cases on the circumstances in which the statement was made…"*[129]

The ambiguity arises as there is a difference of opinion with regards to the relevance of boundary recitals under this clause. The issue has been whether a boundary recital stating the extent of one's land can be considered "against the maker" and be admissible under this clause or not and this has come up before the courts several times. Over the years, the courts have expressed differed opinions on the issue.

In the Calcutta High Court case of ***Ningawa v. Bharmappa***[130] it was laid down that the boundaries given in a mortgage deed relating to adjacent land, at a time when there was no dispute, was a statement admissible under Cl. (3) of S. 32 of the Indian Evidence Act. The same view has been expressed in ***Imrit Chamar v. Sibdhari Pandey***.[131] In ***Tika Ram v. Moti Lal***[132] the Allahabad High Court held that a statement of a neighbour disclaiming his own title to land and recognizing another's title is a statement against the proprietary interest of the

[128]*Dal Bahadur Singh v. Bijai Bahadur Singh*, (1930) 32 Bom LR 487.
[129]*Ramrati Kuer v. Dwarika Prasad Singh*, AIR 1967 SC 1134.
[130]*Ningawa v. Bharmappa*, (1897) I.L.R. 23 Bom.
[131]*Imrit Chamar v. Sibdhari Pandey*, (1911) 17 C.W.N., 108.
[132]*Tika Ram v. Moti Lal*, AIR 1930 All 299.

person making it and is admissible under S. 32(3). *"The recognition of another's title to the land is undoubtedly a statement against the proprietary interest of the person making that statement."*

On the other hand, this view was dissented from in ***Pramatha Nath v. Krishna Chandra***,[133] ***Braja Mohan Das Adhikary v. Gaya Prasad Karan***[134] and ***Kumuda Kumari Dasi v. Dilsook Roy***.[135]

In ***Abdullah v. Kunj Behari Lal***,[136] it was held that recitals of boundaries in sale deeds and mortgages, executed by owners of adjoining plots of land, and describing the disputed land as the tenanted land of the defendants, were relevant under S. 32(3), but not S. 11 or S. 32(2).

13. Interpretation of Section 32(7)

Clause 7 of S. 32 makes statements contained in any deed, will or other documents which relate to any such transaction as is mentioned in section 13, clause (a) relevant facts.

S. 13: *"Facts relevant when right or custom is in question Where the question is as to the existence of any right or custom, the following facts are relevant:-*

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence."

In ***Khudiram v. Amodebala***,[137] the Court opined that the statements would be admissible even if the deed is not between the two parties to the proceedings and it was laid down that the right or custom does not necessarily have to be the question in issue in the proceedings and Cl. (a) of S. 13 has to be read independently of the other portions of S. 13. In ***Rajnarayan v. Maharaj***,[138] the opposite view was taken by the Court, and the scope of S. 32 Cl. 7 was interpreted to only include the statements directly relating to the right or custom.

[133] *Pramatha Nath v. Krishna Chandra*, AIR 1924 Cal. 1067.
[134] *Braja Mohan Das Adhikary v. Gaya Prasad Karan*, AIR 1926 Cal 948.
[135] *Kumuda Kumari Dasi v. Dilsook Roy*, AIR 1927 Cal 918.
[136] *Abdullah v. Kunj Behari Lal*, (1911) 14 CLJ 467 (Cal).
[137] *Khudiram v. Amodebala*, AIR 1948 Pat 426.
[138] *Rajnarayan v. Maharaj*, AIR 1937 Oudh 133.

14. Parties in Proceedings and Representatives in Interest under Section 33

The proviso to S. 33 sets down the condition that "the proceeding was between the same parties or their representatives in interest". Since the proviso mentions only proceedings, a question arises whether the parties to the second proceeding should be parties or representatives of the parties to the first proceeding or whether parties in the first proceeding should be parties or representatives of parties in the second proceeding. Under English law, the former holds true. But as per the Privy Council judgment in ***Krishnayya v. Raja of Pittapur***[139], parties in the first proceeding should be parties in the second proceeding in India. This is an inversion from English law. The Privy Council in ***Krishnayya vs. Venkata Kumara***[140] stated that this inversion was intentional keeping in mind representative doctrines of Hindu joint family. However, this view has been challenged with the reasoning that with regard to the span of human life, if parties to the first proceeding are to be representatives of parties to the second proceeding, the section is limited to a few instances where in the first proceeding, younger people are involved who are representatives of (living) older people who are parties to the latter proceeding[141]. Moreover, the functioning of a Joint Hindu Family does not give rise to a situation where parties to the first proceeding will claim through parties of the second proceeding. Such inversion limits the application of this proviso and compels courts to stretch the meaning of 'representatives in interest.

15. Obsolete terms should be removed from the language of Section 37

S. 37 of the Indian Evidence Act states: *"When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom or in any Central Act, Provincial Act or State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of his Majesty is a relevant fact."*

There is an evident need for an amendment to this section, as certain parts of it are no longer relevant to present times, due to the constitutional changes that took place after 1947.

[139] *Krishnayya v. Raja of Pittapur*, (1933) ILR 57 Mad. 11.
[140] *Krishnayya v Venkata Kumara*, AIR 1933 PC 202.
[141] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 231 (March 2003).

16. Section 38

S. 38 of the Indian Evidence Act, 1872 states: *"When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant."*

The section deals with the relevance of statements of law, and as such, the section is appropriate, other than the fact that this section should not be applied to Indian law itself. This is because a question regarding Indian law is not a matter of evidence,[142] but a matter of general law, well established and understood by the courts of the country.

Sulaiman J., in ***Aziz Bano v. Mohammad Ibrahim Husain***[143] observed the following: *"It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore, allowed to be admitted."*

This observation stands relevant with regards to the current section as well, where it is the duty of the judge to know the Indian laws, and it's a matter of the authority of cases and statutes, rather than evidence. Therefore, this section is only relevant to foreign laws. This view has been supported by the 69th and the 185th report of the Law Commission of India.

17. Rights of Opposing Parties under Section 39

Section 39 provides for how much of a statement must be proved. It is written with a view that wasteful, unnecessary and inadmissible part of a longer statement which forms the evidence must not be presented but at the same time trimmed parts of the statement due to which the meaning is altered out of context should not be presented. The section says that part of the evidence that the court finds necessary must be presented. The problem herein lies as to the extent to which the court's discretion exists and whether the party presenting the

[142]Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 284 (May, 1977).
[143]*Aziz Bano v. Mohammad Ibrahim Husain,1* (1925) ILR 45 All. 823, 835.

evidence has a right to present the entire statement to give a proper understanding. Another question arises as to the right of an opposing party to present a part of evidence if he believes that a trimmed or truncated part is presented before the court or that presenting another part of the longer statement creates a better understanding of the statement or his position. In a judgment[144], Abbot CJ identified the right by differentiating between evidence involving the party being presented against him in which case the party has a right to present the whole evidence but when the evidence is with respect to the witness and a third person, this right does not exist[145].

The Allahabad High Court in ***Queen Empress v. Mannu***[146] interpreted that the section gives courts the discretion to decide how much of the evidence is to be presented. This has been discussed and opposed in the 69th Law Commission Report[147] as well. The differentiation between what the court considers necessary and the court's discretion lies in the fact that the court can decide as to how much of the remainder of the statement is essential to understanding what is to be admitted and not how much of the remainder of a statement can be presented by the opposing party. S. 161 of the Evidence Act also provides that writing must be shown to the adverse party if he requires and the party can then cross-examine the witness. Thus, the adverse party here has the right to inspect the document. Furthermore, S. 145 of the Evidence Act provides for a witness to be made aware of those parts of his previous statements used for the purpose of contradicting him before cross-examination. Thus, the opposing party has broad rights with regards to defending and providing reasons for their statements presented as evidence. They must have the right to defend themselves using statements from the longer statements that consist of the evidence presented by the first party. It is desired that the rights of the opposing party under S. 39 and the extent of court's discretion must be clarified to limit it to deciding as to how much of the remainder of the statement is essential to understanding what is to be admitted, in concurrence with S. 161, S. 145, the 69th and 185th[148] Law Commission Reports.

[144] Queen's case [1820] 2 B&B 297.
[145] SARKAR, LAW OF EVIDENCE 814 (15th Ed, 1999).
[146] *Queen Empress v. Mannu* (1897) ILR 19 All 390
[147] Law Commission of India, *Sixty-ninth Report on the Indian Evidence Act, 1872*, Report No. 69, 289-291 (May 1997).
[148]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 256-259 (March 2003).

18. Section 40

Section 40 of the Evidence Act provides that *"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial."*

The basis for this section is the principle of *res judicata* in civil cases or *autre fois acquit or autre fois convict* in criminal cases. The main object of this section is to prevent a multiplicity of suits.[149]

The section includes the words suit and trial, but in some cases, there may be judgments that bar the trial of a particular issue and not the whole case. This is known as issue estoppel but S. 40 does not include issue estoppel explicitly.

In ***Gujju Lal v. Fateh Lal***,[150] the judge criticized the way S. 40 was worded, and observed: *"It has been considered, that Section 40 only makes former decrees admissible when they have the effect of preventing a Court of Justice from taking cognizance of a suit, that is, from dealing with a suit in its entirety, and that the words "holding a trial" must necessarily refer to criminal proceedings only. This construction of Section 40 would, of course, confine its operation very materially. For example, in the case of a suit for three years' rent, if a former decree had decided against the claim as regards the first year's rent only, that decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree, though a bar to the second suit pro tanto, would not be admissible in evidence under that section; because it would not prevent the Court from taking cognizance of the whole suit, but only of a part of it.*

I cannot doubt that it was intended to include all judgments which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue. The words 'holding a trial' are amply large enough to admit of this construction; and it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in Section 40 of the Evidence Act."

[149]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 262 (March, 2003).
[150]*Gujju Lal v. Fateh Lal*, (1881) ILR 6 Cal 171.

The principle of issue estoppel has been adopted by the Courts of this country. *"The principle of issue estoppel is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently, even for a different offence which might be permitted by law."*[151]

19. Section 41

Section 41 of the Evidence Act consists of two parts. The first part makes the final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction relevant; the second part makes the judgments conclusive proof in certain matters.[152]

Though the section states that judgements in probate jurisdiction "which confer upon or take away from any person any legal character", it has been held in ***Ganesh vs. Ram Chandra***[153] and in ***Kalyan Chand vs. Sita Bai***[154] that this section does not apply to the judgment of the Probate Court refusing probate. The opposite view was taken by the Madras High Court in ***Chinnaswami vs. Harihara Badra***,[155] i.e., a refusal to grant probate took away the character of executors or legatees or beneficiaries under a will and this was also conclusive.

EXPERT EVIDENCE

1. Section 45

i. Qualifications of an expert

Section 45 of The Indian Evidence Act, 1872 states that in order to qualify as an expert, a person needs to have special knowledge, skill or experience in the specific field.

[151] *Masud Khan v. State of Uttar Pradesh*, 1974 AIR 28.
[152] RATANLAL AND DHIRAJLAL, LAW OF EVIDENCE 276 (27TH ed. LexisNexis 2020).
[153] *Ganesh vs. Ram Chandra,* ILR 21 Bom. 563 (1896).
[154] *Kalyan Chand vs. Sita Bai,* AIR 1914 Bom 8 (FB).
[155] *Chinnaswami vs. Harihara Badra,* (1893) 16 Mad 380.

The Supreme Court of India has observed that an expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have special knowledge of the subject.[156] In order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

The lacuna in the act is that it does not provide specific qualifications which are required for an expert but merely states that the expert should be especially skilled in foreign law, science or art.

ii. Fields Requiring Expert Opinion

Opinions of experts are relevant upon a point of (a) foreign law, (b) science, (c) art, (d) identity of handwriting and (e) finger impressions.[157]

The lacuna in the act is that these mentioned fields were determined decades before and do not include other fields which became significant over a period of time.

In the case of ***State (Through Cbi/New Delhi) v. S.J. Choudhary*** [158], the trial court and the high court had rejected the expert opinion of a typewriter by stating that typewriting does not fall within the ambit of Section 45. However, the Supreme Court overruled this judgement to include typewriting as a valid field. Thus, in order to avoid such ambiguity in the act, it is necessary to include certain other fields as well.

2. Admissibility of Expert Evidence

The Supreme Court observed that the law of evidence is designed to ensure that the court considers only that evidence that will enable it to reach a reliable conclusion.[159] The first and foremost requirement for expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge.

[156] *State of Himachal Pradesh v. Jai Lal And Ors,* 1999 7 SCC 280.
[157] The Indian Evidence Act, 1872 §45.
[158] *State (Through Cbi/New Delhi) v. S.J. Choudhary* ,1996 AIR 149.
[159] *Ramesh Chandra Agrawal vs Regency Hospital,* AIR 2010 SC 806.

Thus, in cases, where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

i) that the expert must be within a recognized field of expertise

ii) that the evidence must be based on reliable principles, and

iii) that the expert must be qualified in that discipline.

The lacuna in the law is that it does not mention specific requirements for certain cases of scientific evidence, where the admissibility criteria should be more stringent and more specific since scientific evidence is completely based on facts and hence is more reliable.

3. Reliability on Expert Evidence

An expert is not a witness of fact and his opinion evidence is really of an advisory character. The act states that this evidence is advisory in nature and the opinion does not have a binding effect on the court.

The lacuna in the act is the less reliability placed on scientific evidence and the opinion of a scientific expert not being binding on the court.

4. Ocular Evidence and Scientific Evidence

The Supreme Court in the case of ***Madan Gopal Kakkad*** **v.** ***Naval Dubey***[160], held that a medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court, all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due

[160] *Madan Gopal Kakkad v. Naval Dubey,* 1992 SCC (3) 204.

regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

There has always been a conflict between oral evidence and medical evidence, however as a general rule, oral evidence is given more weightage than medical evidence. In ***Solanki Chimanbhai Ukabhai v. State of Gujarat*** [161], the Court ruled that held that the eyewitnesses account should be preferred unless the medical evidence completely rules it out.

In the case of ***Purushottam v. State of Madhya Pradesh***,[162] the Supreme Court rejected the ocular evidence, which was in conflict with the medical evidence as to the number and nature of the injuries found on the person of the victim.

Thus, the lacuna in the law is in terms of the ambiguity present as to which evidence should be given more precedence in differing situations.

5. Absence of an Expert Panel

In the case of ***Murarilal v. State of Madhya Pradesh*** [163], the Supreme Court held:

> "*But the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses-the quality of credibility or incredibility being one which an expert share with all other witnesses-, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion."*

Thus, it can be inferred that a reason of reluctancy while accepting expert opinion is the possibility of error. The lacuna in the law is the absence of an expert panel which can reduce the possibility of an error due to numerous, qualified experts being involved.

[161] *Solanki Chimanbhai Ukabhai v. State of Gujarat,* AIR 1983 SC 484.
[162] *Purushottam v. State of Madhya Pradesh*, AIR 1961 MP 205.
[163] *Murarilal v. State of Madhya Pradesh,* AIR 1980 SC 531.

6. Liability of Expert Witness

The Act does not talk about the liability of expert witness in case of false information presented by him on purpose. The removal of the lacuna in the form of immunity provided to expert witnesses is extremely essential. It will ensure that the expert witness discloses all the acts with full honesty and does not give false information.

7. Section 47

i. Prerequisites to be an Expert

This section allows an expert can be called upon in order to give their opinion upon a case. The lacuna in this section is that it does not define who can be called a handwriting expert. Strict guidelines to classify a handwriting expert or the qualifications required are not mentioned.

ii. An Objective Judgment

A handwriting expert states whether in his opinion of the admitted writing and the disputed writing was made by the same person but not whether the disputed writing was made by the defendant. The lacuna here is that the court has to spend more amount of time and resources instead of having a bunch of objectives, centrist handwriting experts. The purpose of the opinion of the expert is to assist the trial Judge to make the correct inference from the comparison of the admitted and disputed writings. The opinion of a handwriting expert is not conclusive about the identity of the maker of the disputed writing.

iii. A Certified Copy

One of the main lacunae is that there is no set/verified process for original handwriting for it to be compared within the courts. It could help to understand whether the writing or signature has been written by an individual other than the alleged writer. An anonymous letter is written by a particular suspect writer the writing or the signature in dispute is genuine or forged specially for aged plaintiffs as seen in the case of ***Xavier (Deceased) v. Vaidooriyam***.[164]

[164] *Xavier (Deceased) v. Vaidooriyam*, (2010) 1 MWN (Civil) 331.

8. Lack of Restrictions

A non-expert acquaintance related to the case can identify for the person in question in the court or someone who meets the above guidelines, but there are no verified restrictions on when a person cannot verify. Similarly, since there are no set guidelines regarding who is to be called an expert, one cannot rule out who should not be given the opportunity to verify. Thus, the lacuna is that there is a need to define the scope of the ambit of the individual's permitted to opine or testify on someone's handwriting.

9. Priority to Expert Opinion

The Act does not differentiate between the gravity of opinion rendered by a handwriting expert and an acquaintance regarding the alleged handwriting or signature of the accused or concerned individual. This creates uncertainty in case of dispute between the opinion of the expert and the acquaintance. Additionally, in cases where the handwriting or signature is alleged to be written by a non-authorised person then it is necessary to understand every stroke of the handwriting to reach a scientific conclusion. The same can only be achieved by an individual who is an expert in handwriting analysis and not by a layman who is aware about such alleged handwriting.

10. Reliability of Oral Evidence

Any witness can make bold statements, supporting the allegation of the party who called them but many times proving the reliability of these statements becomes difficult as the documented or social evidence is not visible. They need to present proof for the existence of a custom. For a custom to be legally binding, it should be certain, reasonable, and should have existed since time immemorial i.e. acted upon imperative for a long period with such invariability and continuity that it has established itself as a governing rule in the community, not be opposed to public policy and should be able to be proved.

The lacuna in Section 28 is the lack of reliability of oral evidence unless documented proof is seen or if they are strictly followed among the community. A single person following a custom will not be accepted and the acceptance of oral evidence varies from case to case; there are no strict guidelines regarding what oral evidence consists of and how much should one rely on oral evidence in the absence or presence of any other form of evidence.

11. Section 48 – Admissibility of a Custom

Any custom has to be reliable and relevant for it to be admissible. This section has not mentioned any guidelines regarding what kind of proof is necessary to be provided to the courts for to prove the existence of a right or custom.

It is admissible evidence for a living witness to state his opinion in the existence of a family custom and to state, as the grounds of that opinion, information derived from deceased persons, and the weight of the evidence would depend on the position and the character of the witness and of the persons on whose statements he has formed his opinion. It has been held in ***M/S. Motilal Padampants Sugar Mills v. State of Uttar Pradesh and Ors***.[165] and ***Sheonath Singh v. Appellate Assistant***[166] that the most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom had been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced. It has been held that a custom proved to have existed during a period of living memory can only be presumed to have existed from before the period of legal memory only where conditions may be assumed to have been permanent and stable.

A major lacuna with this section is that for a custom to be regarded as reasonable, there is no checklist; the main requirement is that it cannot be contravened, but, apart from that nothing is specified, nor is a time limit set for it to exist for a long time. For how long a custom should be a governing rule in the society and what should be the nature of such a custom are not mentioned in the IEA. Therefore, Courts have to rely on past cases to determine whether a practice qualifies as a custom and the outcome differs on a case-to-case basis.

12. Commentaries vs. Religious Texts

Courts have to construe the text of any religion and its laws in the light of the explanations given by recognised commentators upon it. An amendment is required here to specify whether the court has to abide by the cultures' written text or the commentary interpretation of a custom. The commentaries can override the authority of smritis only on the strength of the customs and usages that were incorporated in such commentaries. But it must always be

[165] *M/S Motilal Padampat Sugar Mills* v. *State Of Uttar Pradesh and Ors.,* AIR 1979 SCR (2) 641
[166] *Sheo Nath Singh* v. *Appellate Assistant CIT,* AIR *(*1972) 3 SCC 234

remembered that since the said commentaries were written, several centuries have passed by and during this long period, the society has not remained static.

Notions of good social behaviour and the general ideology of any and all societies have been changing; with the growth of modern sciences and as a result of the impact of new ideas based on a strictly rational outlook of life, customs and usages have changed. The commentaries have acquired greater importance due to their progressive absorption of customs and the local customs and usages incorporated in their texts. It is difficult to speculate whether the Indian courts in the future would be inclined to attribute such contingent authority to the commentaries, but there is certainly both novelty and force in this reasoning.

EXAMINATION OF WITNESSES

1. **Section 138**

Absence of provisions for summoning witness for further examination-in-chief in cases where a new matter has been introduced in the re-examination

2. **Section 144**

The presence of the words "evidence" and "statement" under the same clause under Section 144 gives rise to some ambiguity.

3. **Oral statements and secondary evidence excluded by the scope of 'writing' under S. 145**

S. 145 accounts only for cross-examination of a previous statement via writing. This ignores all oral statements, thus constricting the scope of cross-examination and the section.

4. **The narrow scope of questioning the credibility of a witness due to the term 'veracity' under S. 146(1)**

The use of the term 'veracity' narrows down the scope of questioning the credibility of a witness. The term limits the scope, prohibiting the lawyer from cross-examining a witness under S. 146 from casting moral aspersions on the witness.

5. The wording of S. 147 is slightly confusing

The phrase 'matter relevant to suit or proceeding' under S. 147 refers to the 'matter in issue' however, a wide interpretation of S. 147 can be taken to include 'matter not in issue' also, which is defined under S. 148.

6. Accused not considered as a witness under S. 148

When the Indian Evidence Act, 1872 was enacted, the accused was not considered to be a competent witness. Therefore, there is a lot of ambiguity as to what extent this section is applicable to the accused as a witness.

7. Improper usage of vernacular words like 'Vakil' and 'Dakait' and words like 'Barrister' which aren't present in today's legal language under S. 149

Words like Barrister, Pleader, Vakil, Dakait do not exist in the legal vocabulary anymore.

8. Improper usage of the term 'High Court' as the authority governing legal practitioners under S. 150 and Improper usage of vernacular words like 'Vakil', 'Dakait' and words like 'Barrister', 'Pleader', 'Attorney' which aren't present in today's legal language under S. 150

9. No mention whether queries can be made with respect to facts in issue as well for corroboration of evidence under S. 156

Under S. 156, it is stated that a query can be made with respect to any relevant fact. However, there is no mention that whether queries can be made with respect to facts in issue as well for corroboration of evidence, especially when S. 5 of Indian Evidence Act, 1872 differentiate between facts in issue and other relevant facts.

10. The ambiguity of statement made and absence of the provision for providing independent evidence under S. 157

A. S. 157 states "any authority legally competent to investigate the fact", and S. 2 (h) of the Code of Criminal Procedure, 1973 excludes magistrate as the authority competent to investigate the fact. This leads to an ambiguity that whether a statement made before a magistrate under S. 159 of the Indian Evidence Act, 1872 or S. 164 of Code of Criminal Procedure, 1973 can be used for corroboration.

B. Another Lacuna that is evident in S. 157 is that there is no comprehensive section or provision permitting independent evidence to be given confirming the credit of a witness, though there is a provision for impeaching credit (i.e., S. 155 of the Indian Evidence Act, 1872).

11. The improper language which constricts the scope of S. 159

12. The use of the word 'writing' as opposed to 'document' under S.160 creates ambiguity and leads to deformity between the two sections.

13. The phrase 'matters of State' under S. 162 leads to a violation of the basic tenet of 'separation of powers.

14. The language of S. 165 creates structural ambiguity.

15. S. 166 deals with the powers of the jury and is thus irrelevant in its entirety.

SUGGESTED AMENDMENTS (Summary)

Section 11

The Scope of Section 11 should be Restricted

Original Provision

"*Facts not otherwise relevant, are relevant.*

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

Suggested Provision

An explanation should be added to Section 11 as per the recommendations of the Law Commission 185th Report[167]:

"*Explanation: Facts not otherwise relevant but which become relevant under this section need not necessarily be relevant under some other provision of this Act but the degree of their relevancy will depend upon the extent to which, in the opinion of the Court, they probabilise the facts in issue or relevant facts*".

Section 12

Scope of Section 12 is required to be Expanded

Original Provision

"*In suits for damages, facts tending to enable Court to determine amount are relevant.—*

In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant."

Suggested Provision

"*In suits for* ***compensation or*** *damages, facts tending to enable Court to determine amount are relevant.—*

In suits in which ***compensation or*** *damages are claimed, any fact which will enable the Court to determine the amount of* ***compensation or*** *damages which ought to be awarded, is relevant.*"

[167] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 77 (March, 2003).

Section 19

Original Provision

"19. Admissions by persons whose position must be proved as against party to suit. *Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and they are made whilst the person making them occupies such position or is subject to such liability."*

Suggested Provision

"19. Admissions by persons whose position must be proved as against party to civil proceedings.

Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and they are made whilst the person making them occupies such position or is subject to such liability".

Section 20

Original Provision

"20. Admissions by persons expressly referred to by party to suit.

Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions."

Suggested Provision

"*20. Admissions by persons expressly referred to by party to civil proceedings.*

Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions."

Section 21

Original Provision

"21. Proof of admission against persons making them, and by or on their behalf

Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases: —

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."

Suggested Provision

*"**21. Proof of admissions against persons making them, and by or on their behalf***

(1) Admissions are relevant and may be proved against the following persons that is to say,—

(a) the person who makes them, or his representative in interest;

(b) in the case of an admission made by an agent where the case falls within sub-s. (2) of S. 18, the principal of the agent;

(c) in the case of an admission made by a person having a joint proprietary or pecuniary interest in the subject-matter of the proceeding, where the case falls within sub-s. (4) of S. 18, any other person having a joint proprietary or pecuniary interest in that subject-matter;

(d) in the case of an admission made by a person whose position or liability it is necessary to prove as against a party, where the case falls within S. 19, that party;

(e) in the case of an admission made by a person to whom a party has expressly referred for information, where the case falls within S. 20, the party who has so expressly referred for information.

(2) Admissions cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(a) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under S. 32.

(b) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(c) An admission may be proved by or on behalf of the person making it, when it is relevant otherwise as an admission."

Section 22

Section 22 should be Re-drafted for more Clarity

Original Provision

"*Oral admissions as to the contents of a document are not relevant unless and until the party proposing them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.*"

Suggested Provision

This section should be redrafted as per the recommendations of the 69th and 185th Law Commission Reports.

"*Oral admissions as to the contents of a document are not relevant –*

(a) unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained; or

(b) except where a document is produced and its genuineness is in question."[168]

Section 23

Original Provision

"*In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given*

Explanation *- Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.*"

Suggested Provision

Section 23 should be amended as per the recommendations of the Law Commission 185th Report[169]

"*(1) In civil cases, no admission is relevant:*

(a) if it is made either upon an express condition that evidence of it is not to be given; or

(b) if it is made for the purposes of or in the course of a settlement of compromise of a disputed claim; or

(c) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given,

unless the party who made the admission and the party in whose favour the admission is made agree that evidence be given, or evidence as to the admission becomes necessary to ascertain if there was at all a settlement or compromise or to explain any delay where a question of delay is raised;

(2) Such an admission which is not relevant under sub-section (1) may be relevant in so far as it touches upon an issue between the person who made the admission and a third party to the admission.

[168] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 177 (May 1977); Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 114 (March, 2003).
[169] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 121 (March, 2003).

(3) Nothing in this section shall exempt;

(a) any legal practitioner from giving evidence of any matter of which he may be compelled to give evidence under section 126; or

(b) a person who made a publication, from giving evidence of any matter of which he may be required to give evidence under section 132 A.

Explanation I: 'legal practitioner' as used in this section shall have the meaning assigned to it in Explanation 2 to section 126.

Explanation II: 'publication' as used in this section shall have the meaning assigned to it in para (a) of the Explanation to section 132 A."

Section 24

Original Provision

"24. Confession caused by inducement, threat or promise, when irrelevant in a criminal proceeding.

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 any 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 proceedings against him."

Suggested Provision

"24. Confession caused by inducement, promise, coercion, violence or torture, when irrelevant in a criminal proceeding.

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 any ***inducement, promise, threat, coercion, violence or torture 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 proceedings against him."

Section 26

Obsolete terms should be removed from the language of Section 26

Original Provision

"26. Confession by accused while in the custody of police not to be proved against him

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation. —In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."

Suggested Provision

This section should be redrafted in accordance with the recommendations of the 69th Law Commission Report.

"*No confession made by an person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a magistrate under section 164 of the Code of Criminal Procedure, 1973*"[170]

Section 27

Original Provision

"Provided that, when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Suggested Provision

[170] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 205 (May 1977)

This section should be redrafted in accordance with the recommendations of the 185th Law Commission Report.

"Notwithstanding anything to the contrary contained in sections 24 to 26, when any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact so discovered may be proved, but not the information, whether it amounts to a confession or not:

Provided that facts so discovered by using any threat, coercion, violence or torture shall not be provable."[171]

Section 32

Ambiguity in the admissibility of facts in issue Under Section 32

Original Provision

The opening lines of Section 32 read as follows –

"Cases in which statement of relevant fact by person who is dead or cannot be found, etc ., is relevant. —Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:"

Suggested Provision

The opening lines of S. 32 should be amended as follows:

"Cases in which statement of relevant fact or fact in issue by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of facts in issue or relevant facts, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or

[171] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 176 (March, 2003).

expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:"[172]

Ambiguity in the interpretation of Clause 3 of Section 32

Suggested Provision

An explanation should be added to the section to settle the issue. The 69th Law Commission report suggested that such recitals shouldn't be admissible,[173] but the 185th report suggests[174] that such recitals should be admissible under Cl. 3 of S. 32.

We agree with the 185th report and suggest the addition of the following explanation, as suggested by the Law Commission:

"Explanation: A recital as regards boundaries of immovable property in document containing such statements, as to the nature or ownership or possession of the land of the maker of the statement or of adjoining lands belonging to third persons, which are against the interests of the maker of the statement, are relevant and it is not necessary that the parties to the document must be the same as the parties to the proceedings or their privies."

Interpretation of Section 32(7)

Original Provision

"(7) or in document relating to transaction mentioned in section 13, clause (a). —When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a)."

Suggested Provision

Section 32 (7) section should be redrafted in accordance with the recommendations of the 185th Law Commission Report.

"(7) or in documents relating to transactions mentioned in section 13, clause (a): When the statement is contained in any deed, will or other document, being a deed, will or other document which relates to any transaction as is mentioned in S. 13, Cl. (a).

Explanation I:- Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom or if such statement related to facts

[172]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 195 (March, 2003).
[173]Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 250 (May, 1977).
[174]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 210 (March, 2003).

collateral to the proceeding and it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies."

Section 33

Parties in Proceedings and Representatives in Interest under Section 33

Original Provision

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a letter stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept our of the way by the adverse party or if his presence cannot be obtained without, an amount of delay of expense which, under the circumstances of the case, the Court considers unreasonable;

Provided -

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

Suggested Provision

Addition of the word 'subsequent' before the word 'proceeding' in the first condition of the proviso to S. 33.

The first condition of the proviso would read as follows:

*"that the **subsequent** proceeding is between the same parties or their representatives in interest"*

Section 35

Original Provision

"Relevancy of entry in public [record or an electronic record] made in the performance of duty—

An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

Suggested Provision

"Relevancy of entry in public [record or an electronic record] made in the performance of duty—

An entry in any public or other official book, register or record or an electronic record stating a fact in issue or relevant fact, and made by

a) public servant in the discharge of his official duty, or
b) any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept
is itself a relevant fact."

Section 36

Original Provision

*"**Relevancy of statements in maps, charts and plans—***

Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of 1[the Central Government or any State Government], as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

Suggested Provision

"Relevancy of statements in maps, charts and plans -

*Statements of facts in issue or relevant facts, made in published maps, charts or **plans** generally offered for public sale, or in maps, **charts** or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."*

Section 37

Obsolete terms should be removed from the language of Section 37

Original Provision

"When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom or in any Central Act, Provincial Act or State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of his Majesty is a relevant fact."

Suggested Provision

"When the Court has to form an opinion, as to the existence of any fact of a public nature, any statement of it made in a recital contained –

(a) in any Central Act, Provincial Act, or a State Act, or

(b) in a Government notification appearing in the Official Gazette, or

(c) as respects the period before 15th day of August, 1947 –

(i) in any Act of Parliament of the United Kingdom, or

(ii) in a Government notification appearing in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, or

(iii) in a notification by the Crown Representative appearing in the Official Gazette,

is a relevant fact."[175]

[175]Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 283 (May, 1977).

Section 38

Original Provision

"When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant."

Suggested Provision

"When the Court has to form an opinion as to a law of any country outside India,[176] *any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant."*

Section 39

Original Provision

"When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of an electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made."

Suggested Provision

Section 39 should be redrafted in accordance with the recommendations of the 185th Law Commission Report.

"(1) When any statement of which evidence is given –

[176]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 254 (March, 2003).

(a) forms part of a longer statement or of a conversation or part of an isolated document or part of an electronic record, or

(b) is contained in a document which forms part of a book or is contained in part of an electronic record or of a connected series of letters or papers,

then, subject to the provisions of subsection (2), the party giving evidence of the statement shall give in evidence so much, and no more of the statement, conversation, document, electronic record, book or series of letters or papers as is necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

(2) Where such party has failed to give in evidence any part of the statement, conversation, document, electronic record, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence."[177]

Section 40

Original Provision

"The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is, whether such Court ought to take cognizance of such suit or to hold such trail."

Suggested Provision

"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or issue or holding a trial or determining a question, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or issue, or to hold such trial or determine such question, as the case may be." [178]

[177]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 261 (March, 2003).
[178]Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 263 (March, 2003).

Section 41

Original Provision

"Relevancy of certain judgments in probate, etc., jurisdiction -

A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof — that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment [order or decree] declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree] declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree] declares that it had been or should be his property."

Suggested Provision

An explanation should be added to S.41:

"Explanation: An order refusing to grant probate does not fall within the scope of the section."[179]

Section 144

Amendment to make two clauses of "evidence" and "statement" separately to remove any ambiguity

Original Provision

"**Evidence as to matters in writing –**

[179]Law Commission of India, *Review of the Indian Evidence Act*, 1872, Report No. 185, 266 (March, 2003).

Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it."

Suggested Provision

"**Evidence as to matters in writing –**

(1) Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was contained in a document or not, and if he says that it was, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who has called the said witness, to give secondary evidence of it.

(2) If any witness, whilst under examination, is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such statement being made until such document is produced, or until facts have been proved which entitle the party who has called the said witness to give secondary evidence of it."

<u>Section 146</u>

Addition of the term 'accuracy' and 'credibility' after the term 'veracity' under S. 146(1) and addition of an Explanation after Clause 3 of S. 146

Original Provision

"Questions lawful in cross-examination -

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(1) to test his veracity"

Suggested Provision

"**Questions lawful in cross-examination –**

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(1) to test his veracity, credibility and accuracy"

Suggested Explanation:

Character includes 'reputation' and 'disposition'.

Section 147

Addition of the words 'the matter in issue in' after the term 'relevant to' under S. 147

Original Provision

"**When witness to be compelled to answer –**

If any such question relates to a matter relevant to the suit or proceeding, the provisions of S. 132 shall apply thereto."

Suggested Provision

S. 147 – When witness to be compelled to answer – If any such question relates to a matter **relevant to the matter in issue in the suit or proceeding,** the provisions of S. 132 shall apply thereto.

Section 149

Replacing words like Barrister, Pleader, Vakil, Dakait which do not exist in the legal vocabulary anymore to suitable words under S. 149

Original Provision

Illustrations

"*(a) A **barrister** is instructed by an **attorney or vakil** that an important witness is a **dakait.** This is a reasonable ground for asking the witness whether he is a **dakait**.*

*(b) A **pleader** is informed by a person in Court that an important witness is a **dakait**. The informant, on being questioned by the **pleader**, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a **dakait**.*

*(c) A witness, of whom nothing whatever is known is asked at random whether he is a **dakait**. There are here no reasonable grounds for the question.*

*(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a **dakait**.*"

Suggested Provision

Illustrations

"*(a) A **legal practitioner** is instructed by another **legal practitioner** that an important witness is a **thief**. This is a reasonable ground for the first **legal practitioner** for asking the witness whether he is a **thief**.*

*(b) A **legal practitioner** is informed by a person in Court that an important witness is a **thief**. The informant, on being questioned by the **legal practitioner**, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a **thief**.*

*(c) A witness, of whom nothing whatever is known, is asked by a **legal practitioner** at random whether he is a **thief.** There are here no reasonable grounds for the question.*

*(d) A witness, of whom nothing whatever is known, being questioned by a **legal practitioner** as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a **thief**.*"

<u>Section 150</u>

Replacing the term 'High Court' with the term 'Bar Council' and suitably amending the section to correct the defect of a wrong authority, along with replacing words like Barrister, Pleader, Vakil, Dakait to suitable words under S. 150

Original Provision

"*Procedure of Court in case of question being asked without reasonable grounds – If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any **barrister, pleader, vakil or attorney**, report the circumstances of the case to the **High Court or other authority** to which such **barrister, pleader, vakil or attorney** is subject in the exercise of his profession.*"

Suggested Provision

"*Procedure of Court in case of question being asked without reasonable grounds – If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any* ***legal practitioner****, report the circumstances of the case to the* ***appropriate Bar Council established under the Advocates Act, 1961*** *to which such* ***legal practitioner*** *is subject in the exercise of his profession.*"

<u>Section 156</u>

Addition of the term 'facts in issue' before 'relevant facts' under S. 156

Original Provision

"Questions tending to corroborate evidence of relevant fact admissible –

When a witness whom it is intended to corroborate gives evidence of ***any relevant fact****, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.*"

Suggested Provision

"Questions tending to corroborate evidence of relevant fact admissible –

When a witness whom it is intended to corroborate gives evidence of any ***fact in issue or relevant fact****, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies."*

<u>Section 159</u>

Substituting the word 'writing' by the word 'document' to widen the scope of S. 159

Original Provision

"Refreshing memory –

A witness may, while under examination, refresh his memory by referring to any ***writing*** *made by* ***himself*** *at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such* ***writing*** *made by* ***any other person****, and* ***read by the witness*** *within the time aforesaid, if when* ***he read*** *it, he knew it to be correct.*"

Suggested Provision

"Refreshing memory –

(1) A witness may, while under examination, refresh his memory by referring—

(a) to any ***document*** *made by the* ***witness himself*** *at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory;*

(b) to any such ***document*** *made by any other person, and* ***read or seen*** *by the witness within the time aforesaid, if, when he* ***read or saw*** *it, he knew it to be correct;*

(c) with the permission of the Court, to a copy of ***such document****; provided the Court be satisfied that there is sufficient reason for the non-production of the original.*

(2) An expert may refresh his memory by reference to professional ***treatises or articles published in professional journals.*** *"*

Section 161

Substituting the word 'writing' by the word 'document' to negate the ambiguity and maintain harmony between S. 160 and S. 161

Original Provision

"Right of adverse party as to writing used to refresh memory –

Any ***writing*** *referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."*

Suggested Provision

"Right of adverse party as to document used to refresh memory –

*Any **document** referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."*

Section 162

The exception under S. 162 which is related to the 'matters of the state' should be deleted

Section 165

Redrafting of S. 165 to increase clarity

Original Provision

"Judge's power to put questions or order production –

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

***Provided that** the judgment must be based upon facts declared by this Act to be relevant, and duly proved:*

***Provided also that** this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Ss. 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Ss. 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.*"

Suggested Provision

"Judge's power to put questions or order production –

(1) ***Subject to the provisions of sub-sections*** *(3) and (4), the Judge, may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any, document or thing.*

(2) Neither the parties nor their agents shall be entitled —

(a) to make any objection to any such question or order, or,

(b) without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

(3) ***Notwithstanding anything contained in this section****, the judgment must be based upon facts declared.by this Act to be relevant, and duly proved.*

(4) ***Nothing in this section*** *shall authorize the Judge—*

(a) to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under Ss. 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; or (b) to ask any question which it would be improper for any other person to ask under Ss. 148 or 149; or

(c) to dispense with primary evidence of any document, except in the cases herein before excepted."

Section 166

S. 166 deals with the powers of the jury and thus should be repealed.

NEW SECTIONS TO BE INSERTED

Relevancy

A Separate Provision should be Enacted to Include Ephemeral Electronic Data as Evidence

There is no Section under the Indian Evidence Act that substantiates ephemeral electronic data as oral evidence. In ***Herzig v. Ark. Found. for Med. Care, Inc***.[180], the Court ordered plaintiffs to produce relevant text messages in discovery. Plaintiffs used to communicate over an ephemeral messaging application called Signal. The defendant found out about these destroyed messages and asked the Court for sanctions. The Court found that plaintiffs acted in bad faith by using this type of application after litigation ensued and their communications were put at issue in discovery. The intent is undoubtedly a key factor in such cases to determine whether the use of such communication applications would constitute as an element for the offence.

It is found prima facie that a party tries to avoid the discovery of messages by using ephemeral messaging applications. Additionally, these kinds of electronic data can create the appearance of impropriety and hinder evidence preservation. In ***Waymo LLC v. Uber Techs., Inc.***[181] plaintiff alleged that the defendant misappropriated its company trade secrets by using in-house technology to generate profit. During the discovery of such an instance, Waymo argued that the use of Ephemeral Communication applications such as Wickr and Telegram was used to delete information. The judge ruled that while actions were not intentional, both parties could present evidence on this issue to the jury. The case got settled in mediation, but nevertheless, the gravity of the facts cannot be ignored. An inference could be drawn out of what damage it would have caused both parties if the case was tried in Court.

Certain social media platforms (WhatsApp disappearing messages, Snapchat, Instagram disappearing messages) have introduced a feature in their applications where users can erase/delete or in some cases system can automatically delete a conversation between two parties after a certain amount of time. Given the popularity of ephemeral messaging software,

[180] *Herzig v. Ark. Found. for Med. Care, Inc*., No. 2:18-CV-02101 (W.D. Ark. Jul. 3, 2019).
[181] *Waymo LLC v. Uber Techs., Inc*., No. C 17-00939 WHA (N.D. Cal. Jan. 29, 2018).

one of the few reasons that ephemeral communication application companies quote is the reduction in the production of a large chunk of electronic data. The emphasis is laid down on the cost to retain such a large amount of data for a larger period of time. Time and again, courts would need to interpret the use of ephemeral electronic data as oral evidence, and the said argument cannot be denied in light of cost production. There are several ways in which the discussed topic could be dealt with:

1. Insertion of a new sub-clause would narrow down the limitations of ephemeral electronic data.
2. Categorization of Ephemeral Electronic data in Oral Evidence under Section 22 of Indian Evidence Act.
3. A Section that clearly addresses the use of ephemeral Electronic data, making clear what is, and is not, permitted.
4. Explanation of retainment of such Data. Electronic Data from such platforms which is no longer used can be subjected to legal hold, if so what are its limitations.

Expert Evidence

1. **Guidelines for the admissibility of scientific evidence** –The Act should be amended to include specific guidelines for the admissibility of scientific evidence including medical evidence. In the case of ***Daubert v. Merrell Dow Pharmaceuticals Inc***.[182] the United States Supreme Court gave the Daubert Standard consisting of the factors that may be considered in determining whether the scientific evidence is admissible or not.

   These factors are-

   i. whether the theory or technique in question can be and has been tested;
   ii. whether it has been subjected to peer review and publication;
   iii. its known or potential error rate;
   iv. the existence and maintenance of standards controlling its operation; and
   v. whether it has attracted widespread acceptance within a relevant scientific community.

[182] *Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 U.S. 579 1993.

Thus, this act can be amended by adopting The Daubert Standard used by the USA.

2. **Making expert opinions binding in certain cases** – The Act should be amended to devise a mechanism wherein certain cases which are related to scientific interpretation and technicalities rather than personal interpretation, should have the expert opinion binding on the court.

   In the case of, ***Mafabhai Nagarbhai Raval v. State Of Gujarat***[183] the Supreme Court held that it is needless to say that the Doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective the court cannot substitute its opinion to that of the Doctor.

Supreme Court reiterated this in the case of ***Sahebrao Mohan Berad v. State of Maharashtra***[184] as well. These cases establish the stance taken by the supreme court on various occasions to place great reliability on medical evidence by doctors. Thus, an amendment should be made wherein cases going to medical experts involving issues of scientific facts should be made binding on the court.

3. **Different reliance on ocular and scientific evidence** – This Act needs to be amended to constitute a category of situations and cases involving different reliance on ocular and scientific evidence. These categories can be adopted from the judgement of the Supreme Court in the case of *Thaman Kumar v. State of Union Territory of Chandigarh*[185], where the court held the following-

   > "*The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the*

[183] *Mafabhai Nagarbhai Raval v. State of Gujarat,* AIR 1992 SC 2186.
[184] *Sahebrao Mohan Berad v. State of Maharashtra,* 4 SCC 249.
[185] *Thaman Kumar v. State of Union Territory of Chandigarh*, (2003) 6 SCC 380.

> *victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.*"

Thus, to conclude, in cases having a minor discrepancy between ocular evidence and scientific evidence, ocular evidence can be given primacy. However, in cases having a major discrepancy between the two, various other factors should also be considered and ocular evidence should not be given supremacy. Such eye-witnesses having a completely opposite position to medical witnesses can be hostile and intend to falsely implicate the accused. Whereas scientific evidence, due to the absence of biasness should be given precedence in such a scenario.

4. **Inclusion of an expert panel** – The Indian Evidence Act should be amended to include an expert panel that will deliver the evidence together. Such a system is practised in Australia and the English Law where Concurrent witness evidence or "hot-tubbing" is an innovative method of delivering expert witness evidence. It is used to deliver expert witness opinions in a panel-style discussion. Experts from similar fields are assembled and are asked to give the evidence together in order to better understand it. This method is beneficial as it allows key issues to be highlighted in a timely and efficient manner.

   Thus, the act should be amended to include guidelines for the creation of an expert panel consisting of an 'n' number of experts decided by the court to whom the respective cases can go to for their opinion. There can be a formation of 5 such panels for all the five areas where expert opinion can be referred to, or more if additional fields are added.

   As recommended by the 69th and the 185th law commission reports, the act should be amended to include a copy of the expert's report which should contain a statement by the

expert that if the report contained any false statement without an honest belief about its truth, proceedings may be brought for prosecution or contempt of Court, with the permission and under the directions of Court." This is inspired by the model of the UK '**Practice Directions, Supplementary Civil Practice Rule 35'**.

In ***Jones* v. *Kaney*** [186] the Supreme Court of the United Kingdom abolished the partial immunity from suit for negligence previously enjoyed by expert witnesses. According to the judgement, expert witnesses can now be sued for providing negligent expert evidence just as they could be sued for negligently providing any other service. The decision ends the previously absurd position that, for example, a consultant neurosurgeon could be sued for negligently conducting brain surgery, but in any proceedings, for clinical negligence, his fellow consultant neurosurgeons would have immunity for any negligence while acting as expert witnesses. There was the risk of liability for performing the operation but immunity for talking about it.

Thus, such an amendment to the Indian Evidence Act, 1872 would ensure that expert witnesses are held liable for false and negligent disclosure of information.

Examination of Witnesses

<u>Section 138</u> - Amendment to include a provision for calling witness for further examination-in-chief in cases where a new matter has been introduced in the re-examination, under S. 138.

Proposed Amendment: (New clause)

"The Court may permit a witness to be recalled either for examination-in-chief or for further cross-examination when a new matter has been introduced in the re-examination, and if the court does so, the parties have the right of further cross-examination and/or re-examination, as the case may be."

[186] *Jones v. Kaney*, 2011 UKSC 13.

<u>Section 145</u> – Amendment of S. 145 to include oral statements, including oral statements that have been tape-recorded and to cover contradiction by secondary evidence.

Proposed Amendment: (New Clauses)

(2) Where a witness is sought to be contradicted by his previous statement in writing by a party entitled to produce secondary evidence of the writing in the circumstances of the case, his attention must, before such secondary evidence can be given for the purpose of contradicting him, be called to so much of it as is to be used for the purpose of contradicting him.

(3) If a witness, upon cross-examination as to a previous oral statement (including a statement recorded mechanically and electronically) made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present evidence, denies that he made the statement or does not distinctly admit that he made such statements, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement.

<u>Section 148</u> – Amendment to consider an accused as a witness under S. 148

Proposed Amendment: (New Clause)

(2) An accused person who offers himself as a witness in pursuance of S. 315 of the Code of Criminal Procedure, 1973, shall not be asked. and if asked, shall not be compelled to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged, or that he is of bad character, unless-

(i) the proof that he has committed or been convicted of such other offence is relevant to a matter in issue; or

(ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or

(iii) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, provided the leave of the court is obtained for asking the particular question; or

(iv) he has given evidence against any other person charged with the same offence.

Proposed Explanation:

Where, in a suit for damages for defamation for injury to the reputation of a person, an aspect of the character of that person, other than that to which the matter alleged to be defamatory relates, is likely to be injured by a question under this section, the court shall have particular regard to the question whether, having regard to the considerations mentioned in this section, such question is proper.

<u>Section 157</u> – Addition of an Explanation under S. 157 to overcome the ambiguity of statement made and Insertion of S. 157A to create a provision for providing independent evidence under S. 157

A. Proposed Explanation:

The statements made before any authority, legally competent to investigate the facts include statements made before a Judicial Magistrate in an identification parade and also statements made before such a Magistrate under S. 164 of the Code of Criminal Procedure, 1973.

B. Proposed Amendment:

S. 157A – Establishing credit of witness by independent evidence – Where the credit of a witness has been impeached by any party, the adverse party may, notwithstanding anything contained in S. 153, in order to re-establish his credit, introduce independent evidence concerning his accuracy, credibility or veracity or to show who he is and his position in life.

PART – III

EXPLANATION RELATED TO SUGGESTED AMENDMENTS AND RECOMMENDATIONS

Relevancy and Admission

No changes are required under Sections 19 and 20, except for the suggestions mentioned in the 69th Report, which is word 'suit' may be substituted by the word 'civil proceeding' in the title of both Sections.[187] There is no requirement of an amendment with respect to the application of these Sections in other Laws, as both these sections are direct in understanding.

The positive part of S. 21 has a very narrow scope and leaves out the possibility of admissions made by the agents, persons with joint interests, persons whose position must be proved against a party and a referee.[188] Hence, it becomes important to split up the sections into positive and negative parts, with sub-section (1) dealing with the cases wherein admissions can be proved and subsection (2) establishing the law that admissions cannot be proved on behalf of persons and the exceptions as the clauses within this sub-section.[189]

S. 26 suffers from the due diligence for negating all the factors of an involuntary confession. Therefore, it is important to include reference to provisions akin to Miranda warnings. There exist statutory provisions in the form of S. 164 of Code of Criminal procedure, 1973 for a Magistrate to record a confession.[190] The Bombay High Court in the case of ***Dagadu Dharmaji Shindore v. State of Maharashtra***,[191] observed that "In our view, the presence of Magistrate contemplated under Section 26 of the Evidence Act cannot be other than the Magistrate following the mandatory provisions of Section 164 of Code of Criminal procedure, 1973."

[187] Law Commission of India, *Indian Evidence Act, 1872,* Report no. 69 (May 1977).
[188] Law Commission of India*, Indian Evidence Act, 1872,* Report no. 69, 183 (May 1977).
[189] Law Commission of India*, Indian Evidence Act, 1872,* Report no. 69, 183 (May 1977).
[190] Nazir Ahmed v. Emperor, I.L.R. 17 Lahore 629 (P.C.).
[191] *Dagadu Dharmaji Shindore v. State of Maharashtra,* 2005 ALL MR(Cri) 1450.

The 48th Law Commission Report on Code of Criminal procedure, 1973 in one of its recommendations observed that the safeguards mentioned in S. 164 of Code of Criminal procedure, 1973 must be followed when the confessions are recorded by the Magistrate.[192] The 69th Law Commission Report extends the section to involve the safeguards mentioned under S. 164 by substituting the phrase "unless it be made in the presence of a Magistrate" with "unless it is recorded by a Magistrate under S. 164 of the Code of Criminal Procedure, 1973".[193] However, the 185th Law Commission Report recommended substitute the 69th Report recommendation, "under S. 164" with "in accordance with Chapter XII" and omit the Explanation part in S. 26.[194]

1. The Scope of Section 11 should be Reduced

In the case of ***Sevugan Chettiar v. Raghunatha***[195] it was held by the Madras HC that the scope of section 11 is required to be curtailed and that "*sec. 11 must be read subject to the other provisions of the Act.*" However, this position has been diverged on several occasions. In the case of ***C. Narayanan v State of Kerala***[196] it was held by the Kerala HC that nothing in the language of S. 11 suggests that it is 'controlled' by any other section. Furthermore, it was held by the HC that S.11 serves as an exception to other general provisions. A similar view was earlier taken by the Allahabad HC in the case of ***State v. Jagdeo***[197] wherein the Court had held that there is no connection between S. 11 and various other provisions of the Evidence Act.

The Law Commission of India in its 185th report relied on the elucidation of Sri Vepa P. Sarathi who had stated that any fact which is *res inter alios acta* or hearsay and therefore not otherwise relevant become relevant under S. 11 of the Evidence Act if satisfies the test u/s 11 wherein "*it should make the existence of the fact in issue highly probable or improbable*".[198] This same view has been taken by the Hon'ble Supreme Court in the cases of ***Ram Kumar v***

[192] Law Commission of India, *Some Questions Under The Code of Criminal Procedure Bill, 1970,* Report No. 48, (July 1972).
[193] Law Commission of India*, Indian Evidence Act, 1872,* Report no. 69, 183 (May 1977).
[194] Law Commission of India*, Review of Indian Evidence Act, 1872,* Report no. 185, 59 (March 2003).
[195] *Sevugan Chettiar v. Raghunatha*, AIR 1940 Mad 273.
[196] *C. Narayanan v State of Kerala*, 1992 Cr. LJ 2868.
[197] *State v. Jagdeo*, 1955 All LJ 380.
[198] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 71 (March, 2003).

State of MP[199] and ***Satbir v State of Haryana***[200]. It is therefore important that a safeguard be added to the provision.

2. The Word Compensation should be added to Section 12

The law commission in its 69th report laid down the etymological distinction between the words 'damages' and 'compensation'. The term damage has been defined as one used in "*reference to pecuniary recompense awarded in reparation for a loss injury caused by a wrongful act or omission.*" Compensation on the other hand is used "*in relation to a lawful act which caused the injury in respect of which an indemnity is obtained under the provisions of a particular statute.*"

While the Law Commission in its 69th report recommended that substitution of the word 'damages' by the word 'compensation, the latter should be added in addition to the word 'damages' due to the different nature and use of the words in different contexts.[201]

3. Amendments in Section 27 vis a vis Section 24, 25, 26

The position of law with regard to the question of Section 27 being a proviso to Section 26 is well settled. It was held by the Privy Council in the case of ***Pakala Narayanswami. v Emperor***[202] that section 27 seemed to be intended to be a proviso to section 26 of the Evidence Act. The same position was reiterated by the Hon'ble Supreme Court in the case of ***Udai Bhan v. State of UP***.[203] However, the Courts did not deal with the scope of section 27 as a proviso to Ss. 24 and 25 in these cases.

To understand the relation between Ss. 27 and 25 it is required to be determined whether a fact discovered by statements made by a person who was not in custody are admissible under section 27.[204] It was held by the Supreme Court that there does exist a relation between these

[199] *Ram Kumar v. State of MP*, AIR 1975 SC 1026.
[200] *Satbir v State of Haryana*, AIR 1981 SC 2074.
[201] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 80 (March 2003).
[202] *Pakala Narayanaswami v Emperor*, AIR 1939 PC 47.
[203] *Udai Bhan v. State of UP*, AIR 1962 SC 1116.
[204] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 145 (March 2003).

sections and that S. 27 acts as an exception to S. 25.[205] The Law Commission of India in its 185th report has also viewed section 27 as a proviso to both section 26 and section 25.[206]

Section 24 of the Evidence Act lays own that "*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 any inducement, threat or promise*". The Law Commission in its 185th Report proposed that facts discovered from statements made under section 24 should be permitted as evidence provided that they were a result of inducement or promise and not a result of threat, coercion or violence.[207] This recommendation was made in order to strike a balance between the rights of the accused and the public interest. We agree with this recommendation and have suggested the amendment accordingly.

4. Addition of kept out of the way by an adverse party in Section 32

As per the recommendations in the 69th[208] and 185th[209] law commission reports and the reasons mentioned above, the words 'kept out of the way by adverse party' must be added to S.32 as a condition under which statements by persons who cannot be called as witness are admissible as relevant facts.

5. Addition of Facts in Issue in Section 32

The cases mentioned in S.32 following the opening paragraph include statements made with regard to facts in the issue. This is further echoed by the illustrations provided under the section. The clarification that relevant facts with respect to the opening paragraph of S.32 also include facts in the issue has been made in multiple cases. Thus, in order to avoid any misinterpretation and provide clear language to the legislation, the words 'facts in issue' must be added to the opening paragraph of S.32.

It would read as follows:

[205] K. Chinnaswamy Reddy v State of Andhra Pradesh, AIR 1962 SC 1788; *Anghoo Nageria v State* , AIR 1966 SC 119.
[206] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 145 (March 2003).
[207] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 167 (March 2003).
[208] Law Commission of India, *Sixty-ninth Report on the Indian Evidence Act, 1872*, Report No. 69, 229 (May 1997)
[209] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 195 (March 2003).

"Statements, written or verbal, of ***facts in issue or*** *relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable,* ***or who is kept out of the way by the adverse party****, are themselves relevant facts in the following cases."*

6. Explanation of Circumstances of Transaction under S. 32(1)

The words 'circumstances of transactions' under S.32(1) have a wide scope of application. This has raised two main points of confusion. The first is with regard to statement revealing motive in the context of circumstances of the transaction and the second dying declaration of one person as proof of facts relating to the death of another person. With regard to the first point of confusion, in *State of UP vs. Ramesh Prasad Misra*[210], the Supreme Court held that S.32(1) has a wider scope and includes a statement by a deceased person expressing motive. However, it has been accepted by courts that utmost care must be taken before relying on a dying declaration as there exists a tendency to implicate rivals in dying declaration. Therefore, there must not exist any incoherence while relying on them. The addition of an explanation with this regard is recommended keeping in mind the existing case laws. A dying declaration expressing motive must be admissible as long as it is consistent with the facts and does not exhibit any malice on the part of the deceased. In ***State of Gujarat vs. Khuman Singh Karsan Singh***[211], there were multiple dying declarations implicating multiple individuals. Such a declaration can be considered to be inconsistent.

An explanation on the dying declaration of one person as proof of facts relating to the death of another person must also be added. It is recommended that such a declaration must not be admissible except in certain exceptional circumstances such as ***Nga Hla Din v. Emperor***[212].

7. Addition of 'Subsequent' in S. 33

The proviso to S.33 has a condition that the proceeding was between the same parties or their representatives in interest. This raises a question as to whether parties in the second

[210] *State of UP vs. Ramesh Prasad Misra*, AIR 1996 SC 2766.
[211] *State of Gujarat vs. Khuman Singh Karsan Singh*, AIR 1994 SC 1641
[212] *Nga Hla Din v. Emperor*, AIR 1936 Rangoon 187 (D.B).

proceeding should be parties or representatives of the parties to the first proceeding or whether parties in the first proceeding should be parties or representatives of parties in the second proceeding. This has been briefly discussed above. Thus, we reach to the conclusion that the parties to the second proceeding should be parties or representatives of the parties to the first proceeding in coherence with the English law. It is recommended that the first condition of the proviso to S.33 be amended to add 'subsequent' before 'proceeding'.

8. Structure of S. 35

S.35 provides for relevancy of entry made in the performance of duty. Here two types of statements are admissible: statements made by a public servant and statement made by an individual under statutory duty. This distinction, although made by the section, causes confusion due to its structure. Thus, it is recommended that the section be amended to divide both the types in accordance with the recommendations under the 185th Law Commission[213] report as follows:

"An entry in any public or other official book, register or record or an electronic record stating a fact in issue or relevant fact, and made by

c) public servant in the discharge of his official duty, or
d) any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept
is itself a relevant fact."

9. Maps, charts and plans under S. 36

S.36 states the relevancy of statements in maps charts and plans in published material for public sale and made under the authority of the government. However, the section provides that the relevancy of statements in published material only mentions maps or charts and not plans. At the same time, the relevancy of statements in the material made under the authority of the government mentions only maps or plans and not charts. There exists no foreseeable

[213] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, 248 (March 2003).

reasoning behind making a distinction between maps, charts and plans as far as the principle of relevancy under this section is considered.

10. Omitting 'Court considers necessary' under S. 39

As discussed above, the court can decide as to how much of the remainder of the statement is essential in understanding what is to be admitted and not how much of the remainder of a statement can be presented by the opposing party under S.39. To bring this clarification under the section, the words 'court considers necessary' should be omitted from S.39 and replaced by 'is necessary'. Furthermore, to secure the rights of the opposing party to present any other part from the larger statement as is necessary, such a right must be explicitly mentioned under this section.

Expert Opinion

Section 45

The act should be amended to reduce the ambiguity on who can qualify as an expert and specify what are the requirements needed to be "especially skilled in these fields". These requirements should focus more on the professional requirements along with experience. In the case of ***Sri Chand Batra v. State of Uttar Pradesh***[214], the Supreme Court held that an Excise Inspector can be considered an expert as he had put in 21 years' service as Excise Inspector and had tested lacs of samples of liquor and illicit liquor. This shows that the Hon'ble Supreme Court considered the Excise Inspector to be an expert on the grounds of his years of service and experience in the field.

Thus, an amendment should be passed to include educational degrees, years of practice and experience as a valid criterion for one to pass in order to qualify as an expert.

As suggested by the 69th law commission report, to include- footprints, palm impressions, typewriting, usage of trade, technical terms or identity of persons or animals[215] in the scope of fields and the 185th Law Commission Report seeks to add three more fields "trade,

[214] *Sri Chand Batra v. State of Uttar Pradesh*, 1974 AIR 639.
[215] Law Commission of India, *Indian Evidence Act*, 1872, Report No. 69, (May 1977).

technical terms and identity of persons or animals"[216] this act needs to be amended to expand the scope of fields. The fields may not be exhaustive and must be amendable as per the future scope.

This amendment can be done by amending the definition of an expert, as follows:

> "*When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of handwriting, or finger impressions or, footprints or, palm impressions or typewriting or usage of trade or technical terms or identity of persons or animals, the opinions, upon that point, of persons specially skilled in such foreign law, science or art, or as to the identity of handwriting, finger impressions, footprints, palm impressions, typewriting, usage of trade, technical terms or identity of persons or animals, as the case may be, are relevant facts. Such persons are called 'experts*'.[217]

Section 47

The Section should provide for any specific attainment of knowledge/study or experience for being called a handwriting expert. The court also held that without adequate confirmation in Murali Lal v. State of Madhya Pradesh a belief based solely on the opinion of a handwriting expert or any other type of expert would be an injustice.[218]

These things aren't implied, but once implied, could make huge changes:

I. The scientific evidence which has been tested and the methodology with which it has been studied with.
II. The evidence would have been subjected to peer review or publication
III. If evidence is generally accepted in the scientific community.
IV. An expert's report must:-
    a. give details of the expert's qualifications;
    b. give details of any literature or other material which the expert has relied on, in making the report;

[216] Law Commission of India, *Review of The Indian Evidence Act, 1872*, Report No. 185, 286 (March 2003).
[217] Law Commission of India, *Review of The Indian Evidence Act, 1872*, Report No. 185, 286 (March 2003).
[218] *Murari Lal S/O Ram Singh* v. *State of Madhya Pradesh*, AIR 1980 SCR (2) 249).

c. state whether or not the test or experiment has been carried out under the expert's supervision
d. contain a summary of conclusions reached;
e. contain a statement setting out the substance of all material instructions (whether written or oral) of the party on whose behalf he is examined.;
f. contain a statement that the expert is conscious that if the report contained any false statement without an honest belief about its truth, proceedings may be brought for prosecution or for contempt of Court, with the permission and under the directions of Court."

In the UK Constitution, a copy certified/ true copy by an official of that institution; and any document purporting to be such a copy needs to be received in evidence without proof of the official position or handwriting of the person signing the certificate. The production of a copy certified on behalf of the department is said to be a true copy by an officer[219] of the department generally or specially authorised so to do and any document purporting to be such a copy is necessary to be in the custody of a department and shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department. This will alter and allow one to create a precept for what is meant to be the original handwriting or signature.

A handwriting expert states whether in his opinion of the admitted writing and the disputed writing was made by the same person but also should say whether the disputed writing was made by the defendant. It can be amended by introducing a bench of experts who remain objective and give their verdict upon the cases. Experts from similar fields have to be assembled and would ask to give the evidence together in order to better understand it. This method is beneficial as it allows key issues to be highlighted in a timely and efficient manner.

Section 48

Adequate proof and clear evidence for the existence of a custom is necessary. Though judicial decisions are not indispensable, the acts required for the establishment of a list to

[219] *Certifying a document*, GOV.UK, (2015, August 27), https://www.gov.uk/certifying-a-document.

verify customs ought to be plural, uniform and constant. There has to be a set specific list on how to recognise customs under this law.

We see that most cogent evidence of custom is not that afforded by expression of opinion as to its existence but the examination of instances in which the alleged custom had been acted upon and by the proof afforded by judicial or revenue records or private records that the custom has been enforced.

Examination of Witnesses

i. Amendment to include a provision for calling witness for further examination-in-chief in cases where a new matter has been introduced in the re-examination, under S. 138.

The section does not mention any provision for recalling the witness for further examination-in-chief or cross-examination after the completion of re-examination in cases where a new matter has been introduced in the said re-examination. Usually, re-examination is confined to the facts stated in the cross-examination and the witness is provided with an opportunity to give clarifications regarding the same.[220] However, at times, new matters can come up in the re-examination and for this, a provision enabling the party to conduct an examination-in-chief with regard to that matter needs to exist.[221] It has been observed that a similar clause is available in the Sri Lankan Constitution and that has been referred while suggesting this amendment.[222] Thus, for the reasons stated above, the researchers would recommend the said amendment to the section.

ii. Amendment to make two subsections of "evidence" and "statement" separately under S. 144 to remove any ambiguity

The researchers have proposed to split the section into two sub-sections. The reason for this is that the first part of the section makes a mention of both "evidence" and "statement", but the second part of the section just uses the word "evidence". The section may be modified to include provisions for both "evidence" as well as "statement" and expanded to include two subsections, one to include "evidence" and another for "statement". In the proposed

[220] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report no. 185 (March 2003).
[221] *Id* at 19.
[222] *Id* at 19.

amendment, the first sub-section talks about the situations where a witness may be asked to produce a document when he has been asked whether the concerned document contained any contract, grant or disposition of property and the witness has answered in affirmative. The second sub-section talks about the situation when the witness is about to make any statement and the objections that the opposite party may raise in response to it.

iii. Amendment of S. 145 to include oral statements, including oral statements that have been tape-recorded and to cover contradiction by secondary evidence.

The Commission[223] observed that the Indian Evidence Act, 1872, makes no express provision to the effect that the witness's attention must first be drawn to the previous oral statement and the witness asked whether he made such a statement before his credit can be impeached by independent evidence. As it has been pointed out, there can be little doubt that here also the circumstances of such previous statement that are sufficient to designate the particular occasion ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement.

The Commission[224] also noted that that contradiction by an oral statement is a permissible means of impeaching the credit of a witness under S. 155(3). There can be no distinction in principle, between an oral and written statement. Of course, the contradiction must be in regard to a matter relevant to the issue, which is the implication of the words 'liable to be contradicted' in S.[225] 155(3). It is upon this reasoning that the Orissa High Court applied the principle of S. 145 to oral statements too.[226]

However, the Bombay[227] and Rajasthan[228] High Courts have taken a different view on the subject, holding that since S. 145 covers only written statements and the procedure laid down by the Orissa High Court need not be followed. The Punjab High Court in ***Rupchand v. Mahabir***[229] held that while the taped statement could be used for impeaching the credit of the witness under S. 155(3), it could not be used for purposes of S. 145 as a tape recording cannot be equated as a statement in writing or reduced to writing.

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[223] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[224] *Id* at 20.
[225] *Khadija v. Abdul Kareem*, (1890) I.L.R. 17 Cal. 344.
[226] *State v. Minaketan*, A.I.R. 1952 Orr 267, 277, 26.
[227] *Muktavandas v. R.*, A.I.R. 1939 Nag. 13.
[228] *Ram Rattan v. The State*, A.I.R. 1956 Raj. 196, 197.
[229] *Rupchand v. Mahabir*, AIR 1956 Punjab 173.

The Commission[230] was of the view that the mode of proof[231] for the purpose of contradiction has already been dealt with by S. 145, therefore, it would seem appropriate that the procedure to be followed in regard to oral statements should also be dealt with in that section. It noted that the rule under S. 145 is one of substance, and not of form[232] and that justice requires that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradiction, whether the statement be written or oral. It also noted the corresponding section in the Evidence Act of Sri Lanka[233] considers both written and oral statements. This provision was added on the lines of S. 4 and S. 5 of the Criminal Procedure Act,1865 (UK)[234].

The Commission observed that S. 145 and even the Indian Evidence Act, 1872, is silent in the case when the document sought to be used for contradiction has been lost or destroyed, and the question may arise whether in these or in any other cases a copy can be used (instead of the originals) for contradiction i.e., secondary evidence. The Commission noted that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production and that if it were material to the issue, the witness can be afterwards contradicted by secondary evidence. In such a case, the cross-examining party may interpose evidence out of their turn to prove the events, such as loss, etc., relating to the document and to furnish secondary evidence thereof.

The 185th Law Commission Report[235] took into consideration the suggestions made by the 69th Law Commission Report[236] and accepted the same. It only differed on one point and recommended the addition of the words 'and electronically' after the words 'statement recorded mechanically' under sub-clause 3 of S. 145.

The 69th Law Commission Report[237] had opined that S. 145 should be amended to include a "statement recorded mechanically". However, the Information and Technology Act, 2000, amended the definition of 'Evidence' as under S. 3 of the Indian Evidence Act, 1872, to state that 'Evidence' includes all documents (including electronic records) produced in the Court.

[230] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[231] *Gopi Chand v. R.,* A.I.R. 1930 Lah 491.
[232] *Bhagwan v. S.*, A.l.R. 1952 S.C. 214.
[233] Ceylon Evidence Ordinance, 1895, § 146.
[234] Criminal Procedure Act, 1865, § 4, § 5.
[235] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[236] Law Commission of India, Indian Evidence Act, 1872, Report No. 69 (May 1977).
[237] *Id.*

Hence, the 185th Law Commission[238] suggested that it would be advantageous to add the words 'statement recorded mechanically or *electronically*'. It also noted the advantage of widening the scope of evidence by adding 'secondary evidence' under S. 145 and noted that the same has been there in English Law for years.[239]

The researchers agree with the recommendations of both the Commissions and have given their recommendations likewise.

iv. Addition of the term 'accuracy' and 'credibility' after the term 'veracity' under S. 146(1) and addition of an Explanation after Clause 3 of S. 146

The expression "veracity" is a narrow one. The 69th Law Commission Report[240] referred to the diverse factors which enable the court to make an intelligent estimate of the value of the testimony of the witness. Such diverse factors go beyond mere contradiction or impeachment of credit or veracity. The Commission[241] also noted that a witness may believe himself to be true, and yet be mistaken.

The Commission[242] also noted that the corresponding section of the Evidence Act of Sri Lanka[243] uses the expressions "accuracy" and "credibility". This seems to be a useful improvement, in as much as, apart from any moral aspersions which are covered by "veracity" as used in clauses (1) of S. 146, there could be cases where the cross-examiner wishes to challenge the accuracy or power of observation or memory of the witness.

The Commission[244] noted that the word "veracity" means accuracy or credibility. However, this is not the ordinary sense in which the word is understood. In the ordinary parlance, "veracity" does carry certain moral overtones and is not appropriate enough to cover cases where there is no moral aspersion involved. Most of the dictionary meanings also give primacy of place to the restricted meaning.

The 185th Law Commission Report[245] while reviewing the 69th Law Commission Report[246], noted that 'credibility' can be tested by putting to the witness his previous 'inconsistent'

[238] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[239] LORD SIMONDS, HALSBURY'S LAWS OF ENGLAND 15 (3rd ed.) (1956).
[240] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[241] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[242] *Id.*
[243] Ceylon Evidence Ordinance, 1895, § 146.
[244] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[245] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).

statements as permitted by S. 145 but that could not be the only basis for impeaching the creditworthiness of a witness and hence it is necessary to add, as done in Sri Lanka, the words 'accuracy and credibility' in clause (1).

Due to this, the researchers have recommended that the words "accuracy and credibility" be added after the word "veracity" in clause (1) of S. 146.

The 185th Law Commission Report[247] had also debated if the word 'character' would include 'disposition', along with its general understand of 'character' as 'reputation'. They had considered 'disposition' to be the previous wrong actions relating to the accused or witnesses (including police officers are the subject matter of questions).

The Commission[248] had observed that evidence of 'disposition' as part of 'character' is treated as relevant though cross-examination can be controlled by the Court and had relied on S. 55 of the Indian Evidence Act, 1872, which refers to 'general reputation' and 'general disposition'. The Commission[249] placed strong reliance on the Report by 'Criminal Law Review Committee, 1972 (United Kingdom)'[250] which had recommended that the word 'character' must include 'disposition'.

Due to this, the researchers have recommended that an explanation be inserted so that character includes reputation and also 'disposition'.

v. Addition of the words 'the matter in issue in' after the term 'relevant to' under S. 147

The questions permitted by S. 147 are those relating to the credibility of the witness or which are injurious to the character of the witness and such questions and answers thereto, which are compellable.[251]

In the 69th Law Commission Report[252], the Commission noted that the words "relevant to the suit or proceeding" in this section refer to what is relevant to a **matter in issue**. Hence, by adding the same in S. 147, a clear distinction will be drawn between S. 147 and S. 148

[246] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[247] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[248] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[249] *Id.*
[250] 11th Criminal Law Revision Committees Report on Evidence, 334 (Aug. 09, 1972).
[251] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[252] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).

between questions (strictly) relevant to the matter in issue and questions which are "relevant to the suit or proceeding" only because they affect the credit of the witness by injuring the character of the witness.

Hence, the researchers have recommended the addition of the words 'the matter in issue in' after the term 'relevant to' under S. 147.

vi. Amendment to consider an accused as a witness under S. 148

The 69th Law Commission Report[253] while considering if the accused should be considered as a witness, examined foreign jurisdictions.

In Australia, under the Criminal Evidence Act, 1898, there is a provision permitting the previous convictions of the accused to become an issue only if, the nature or conduct of his/her defence is such as to involve imputations on the character of prosecution witnesses. Even if the provision becomes applicable, there is a discretion in the trial judge whether to allow cross-examination of the accused as to his record.

In the U.S.A., Rule 21 of the Uniform Rules of Evidence, 1974 provides for 'limitations on evidence of conviction of crime as affecting credibility'. Accordingly, evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

After considering the rules in such jurisdictions, the Commission opined that when an accused is considered as a witness, the ends of justice are fully met. The Commission also noted that S. 148 throws a duty on the Court to determine the propriety of questions likely to injure character and sets out certain guidelines. It would not be inappropriate to draw the attention of the Court more particularly to those guidelines regarding libel suits. To achieve this object, the addition of an explanation under S. 148 is required. The researchers agree with these recommendations and have recommended them likewise.

[253] *Id.*

vii. Replacing words like Barrister, Pleader, Vakil, Dakait which do not exist in the legal vocabulary anymore to suitable words under S. 149

The 69th Law Commission Report[254] suggested changing the word 'barrister' as under Ss. 149 and 150 to 'legal practitioner' and 'attorney' as under S. 149 to 'advocate'.

The 185th Law Commission Report[255] took into consideration the suggestions of the earlier report. The Report also emphasised the change from the word 'barrister' to 'advocate' and 'dakait' as 'thief' in the equivalent section of the Ceylon Evidence Ordinance, 1895. It subsequently suggested that the words 'barrister', 'attorney', 'vakil' and 'pleader' as under Ss. 149 and 150 be replaced with the word 'legal practitioner' and the word 'dakait' be replaced with the word 'thief'.

The researchers agree with the recommendations of the Commission.[256]

viii. Replacing the term 'High Court' with the term 'Bar Council' and suitably amending the section to correct the defect of a wrong authority, along with replacing words like Barrister, Pleader, Vakil, Dakait to suitable words under S. 150

The explanation for change of terminology same as that of Point 7.

The current S. 150 gives the Courts power to initiate appropriate disciplinary action by reporting the circumstances of the case to the High Court or other authority against lawyers asking questions not having 'reasonable grounds'. However, as per the Advocates Act, 1961, the respective Bar Councils have authority over legal practitioners and High Courts ceased to have disciplinary jurisdiction of legal practitioners from 1872 onwards, hence 'High Courts' should be replaced with 'appropriate Bar Council established under the Advocates Act, 1961' and the words 'other authority' must be deleted.

The researchers agree with the recommendations of the Commission.[257]

[254] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69 (May 1977).
[255] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[256] Law Commission of India, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003).
[257] *Id.*

ix. Addition of the term 'facts in issue' before 'relevant facts' under S. 156

The above amendment was suggested by the 69th[258] and 185th[259] Law Commission report considering the fact that S. 5 of Indian Evidence Act, 1872 differentiate between facts in issue and other relevant facts. The amendment will remove the ambiguity that whether the principle enshrined under S. 156 of the Indian Evidence Act, 1872 can be used for fact in issue as well. This change will help in furthering the object of S. 5 of the Indian Evidence Act, 1872 which is to restrict the investigation made by courts within the bounds prescribed by general convenience.[260]

x. Addition of an Explanation under S. 157 to overcome the ambiguity of statement made and Insertion of S. 157A to create a provision for providing independent evidence under S. 157

A. The 69th and 185th Law Commission Reports[261] noted that in light of S. 2(h)[262] of Code of Criminal Procedure, 1973 the word "investigation" acquires a narrow meaning which eventually excludes the magistrate as an authority competent to investigate. As per S. 157, the pre-condition for using a statement for corroboration is that it should be made either before an authority "legally competent to investigate the fact", or at or near the time when the fact to which the statement relates took place.[263] Thus, this leads to an ambiguity that whether a statement made before the magistrate under S. 159 and S. 164 of Code of Criminal Procedure, 1973 can be used for corroboration under S. 167 or not. It was noted by the Supreme Court in the case of ***H.N. Rishbud vs. State of Delhi***[264] that the term "investigate" under the Indian Evidence Act, 1872 is broader than what it is under the Code of Criminal Procedure, 1973. The Apex Court in its judgement also held that the statement made before the committing Magistrate could be availed of to corroborate the evidence in examination-in-chief of the witness concerned.

The principle that statements made before the magistrate under S. 154 and S. 164 of Code of Criminal Procedure, 1973 can be used for corroboration under S. 167 of Indian

[258] Law Commission of India, *Indian Evidence Act, 1872,* Report No. 69, 764 (May 1977)
[259] Law Commission of India, *Review of Indian Evidence Act, 1872,* Report No. 185, 500 (March 2003)
[260] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).
[261] Law Commission of India, *Indian Evidence Act, 1872,* Report No. 69, 772 (May 1977); Law Commission of India, *Review of Indian Evidence Act, 1872,* Report No. 185, 504 (March 2003).
[262] The Criminal Procedure Code, 1973, § 2(h).
[263] The Indian Evidence Act, 1872, § 157.
[264] *H.N. Rishbud vs. State of Delhi*, AIR 1965 SC 96.

Evidence Act, 1872 has been widely held in many judicial decisions like ***Sarju v. State of West Bengal***[265], ***Bhagwan vs. State of Punjab***[266], ***Bhuboni vs. R***[267] etc. Thus, the explanation must be drafted by keeping in mind its consonance with other sections of Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872.

B. The 69th and 185th Law Commission Reports[268] noted that as per Ss. 156 and 157 of Indian Evidence Act, 1872 confirmation of the credit can be made (i) by way of providing corroborative evidence under (ii) by cross-examining the witness produced to impeach the credibility, or (iii) by substantive evidence on the main issues. There was no comprehensive section permitting independent evidence for confirming the credibility of evidence even though there is S. 155 of the Indian Evidence Act, 1872 which allows independent evidence for impeaching the credibility of the witness. The Law Commission reports further refer to laws in U.S and England to strongly recommend adding of comprehensive provision for confirmation of the credibility of a witness in order to balance the confirmation of credibility of witness and impeachment of credibility of the witness.

The researchers agree with the recommendations of both the Commissions and have made recommendations likewise.

xi. Substituting the word 'writing' by the word 'document' to widen the scope of S. 159

S. 159 should be re-structured to deal with witnesses in one sub-section and experts in another. The word 'writing' should include printed matter.[269] The word 'writing' should be replaced by the word 'document', an expression which is already used in the section in regard to copies and is wider than 'writing'. That expression will cover, for example, photographs. Furthermore, for experts allowing reference to periodical literature which may not fall in the ambit of 'treatises' may prove substantially beneficial.

[265] *Sarju v. State of West Bengal* (1961) 2 Cr. L. J. 71 (Cal.).
[266] *Bhagwan vs. State of Punjab* AIR 1952 SC 214.
[267] *Bhuboni vs. R* AIR 1949 PC 257.
[268] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 774 (May 1977); Law Commission of India, *Review of Indian Evidence Act, 1872*, Report No. 185, 505 (March 2003).
[269] *Ram Chandra v. R.,* ATR 1930 Lah. 371.

xii. Substituting the word 'writing' by the word 'document' to negate the ambiguity and maintain harmony between S. 160 and S. 161

The word 'writing' should be replaced with the word 'document' for the reasons as given under Point 11.

xiii. The exception under S. 162 which is related to the 'matters of the state' should be deleted

The major loophole in this section lies in part three i.e., the procedure to be followed by the court when ruling on the admissibility of a document. The two branches here are- *1) 'The court may inspect the document unless it relates to matters of State'*, and *2) 'The court may take other evidence for enabling it to decide the objection'*.[270] There exists a serious anomaly in the first branch. There should be no exception to the powers of the court when inspecting a document. The phrase "matters of State" is vague and ambiguous. It is a negation of the basic postulate of the rule of law because it places officials of the executive on a higher standing and provides virtually no checks on their power as pertaining to this section. Therefore, the exception relating to "matter of State" should be removed.

xiv. Redrafting of S. 165 to increase clarity

The 69th Law Commission Report[271] suggested the redrafting of S. 165 for increased clarity and structural improvement. The researchers agree with this suggestion.

xv. S. 166 deals with the powers of the jury and thus should be repealed.

The jury system witnessed its abolition from the Indian jurisprudence on the grounds of a jury's susceptibility to bias. The most famous case in this regard, the *K.M. Nanavati case*[272], was at the forefront of the bias argument and perhaps the final nail in the coffin of the jury trial system. Due to the abolition of juries, S. 166 is no longer relevant and should be repealed.

[270] *Id* at 28.
[271] Law Commission of India, *Indian Evidence Act, 1872*, Report No. 69, 772 (May 1977).
[272] *K.M. Nanavati v. State of Maharashtra,* 1962 AIR 605 1962 SCR Supl. (1) 567.

1. POSITION IN INTERNATIONAL LAW

International Standard of Human Rights

Right against self-incrimination through a compelled confession is part of Human Rights. The most basic tenets of human rights are found in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights[273], the International Covenant on Civil and Political Rights[274] and the International Convention on Economic, Social and Cultural Rights.[275] Universal Declaration of Human Rights entails the spirit of brotherhood[276] and a life free of torture and cruelty.277 The International Covenant on Civil and Political Rights, 1966[278] to which India is a party, states that the accused is not to be compelled to testify against himself or to confess guilt.[279] On similar lines, International Convention on Economic, Social and Cultural Rights, recognizes the right against self-incrimination on an individual.[280]

United Kingdom

In the United Kingdom Section 76 of the Police and Criminal Evidence Act, 1984[281] speaks about confession. Part 2 of this act states:

"(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a)by oppression of the person who made it; or

(b)in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

[273] UN General Assembly, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III).
[274] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171.
[275] International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, A/RES/2200.
[276] UN General Assembly, Universal Declaration of Human Rights, Article 1, Dec. 10, 1948, 217 A (III).
[277] UN General Assembly, Universal Declaration of Human Rights, Article 5, Dec. 10, 1948, 217 A (III).
[278] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171
[279] Law Commission of India, Article 20(3) of the Constitution of India and the Right to Silence, Report No 118 (2002).
[280] International Convention on Economic, Social and Cultural Rights, Article 14, Dec. 16, 1966, A/RES/2200.
[281] Police and Criminal Evidence Act, 1984 § 76

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

"*(8) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).*"[282]

This supports the recommendations made above in elaborating through adding more words to define circumstances for the inadmissibility of confessions. Part 2 (b) and Part 8 of this section can be taken as examples whilst amending of the section.

To conclude, we can say that the recommendation mentioned above is primarily based on the expansion of the scope of the section through new words. These are essential in defining more appropriately what would constitute a forced confession and how by making it non-admissible, misuse by police can be prevented by preventing forced confessions through illegal means.

There is a fine balance to be maintained between the human rights of prisoners against self-incrimination (mentioned in article 20 (3)) and the larger public interest of ensuring justice since criminal acts are crimes against society and state.

CONCLUDING REMARK

The Indian Evidence Act, 1872 is a century and a half old and needs certain amendments to keep up with the changing modern world. The goal of this report was to suggest the various areas of the act, which can benefit from amendments and the introduction of new rules. These amendments thus include, need for specific guidelines on who can be an expert, to expand the fields on which expert evidence is sought, specifications on admissibility and reliability of expert evidence along with a focus on ocular versus scientific evidence. The act can also benefit from the creation of an expert panel and removing the partial immunity granted to expert witnesses. Hence, the Indian Evidence Act, being one of the most important pillars of the legislative community has certain lacunas which should be amended to ensure better administration of justice.

Society does not remain static so the legal system and the laws it produces need to be relevant to be effective. As the values of society change, so too must the law. Otherwise, the law does not reflect the society it governs. For instance, before only the written texts of religions were used to pass judgements concerning the laws but nowadays commentaries and previous judgements are incorporated as well with India having a codified legal system. The law needs to change to meet demands made by the emergence of new technology and people are arguably more aware of their rights and responsibilities now than in the past and similarly later on Section 47 & 47A dealing with handwriting and the electronic signature was introduced. This helps us enhance co-operation and advance as a society together.

The law of admissions and confessions is laid down in the scheme of provisions of the Indian Evidence Act, 1872, starting from S. 17 to S. 31. These sections very well lay down the scope and application of the law of admissions and confessions. However, some of these sections need to be updated with the current dynamics of the criminal justice system.

The right against compelled self-incrimination as given in Article 20(3) forms an important part of the Due Process Model of the Criminal Justice System. Self-incrimination is based on the legal maxim of "*nemo teneteur prodre accussare seipsum*", which means that "no man is bound to accuse himself".[283] After the advancements in technology and the increasing police

[283] Hariharan E. & Tharika S., *Compulsion, Confession and Article 20(3),* 2 IJLMH, 2581 (2018).

brutality, the illegal methods of obtaining the confessions increased.[284] Therefore, it becomes important to strengthen the due process to be observed while recording confessions.

It is important to uphold the principles of justice, equity and good conscience, especially for the Criminal Justice System. Articles 20, 21 and 22 of the Indian Constitution form the triangle of the principles of Natural Justice and form the heart of a strong and fair Criminal Justice System.

Examination of witnesses constitutes an important part of criminal trials. Chapter X of the Code of Criminal Procedure, 1973 lays down the procedure for conducting the examination.[285] The amendments recommended by the researchers have been suggested with the aim of bringing about an ease in the process of examination of witnesses. The amendment recommended for S. 138 has been suggested for creating a provision of examination-in-chief and cross-examination of witnesses in case any new matter is introduced in the re-examination. This recommendation has been made keeping in mind the necessity to provide both the parties a fair and reasonable chance for examination. The amendment to S. 144 has been suggested for the purpose of convenience. It has been suggested to divide the section into two sub-sections, one for "evidence" and the other for "statement" to be given by the witness. It is expected that the said amendments if brought about would make the process of examination of witnesses more convenient and smoother

All the sections from S. 145 to S. 150 have to be amended. Amongst these amendments, Ss. 145 and 148 are major amendments having recommendations which will have a substantial impact on the law of evidence. The recommendation of considering secondary evidence and oral statements during cross-examination of witnesses as under S. 145 and giving the accused a right to be a witness as under S. 148 will change the jurisprudence of the law of evidence in the coming years. The other changes are the additional safeguards as in the case of Ss. 146 and 147, simplifying the provisions, widening their constricted scope and changes in the legal terminology in the case of Ss. 149 and 150, for the provisions, to be in sync with the current terminology of evidential jurisprudence. These amendments with the additional safeguards might significantly improve the law of evidence and its existing jurisprudence.

[284] Dr. Vijay Pal, *Poison tree principle: It's applicability in India,* 3 International Journal of Advanced Research and Development, 370 (2018).
[285] The Code of Criminal Procedure, 1973, Chapter X.

S. 156 and S. 157 of the Indian Evidence Act, 1872 deals with a crucial part of the Indian Evidence Act, 1872 which is corroboration of witness. It is a well-settled principle of law that even where the evidence of the complainant is quite credible, no conviction can be based on such evidence unless it is corroborated by independent material.[286] These provisions help in furthering the object of Indian Criminal Law, which is that nobody should be punished under his/her guilt is proven beyond a reasonable doubt. The researchers have analysed all the sections and suggested amendments which deal with the corroboration of witnesses. Some of these amendments are just a necessity to remove the underlying ambiguity in these sections and to balance the provisions governing confirmation of the credibility of witness and impeachment of credibility of the witness.

A post-mortem of Ss. 158 through 166 reveals the nature of the incongruities in said sections. It is glaringly clear that most lacunae in this regard are not substantive. They are based upon dubieties resulting from improper drafting. Most amendments, therefore, are technical and have been idealised to widen the ambit and scope of the sections.

[286] RATANLAL AND DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. Lexis Nexis 2020).

B: Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994

CONTENTS

PART – I

INTRODUCTION

In India, Female Foeticide increased in the beginning of 1990, when ultrasound techniques were commonly used in India. Prior to this, there was a trend for families to constantly produce infants, until a male child was born. Today, foetal sex determination and sex-selective abortion have developed into a Rs. 1,000 crore industry (US$ 244 million).[287] In different ways, social discrimination against women and a preference for sons have encouraged female foeticide, skewing the nation's sex ratio against men.

In response to the decrease in the sex ratio in India, which declined from 972 in 1901 to 927 in 1991, the Pre-conception & Pre-natal Diagnostics Techniques Act of 1994 (hereinafter, "the Act") was enacted on 1st January 1996 in order to reduce female foeticide. The key aim of enacting this act was to forbid the use of sex selection techniques, before or after conception and to discourage the abuse of prenatal screening techniques for selective sex abortion. Therefore, the key goal of this legislation is to preclude the use after childbirth of sex selection methods and stop the abuse of prenatal screening techniques for sex-selective abortion.

METHODOLOGY

The researchers have relied upon the following sources while preparing this report for suggestive amendments- 1) The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, 2) Implementation of The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 in India: Perspective and Challenges- A report by Public Health Foundation of India, 3) Handbook on PC&PNDT Act by Ministry of Health and Family Welfare. In addition to this,

[287] *The Unwanted – Part 3*, Human Rights Law Network, Sept. 19, 2017, https://hrln.org/training/the-unwanted-part-3

various case laws have been relied upon to understand the problems that arise due to the lack of implementation of this Act.

PART – II

ABOUT THE ACT

Offences under this Act involve the conduct or aid in the conduct of prenatal diagnostic procedures in unregistered units, the sex selection of a man or woman, the conduct of a Pre-Natal Diagnosis examination for some intent other than that defined in the act and the selling, distribution, supply, leasing, etc. of any ultra-sound system or any other instrument capable of detecting the sex of the foetus.

In order to strengthen the oversight of the technologies used in sex selection, the Act was revised in 2003. The Act was revised to put the pre-design sex selection method and ultrasound technique into the framework of the Act.

For any violations of the provisions, the Act provides the following penalties and punishments:

(i) for doctors/owner of clinics[288]:

- Up to 3 years of imprisonment with a fine up to Rs 10,000 for the first offence.
- Up to 5 years of imprisonment with a fine up to Rs 50,000 for a subsequent offence.
- Suspension of registration with the Medical Council if charges are framed by the court and till the case is disposed of, removal of the name for 5 years from the medical register in the case of the first offence and permanent removal in case of a subsequent offence.

(ii) for husband/family member or any other person abetting sex selection[289]:

- Up to 3 years of imprisonment with a fine up to Rs 50,000 for the first offence.

[288] Pre-conception & Pre-natal Diagnostics Techniques Act, 1994, §23.
[289] Pre-conception & Pre-natal Diagnostics Techniques Act, 1994, §23, §24.

- Up to 5 years of imprisonment with a fine up to Rs 1 lakh for a subsequent offence.

(iii) for any advertisement regarding sex selection[290]:

Up to 3 years of imprisonment and up to Rs 10,000 fine.

LACUNAS

1. S. 17: APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

S. 17 of The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 deals with important implementing authorities which are essential to achieve the objective of this Act. As per this section, the role of the implementation of the act has been assigned to the 'Appropriate Authorities' which must function with aid and advice of the Advisory Committee. [291] The Section provides a broad framework for who must be included as Appropriate Authorities and in Advisory Committee. As per the section, Central Government shall appoint one or more Appropriate Authorities for each of the Union territories and State Government shall appoint one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Further, as per Supreme Court directions, Appropriate Authorities are to be appointed at District and sub-district levels as well.[292] Also, for each appropriate authority, there must be an advisory committee appointed by the Central or State Government.

Under S. 17 of The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 there is a lack of permanent legal advisor at the state level, who can advise Appropriate Authorities on-court complaint and further matters. This has led to inadequate preparation of cases by Appropriate Authorities and in further proceedings in a case.

[290] Pre-conception & Pre-natal Diagnostics Techniques Act, 1994, §22.
[291] Ministry of Health and Family Welfare, Handbook on Pre- Conception & Pre- Natal Diagnostic Techniques Act and Rules with Amendments, 33, (2006).
[292] *Id.*

2. LACK OF A PROVISION PREVENTING THE WITHDRAWAL OF COMPLAINTS UNDER THE ACT.

As observed by the report produced by a civil society organisation,[293] a huge number of cases have been withdrawn, despite it being a non-compoundable offence. It further elaborated an instance from Ranchi, wherein, the case was withdrawn, even though, there were witnesses available to testify and evidence were also available. However, the authorities decided to not proceed with the case. 5 out of 57 complaints filed in Delhi were withdrawn mostly for reasons that the medical institution did not have any sex determination procedures with them and the cases were filed by mistake. However, it is pertinent to note that S. 27 of this Act provides that the offences are non-compoundable in nature and therefore the complaints cannot be withdrawn.

3. HOSTILE WITNESSES

As defined by Mary Anne Warren the systematic deliberate killing or extermination of a particular gender or sex is gendercide.[294] The sex-selection abortion of a female child is considered as a social evil and its roots are found in the patriarchal and patrilineal society. This not only results in the mass murder of a particular gender but also acts as a base for other mass offences and atrocities against that particular gender.[295] It is therefore important to focus on institutions promoting gendercides and address these issues.

When a witness gives a statement about the commission of a crime to the police and retracts the statement in the court of law, then this is often termed as 'hostile witness' under common law.[296] Witness turning hostile serves as a major setback for a criminal trial and poses to be a hindrance in the way of justice.[297] Since, there is no provision for the witness to record a statement on oath at the time of investigation by the investigating officer, the witness after recording statements under § 161 of Code of Criminal Procedure, 1973 often turn hostile. The predominant reason for a witness turning hostile is the lack of police protection to act as a

[293] Public Health Foundation of India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges* 109 April, 2010. https://www.wbhealth.gov.in/uploaded_files/PNDT/IMPLEMENTATION%20OF%20THE%20PCPNDT%20ACT%20IN%20INDIA.pdf
[294] MARY ANNE WARREN, GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION 22 (1985).
[295] Adam Jones, *Gendercide: Examining Gender-Based Crimes Against Women and Men*, 31 Clinics in Dermatology, 226 (2013).
[296] *St. Paul v. Delhi Administration*, AIR 1976 SC 294.
[297] *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158.

safeguard against the use of muscle power by the rich and powerful.[298] There have been various cases of witnesses turning hostile, especially in the cases of decoy operation, which have seriously affected the case and resulted in the acquittal of the guilty party.[299] Therefore, there is a need for witness protection, especially, for the people who are part of the decoy operations.[300]

4. LACK OF A PROVISION FOR *EX PARTE* PROCEEDINGS

AMENDMENTS SUGGESTED

1. Section 17 must be amended to include a full-time legal advisor at the state level to ensure that Appropriate Authorities are well prepared before filing court complaint and to further advise and draft and prepare cases under the Act.

2. It is recommended by the researchers to insert the following section after S. 28 of the Act.

   Proposed section:

   "*No complaint filed under this Chapter of the Act shall be withdrawn at any point of time after the filing*."

3. Insertion of a provision so that the witnesses receive statutory safeguard.
4. Provision for *ex parte* proceedings

   Proposed section

   Procedure when only petitioner appears for the court proceedings.—

   (1) Where the petitioner appears and the respondent does not appear when the matter is called on for hearing, then—

   1 [(a) When summons duly served.—if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte;]

[298] *Manu Sharma v. State (NCT of Delhi)*, (2016) 6 SCC 1,
[299]National Judicial Academy, *Verbatim Report Workshop on PC&PNDT Act*, 40, 2016. http://www.nja.nic.in/Concluded_Programes_2015-16/Verbatim_Reports/SE-6%20(PC&PNDT).pdf
[300] Implementation of PCPNDT Act in India: Perspectives and Challenges, Public Health Foundation of India, April 2010.

(b) When summons not duly served.—if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the respondent;

(c) When summons served but not in due time.—if it is proved that the summons was served on the respondent, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the respondent.

(2) Where it is owing to the petitioner's default that the summons was not duly served or was not served in sufficient time, the Court shall order the petitioner to pay the costs occasioned by the postponement.

PART – III

RECOMMENDATIONS

Explanation related to every suggested amendment

1. S. 17: APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

The inclusion of a permanent legal advisor at the state level is strongly recommended by a report[301] of Centre for Youth Development & Activities, Pune. This report highlights that there is the inadequate use of act while drafting case complaints, inadequate case preparation and the gap in legal documentation by Appropriate Authorities which has adversely affected cases under The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994.[302] The report further highlights that there is a lack of awareness about the act in Public Prosecutors and the judicial magistrate.[303] The report also contains case analysis of cases such as ***State of Punjab vs Pushpa Maternity Home*** and ***Dr (Mrs) Shashi Mehta, CDMO, Delhi and DAA vs Dr Pawandeep Singh Kohli*** which highlight the problems of procedural gaps in complaints filed by Appropriate Authorities[304]. Thus, in order to ensure that court complaints by Appropriate Authorities are well prepared and to advice Appropriate Authorities and public prosecutor on the matter of collection of evidence, drafting and further proceedings - a permanent legal advisor is necessary. The inclusion of a permanent legal advisor will strengthen the possibility of a speedy verdict.

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[301] Centre for Youth Development & Activities, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, 116, (April 2006) https://india.unfpa.org/sites/default/files/pub pdf/IMPLEMENTATIONOFTHEPCPNDTACTININDIAPerspectivesandChallenges.pdf

[302] Centre for Youth Development & Activities, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, 108-110, (April 2006) https://india.unfpa.org/sites/default/files/pub pdf/IMPLEMENTATIONOFTHEPCPNDTACTININDIAPerspectivesandChallenges.pdf

[303] Centre for Youth Development & Activities, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, 67-68, (April 2006) https://india.unfpa.org/sites/default/files/pub pdf/IMPLEMENTATIONOFTHEPCPNDTACTININDIAPerspectivesandChallenges.pdf

[304] Centre for Youth Development & Activities, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, 99, 106, (April 2006) https://india.unfpa.org/sites/default/files/pub pdf/IMPLEMENTATIONOFTHEPCPNDTACTININDIAPerspectivesandChallenges.pdf

2. NON-WITHDRAWAL OF COMPLAINT

It has been observed that many cases filed under the Chapter VII of the Act are withdrawn after they are filed.[305] An important fact to be noted here is that according to S. 27 any offence under this Act is a non-compoundable offence. [306] Any off-the-court settlements have to be prohibited in such cases, considering the sensitivity and the magnanimity of the issue. Moreover, it is of utmost importance that these cases are filed after proper information of the instances and knowledge of the facts. Thus, it is suggested by the authors to make the amendment to include a provision which will disable the withdrawal of complaints once they have been filed.

As recommended by the Public Health Foundation of India in its report,[307]

"*Considering the number of cases withdrawn, instructions should be issued to the implementing authorities that cases should be filed after careful consideration and examination of all the facts. The guidelines should specify that once a complaint has been filed, the case should not be withdrawn since the offences under the Act are non-compoundable."*

3. SAFEGUARD FOR WITNESSES

Inducement by threat and intimidation qualifies to be the major cause for witnesses turning hostile.[308] The Supreme Court in the case of ***Zahira Habibullah Sheikh v. State of Gujarat***[309] and various other judgments[310] has observed that any hindrance in the way genuine deposition by witnesses in the court of law, in many cases, results in a low rate of conviction and shakes the public confidence in the criminal justice system. Therefore, it

[305] Public Health Foundation of India, *Implementation of the PCPNDT Act in India: Perspective and Challenges*, 116, (Apr. 2020). https://www.wbhealth.gov.in/uploaded_files/PNDT/IMPLEMENTATION%20OF%20THE%20PCPNDT%20ACT%20IN%20INDIA.pdf
[306] The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, § 27.
[307] Public Health Foundation of India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges* 109 April, 2010. https://www.wbhealth.gov.in/uploaded_files/PNDT/IMPLEMENTATION%20OF%20THE%20PCPNDT%20ACT%20IN%20INDIA.pdf
[308] *Ramesh v. State of Haryana*, 2016 (12) SCALE 246.
[309] *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158.
[310] *Govindaraju @ Govinda v. State by Sriramapuram Police Station*, (2012) 4 SCC 722; *Jai Karan v. State of N.C.T., Delhi*, (1999) 8 SCC 161*; State v. Sanjeev Nanda*, (2012) 8 SCC 450; *Vikas v. State of Maharashtra*, (2008) 2 SCC 516.

becomes the responsibility of the State to play a role for protecting these witnesses, especially in cases where people in at a high position with access to resources that can dominate the course of the proceedings are involved. This will ensure that the chances of the trial getting affected are reduced to a certain extent, eventually resulting in an effective justice delivery system. Being bound by the obligation to protect its citizens, the State has a definite role that in a trial the witness should be able to testify without being influenced by the people against whom the witness will be testifying.[311]

Further, there have been various judicial precedents, such as ***National Human Rights Commission v. State of Gujarat***[312], wherein, the court has observed that there exists no law or scheme that would protect the interests of the witnesses. As most of the criminals enjoy a certain power and access to resources in society, the introduction of a provision protecting the witnesses is required.

Therefore, it becomes the responsibility of the lawful authorities and the legal institutions, to satisfy the ordinary people and the witnesses, deposing in the court of law in extraordinary circumstances by risking their safety, of their protection.[313]

4. PROVISION FOR *EX PARTE* PROCEEDINGS

The amendment suggested above is along the same lines as Order IX Rule 6 of the Code of Civil Procedure, 1908.[314] The reason for suggesting this amendment is that the accused should not be able to misuse the machinery of the law by not appearing for court hearings and thereby delay justice. There needs to be a provision for *ex parte* judgements in order to expedite the conclusion of cases.

[311] *State of Guajarat v. Rajubhai Dhamirbhai Baria* and others, (2003) SCC OnLine Guj 236.
[312] *National Human Rights Commission v. State of Gujarat*, (2008) 16 SCC 497.
[313] Dr. Shabnam Mahlawat, *Hostile Witnesses And Evidentiary Value Of Their Testimony Under The Law Of Evidence*, 2 ILI L. Rev., (2017).
[314] The Code of Civil Procedure, 1908, Order IX Rule 6

INTERNATIONAL STANDPOINT

The International Community recognizes that women's rights are human rights and human rights are women's rights.[315] This is evident in various international documents and authorities.

Universal Declaration of Human Rights[316] at the very start of its preamble states that "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*".

Following the provisions of the Universal Declaration of Human Rights provides for the essence of gender justice.

Article 1: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*."[317]

Article 7: "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*."[318]

Article 25:

"*1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." [319]

International Covenant on Civil and Political Rights[320] recognizes that the State should ensure that lawful measures are taken through constitutional processes for recognition of rights under this covenant.[321] It further states that the State should ensure "*equal right of men and*

[315] CHRISTINE BELL, WOMEN'S RIGHTS AS HUMAN RIGHTS: OLD AGENDAS IN NEW GUISES, IN HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY (Angela Hegarty & S. Leonard eds., 1999).
[316] UN General Assembly, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III).
[317] UN General Assembly, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III), Article 1.
[318] UN General Assembly, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III), Article 7.
[319] UN General Assembly, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III), Article 25.
[320] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171.
[321] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171, Article 2(2).

women to the enjoyment of all civil and political rights"[322] and that "*No one shall be arbitrarily deprived of his life*"[323].

The Platform for Action of the United Nation's Fourth World Conference on Women of 1995 was for the objective of women's empowerment.[324] Principle 4 of the United Nations Population Division, Program of Action states that "*advancing gender equality and equity and the empowerment of women, and the elimination of all forms of violence against women, are…. cornerstones of population and developmental programs*".

Various International Organizations such as the Office of the United Nations High Commissioner for Human Rights, United Nations Population Fund, United Nations Children's Emergency Fund, United Nations Entity for Gender Equality and the Empowerment of Women and World Health Organization joint interagency statement has raised concerns over the problem of sex-selection and sex-determination and reproductive rights of women. These organizations have reaffirmed their support to the efforts taken by the States, international and national organizations, civil society and communities to uphold the rights of girls and women and to address the multiple manifestations of gender discrimination including the problem of imbalanced sex ratios caused by sex selection.[325]

[322] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171, Article 3.
[323] International Covenant on Civil and Political Rights, March 23, 1976, United Nations, Treaty Series, vol. 999, p. 171, Article 6(1).
[324] G.A. Res.50/203, (October 27, 1995).
[325] World Health Organization, Preventing Gender-Biased Sex Selection: An interagency statement OHCHR, UNFPA, UICEF, UN Women and WHO (2011).

CONCLUDING REMARK

The recommendations of the provisions of the Pre-conception & Pre-natal Diagnostics Techniques Act of 1994 seeks to make the laws prohibiting the determination of sex prior to childbirth and the abuse of prenatal screening techniques for sex selective abortion more effective.

At present, the Act provides penalties and punishments to any person who conducts or aids in the conduct of prenatal diagnostic procedures in unregistered units, sex selection of a man or woman, the conduct of a Pre- Natal Diagnosis examination for some intent other than that defined in the Act and the selling, distribution, supply, leasing, etc. of any ultra-sound system or any other instrument capable of detecting the sex of the foetus.

There are certain lacunae in the Act that result in lower rates of conviction which thereby defeat the purpose of the Act. For instance, there is no specification in the Act regarding the position of a permanent legal advisor at the State level who shall be competent to advise the 'Appropriate Authorities' with regard to Court proceedings and other related matters. This has led to inadequate preparation of cases by Appropriate Authorities and has hampered further proceedings of the matters. The inclusion of a permanent legal advisor will make the administration process better and more efficient. Moreover, despite the offence being a non-compoundable one, there have been several instances where complaints have been withdrawn after being filed under Chapter VII of the Act. Therefore, it is pertinent that a specific provision is introduced in the Act to prohibit the withdrawal of cases after they have been filed. In addition to this, there needs to be a safeguard in place to protect witnesses. This will lessen the possibility of the trial getting affected to some extent and increase the chances of a fair verdict. Lastly, there needs to be a provision for *ex parte* proceedings. This is necessary in order to prevent the accused from prolonging the trial by not appearing for court hearings.

It is for these reasons that the above-mentioned recommendations to the provisions of the PC-PNDT Act become relevant.

C: UNLAWFUL ACTIVITIES PREVENTION ACT, 1967

CONTENTS

PART – I

INTRODUCTION

On November 12, 1940, Winston Churchill in his address to the House of Common posted that, *"History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes, to revive its echoes, and kindle with pale gleams the passion of former days."* 80 years later, humanity finds itself echoing Churchill's sentiment. We live in precarious and unpredictable times. Nations, which at a time in history were only concerned with, and worked for, the protection of their citizens from external threats, today find themselves facing convoluted and insidious dangers to their people. A flagrant irony in this state of affairs lies in the fact that a substantial number of these threats come from the citizens themselves. Terrorism is no longer sequestered to non-State actors. On the contrary, it is cavernously systemic and disguised. In the face of this coeval conundrum, and in pursuance of its commitment to safeguarding the country and its citizens therein, the Indian Government, acting upon the recommendation of the Committee on National Integration and Regionalism appointed by the National Integration Council[326], codified certain laws to spearhead the prevention of unlawful activities and associations directed against the integrity and sovereignty of the country, which took the form of the Unlawful Activities (Prevention) Act, 1967[327] ("UAPA"). Since its inception, the Unlawful Activities (Prevention) Act has undergone a multitude of amendments, which are:

1. The Unlawful Activities (Prevention) Amendment Act, 1947
2. The Criminal Law (Amendment) Act, 1972
3. The Delegated Legislation Provisions (Amendment) Act, 1986
4. The Unlawful Activities (Prevention) Amendment Act, 2004
5. The Unlawful Activities (Prevention) Amendment Act, 2008
6. The Unlawful Activities (Prevention) Amendment Act, 2012
7. The Unlawful Activities (Prevention) Amendment Act, 2019

[326] Ministry of Human Affairs, *Background Note on National Integration Council*, Government of India, https://www.mha.gov.in/sites/default/files/NICBackG-171013.pdf.
[327] The Unlawful Activities (Prevention) Act, 1967.

Indian Anti-Terror laws are the outcome of spontaneous actions towards the terrorist incidents that have caused aggressions, loss of life, danger to the safety of person and property, generating disorder and fear in the society and in particular defying the sovereignty, unity and integrity of India. It is believed that a set of laws should be framed within the rule of law framework in a democracy to prevent and combat all kinds of terrorism effectively. Such a set of law is a guiding principle for the law enforcement agencies in the operation of counter-terrorism or insurgency.

Considering the susceptibility of the country to the vicious acts of terror and intricacies associated therein, the government felt that traditional laws are incapable of managing the nuisance caused by terrorism and further to bring terrorists to justice, it relied on the rigorous special laws along with provisions which deviate from the established principle of criminal justice system. Such legislative framework will be effective only when the offences are unambiguously defined, objects clearly spelt out, the procedure law for enforcing them are fair and efficient and execution of law are non-abusive and in accordance with rule of law and with respect for human rights. The legislature must have an all corner debate before enacting anti-terror legislation and must not come with such legislation in haste, as a reactive measure empowering law enforcement agency by limiting civil liberties.

The fundamental objective of this report is to scrutinize the Unlawful Activities (Prevention) Act, 1967 as well as its subsequent amendments to discern the lacunae, if any, and conclude the viability of this statute.

Historical Background

The Unlawful Activities (Prevention) Act is a special law that curbs an accused's fundamental rights, particularly those enshrined under Articles 19[328] and 21[329] of the Constitution of India. It is pertinent to note that a special law is one that supersedes the usual, average, or normal measures[330] that demarcate legislations. They legitimise exceptions in procedures of investigation and trial. The legitimacy of procedural exceptions originates from

[328] The Constitution of India, 1950, Art. 19 (1) (*b*).
[329] The Constitution of India, 1950, Art. 21.
[330] BLACK'S LAW DICTIONARY 1570 (4th ed., 1951).

political decisions ascertaining and establishing the existence of a state of emergency that makes such indemnities crucial.[331]

The UAPA was introduced in 1967 as a legislation to set out reasonable restrictions on the fundamental freedoms guaranteed under Article 19 (1) of the Constitution, such as freedom of speech, right to assemble peacefully and right to form associations. These restrictions were meant to be used to safeguard India's integrity and sovereignty[332]. The Act is not the first of its kind. Although the extensive security measures condensed under the Prevention of Terrorism Act (POTA) were rescinded following the victory of the Congress Party-led UPA coalition in 2004, many of its disputed provisions were shifted into the criminal code through the revision of the Act in the same year.[333] The special status of the UAPA allows it to violate the procedure established by law.[334] Section 15 of the Act defines what constitutes a 'terrorist act'. It emphasises on the *mens rea* or the intent,[335] however, terrorism is nowhere defined in the Act. In the case of ***Hitendra Vishnu Thakur***,[336] Justice A.S. Anand emphasized upon the difficulty in trying to lay down what constitutes 'terrorism'. Additionally, the Kerala High Court in ***Vikraman v. State of Kerala***[337] recognized that the scope of what constitutes a 'terrorist act' under the UAPA is far more extensive than its repealed precursors. Even the possibility of triggering terror in the people or any section of the masses would be construed as a terrorist activity under the Act. The vague definition given to a crime of a great significance allows for the investigating agency to allege individuals with charges that attract a graver consequence.

[331] Ujjwal Kumar Singh, The State, Democracy and Anti-Terror Laws in India 102 (1st ed.) (2007).
[332] The Unlawful Activities (Prevention) Act, 1967, §2(o)(ii).
[333] REECE JONES, BORDER WALLS SECURITY AND THE WAR ON TERROR IN THE UNITED STATES, INDIA, AND ISRAEL 56 (1st ed., Zed Books ltd.) (2012).
[334] *Maneka Gandhi v Union of India*, 1978 (1) SCC 248.
[335] Unlawful Activities (Prevention) Act, 1967, §15.
[336] *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) SCC (4) 602.
[337] *Vikraman v. State of Kerala*, (2015) SCC OnLine Ker 664.

METHODOLOGY AND APPROACH FOR RESEARCH

The compendious study of the Unlawful Activities (Prevention) Act substantiated in this paper is primarily based on a plethora of secondary sources such as the works of eminent jurists, the reports of various committees and human right organisations, and judicial precedents; coupled with a number of primary sources as well as a self-engineered critical analysis of the Unlawful Activities (Prevention) Act. References to credible research and academic work on the legislation have also been made. The focal objective of the paper i.e. identifying the lacunae in the Unlawful Activities (Prevention) Act has been achieved by utilizing the following sources- 1. The Constitution of India, 2. Judicial Precedents with special reference to Supreme Court judgements, 3. Reports of the Law Commission of India with special emphasis on the 2017 report on 'Provisions relating to bail', 4. International Conventions, 5. Constitutional Assembly Debates, 6. Critiques by human right organisations, 7. National Crime Records Bureau Reports and 8. Books by renowned authors

PART – II

ABOUT THE ACT

The Unlawful Activities (Prevention) Act is a pan-India legislation enacted by the Parliament of India with the goal of empowering the government to impose reasonable restrictions on the freedom of speech and expression[338], the right to assemble peaceably and without arms[339], and the right to form associations or unions[340]. The territorial extent of this law extends to the whole of India. Furthermore, any Indian or foreign national charged under the Unlawful Activities (Prevention) Act is liable for punishment if held guilty, regardless of the jurisdiction of the commission of the offence. The Unlawful Activities (Prevention) Act defines an "unlawful activity" as

> *" any action taken by individual or association (whether by committing an act or by words, either spoken or written or by signs to questions, disclaims, disrupts, or is intended to disrupt the territorial integrity and sovereignty of India".*[341]
> *The cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or that which provokes any person or group of persons to bring about such cession or secession is also prohibited under the Unlawful Activities (Prevention) Act."*[342]

LACUNAS

1. Section 2 (o)

> *(o) "unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing*

[338] The Constitution of India, 1950, Art. 19 (1)(a).
[339] The Constitution of India, 1950, Art. 19 (1)(b).
[340] The Constitution of India, 1950, Art. 19 (1)(c).
[341] The Unlawful Activities (Prevention) Act, 1967, §2(1)(o).
[342] The Unlawful Activities (Prevention) Act, 1967, §2.

an act or by words, either spoken or written, or by signs or by visible representation or otherwise), –

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;

This section defines unlawful activities and includes terms which are vague and broad. It describes questioning the territorial integrity of India as an unlawful activity. A close look at this provision indicates that the term "questioning" has a very wide scope and the language of the section creates certain ambiguity in understanding what exactly constitutes "questioning". Therefore, this section becomes a tool for abuse. Various human rights advocates and international organizations have argued that the Act stands in violations of several articles of the International Covenant on Civil and Political Rights (ICCPR). Moreover, the provisions of the Act have also been alleged to disobey the standards mentioned under the Preamble of the ICCPR[343].

Article 15(1) propounds the principle of legal certainty under international law.[344] According to this principle, the laws which are criminal in nature should have no ambiguity whatsoever on the matter of what kind of behaviour or conduct constitutes an offence and what are the consequences upon the commission of such offence. Therefore, vague and broad definitions of terms under UAPA, as mentioned in the above section, falls short of international treaty obligations.

[343] United Nations Human Rights, Preamble to the International Covenant on Civil and Political Rights (ICCPR), (16 Dec, 16, 1966).
[344] Kajal Prasad, *Indian Counter – Terrorism Law Fails to Conform with International Law*, HUMAN RIGHTS PULSE (23 Feb 2021) https://www.humanrightspulse.com/mastercontentblog/indian-counter-terrorism-law-fails-to-conform-with-international-law#:~:text=Article%2015(1)%20of%20the,as%20to%20prevent%20any%20arbitrary

2. Section 15

> *"[(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [, economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, -*
>
> *(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause –*
>
> *(i) death of, or injuries to, any person or persons; or*
>
> *(ii) loss of, or damage to, or destruction of, property; or*
>
> *(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or……"*

Section 15 of the Act defines what constitutes a 'terrorist act'. It emphasises on the *mens rea* or the intent, however, this section does not provide for the definition of words 'terrorism' 'terrorist' and 'likely to cause'. There is no clarity on the standard of proof required to establish the involvement of an individual in any act falling under the broad umbrella of terrorist acts. Therefore, the divergence of the provision from well-known principles of criminal jurisprudence is extensively wide and creates ambiguity.

In the case of ***Vikraman v. State of Kerala,***[345] it was discussed that the scope of what constitutes a 'terrorist act' under the UAPA is far more extensive than its repealed precursors. According to statistics of the National Crime Records Bureau (NCRB), 16.2% of cases under the head of "offences against the state" were under the Unlawful Activities (Prevention) Act[346]. The Delhi Riots which were a result of the protests against Citizenship law saw several individuals including Safoora Zargar, Gulfisha Khatoon, Khalid Saifi, Meeran Haider, Asif Iqbal Tanha being booked under the UAPA. Recently, a Malayalam journalist was also

[345] *Vikraman v. State of Kerala,* (2015) SCC OnLine Ker 664.
[346] Ministry of Home Affairs, *Crime in India (Oct. 01, 2020).* https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf

booked under section 14 and 17 of the Act[347] wherein he was accused of "disrupting peace as a part of the big conspiracy". These precedents of arbitrary arrests lay down a blueprint of how the unbridled use of power has been granted due to the ambiguous meaning of the word "terrorist act".

3. Section 20

> *"Any person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine."*

This section prescribes punishment for being a member of a terrorist gang or organization. Terrorist organisations are simply those designated as such by the state, which gets included in a list under Schedule 1 of the UAPA, and if a person is found to be a member of any such organisation he or she can be sentenced to life imprisonment. However, there is no definition of 'membership', which has allowed the investigating authorities to use even the weakest of excuses to charge people as members belonging to the unlawful or terrorist organisation. In a 2015 case[348] the Supreme Court whilst hearing a challenge to the conviction of a person for being a member of a banned organisation under the old TADA held that "*Mere membership of banned organisation would not make a person criminally liable unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.*" The vague nature of the section allows for arbitrariness in its dealings since no process of identifying an individual as a 'member' has been provided.

4. Section 35

> *"The Central Government may, by [notification], in the Official Gazette, –*
>
> *(a) Add an organization to the [First Schedule] [or the name of an individual in the Fourth Schedule];*
>
> *(b) Add also an organization to the [First Schedule], which is identified as a terrorist organization in a resolution adopted by the Security Council under*

[347] Mahtab Alam, *Hathras Case: Malayalam Journalist and Three Others Booked Under Sedition, UAPA*, The Wire, Oct. 07, 2020, https://thewire.in/media/hathras-case-malayalam-journalist-siddique-kappan-booked-under-sedition-uapa
[348] *Arup Bhuyan v. State of Assam*, (2015) 12 SCC 702.

Chapter VII of the Charter of the United Nations [or the name of an individual in the Fourth Schedule], to combat international terrorism;

(c) Remove an organization from the [First Schedule] [or the name of an individual from the Fourth Schedule];

(d) Amend the [First Schedule] [or the Fourth Schedule] in some other way;…"

(2) The Central Government shall exercise its power under clause (a) of sub-section (1) in respect of [an organisation or an individual only if it believes that such organization or individual is] involved in terrorism.

(3) For the purposes of sub-section (2), [an organisation or an individual] shall be deemed to be involved in terrorism if such organization or individual] —

(a) commits or participates in acts of terrorism, or

(b) prepares for terrorism, or

(c) promotes or encourages terrorism, or

(d) is otherwise involved in terrorism.

[(4) The Central Government may, by notification in the Official Gazette, add to or remove or amend the Second Schedule or Third Schedule and thereupon the Second Schedule or the Third Schedule, as the case may be, shall be deemed to have been amended accordingly.

(5) Every notification issued under sub-section (1) or sub-section (4) shall, as soon as may be after it is issued, be laid before Parliament.]

This section grants undefined and discretionary powers to the Central Government to categorise an individual or an organization as a 'terrorist'.

In the case of ***Sajal Awasthi v. Union of India***[349], it was discussed that – *"…thread of reasonableness runs through the entire Part III of the Constitution and not even an iota of the provisions contained in Section 35 of the impugned law be termed as fair and reasonable……..That in light of the rulings of this Hon'ble Court, it can be safely stated that a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly*

[349] *Sajal Awasthi v. Union of India*. W.P. no. 001076/2019.

arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased. Therefore, positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest etc. all of which are missing in the impugned law"

5. Section 43 D

> *"(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.*
>
> *(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—*
>
> *(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and…."*

Section 43 states that if the investigation is not completed within a stipulated time frame, a person can be detained for a period of 180 days without the filing of a charge sheet and such period of 180 days can be extended further and in that period the right to bail of the detained would not arise. The Law Commission of India in its report titled 'Provisions relating to bail'[350] stated that there should be no "automatic denial" of bail to an accused person who is claimed to be involved in the acts of terror. It further states that the evidence presented against the accused should play an important role and the individuals against whom inadequate evidence is presented should be granted bail.

Criminal Procedure dictates that an individual arrested without a warrant must not be detained for more than twenty-four hours.[351] In a circumstance, when the police cannot complete its investigation within the stipulated time, a magistrate can extend the period to 180 days on the fulfilment of certain requirements for grave cases.[352] These provisions of the

[350] Law Commission of India, *Amendments to Criminal Procedure Code, 1973- Provisions Relating to Bail,* Report No. 268, (May, 2017).
[351] The Code of Criminal Procedure, 1973, §57.
[352] The Code of Criminal Procedure, 1973, §167.

Cr. P.C resonate the fundamental right against arbitrary arrest and detention conferred to every individual.[353]

The Act's provisions permit the police to search, seize and arrest suspected culprits of terror crimes and bail becomes an impossible task as section 438[354] of the Criminal Procedure Code does not apply[355]. The accused is not granted bail lest the public prosecutor has been given an opportunity of being heard on the application for such release. Additionally, the Act allows the creation of special courts and to have a wide discretion to hold in-camera proceedings and use secret witnesses. Adding to the peculiar nature of the Act, it does not contain any provision for mandatory periodic review[356] or a sunset clause meaning that the ceremonial repeal of the law posts the initiation of state action- whether by the police or the courts would be redundant as the law would still be applicable.[357]

6. Schedule 4

This act gives the central government the power to designate an individual as a terrorist, simply through a notification in the official gazette and then add his name to the 4th schedule. This can be done simply by the choice of the government without giving an individual the opportunity to be heard and present his defence. This takes away all of his civil rights. It gives the Central government the power to label and stigmatise an individual as a terrorist without having the evidence to actually prosecute and convict him.

Section 35(3)(d) allocates to the Central Government undefined and discretionary powers to categories an individual/organization as a 'terrorist'. The last year and a half is a testament to the biased use of this section by the Government in an attempt to stifle the voices of oppression and dictate the citizens of the country, as well as target minority groups.

A bare reading of Section 35(3) of the UAPA will make it evident that the provision suffers from the vice of vagueness. The Act does not mention that at what position will an individual be deemed to have committed, prepare, promote or be otherwise involved in the offence of terrorism. Additionally, the section also does not contemplate any oral hearing for the accused at any stage of the allegation.

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[353] The Constitution of India, 1950, Art. 22.
[354] Criminal Procedure Code, 1973, §438.
[355] Unlawful Activities (Prevention) Act, 1967, §43D, §44.
[356] Arun Ferreira, Vernon Gonsalves, *Fifty Years of Unreasonable Restrictions Under the Unlawful Activities Act*, The Wire, Mar. 09, 2017, https://thewire.in/rights/uapa-anti-terrorism-laws
[357] Countering terror or terrorizing the law? Menaka Guruswamy, Seminar (Nov. 04, 2010).

The Act since the 2019 amendment has witnessed certain criticism from the legal experts regarding the absolute and arbitrary power granted to the Government to designate an individual as a terrorist. Since, the 2019 amendment two Public Interest Litigations have been filed in the Hon'ble Supreme Court challenging the validity and constitutionality of Section 35 of the Unlawful Activities (Prevention) Act, 1967. The Hon'ble Supreme Court in ***Sajal Awasthi v. Union of India***[358] and ***Association for Protection of Civil Rights v. Union of India*** is adjudicating upon the constitutionality of the said amendment.

The contentions state that the said amendment is in contravention with the fundamental rights of the citizen of India enshrined under Part III of the Constitution of India, 1950 i.e. Right to life under Article 21[359], Right to equality under Article 14[360], and Right to free speech and expression under Article 19(1)(a)[361]. The allegation states that an individual may be identified as a terrorist without any judicial scrutiny and even before the commencement of a trial or any application of judicial mind over it, which does not amount to following the 'procedure established by law' and is, thus, is violative of right to reputation of such an individual who is being categorized as a terrorist and being added in Schedule 4 of the Act, 1967.

The 2019 Act does not allow a person, who is classified as a terrorist, to present their case and these people are left at the whim and caprice of society. In the amended Act, Section 35 impacts explicitly and adversely the constitutional right to free expression, as enshrined in Article 19(1)(a) of the Indian Constitution. It is important to note that the right of dissent is an integral part of the constitutional right to free speech and expression and cannot, thus, be abridged under any circumstance other than those specified in article 19(2). The 2019 Act assists the government in imposing indirect restrictions on the right to dissent, under the false pretence of curbing terrorism and this can damage the democratic progress of the country. India is a democracy, and every Indian citizen has the fundamental right to dissent, but the existence of such oppressive laws and provisions as found in Sections 35 and 36 of UAPA explicitly infringes on them.

[358] *Sajal Awasthi v. Union of India*, Writ Petition (Civil) 1076 of 2019.
[359] The Constitution of India, Art. 21.
[360] The Constitution of India, Art. 14.
[361] The Constitution of India, Art. 19.

Position of law in international jurisdiction

United States of America

The US Patriot Act was introduced in 2001 to curb terrorism in the country. This Act gives the power to respective departments to use its prosecutorial discretion – investigating, prosecuting and punishing crimes that in the past might have been overlooked – in order to incapacitate suspected terrorists and thereby prevent terrorist attacks. Section 411 of the US Patriot Act of 2001 authorized the Secretary of State, in consultation with or upon the request of the Attorney General, to designate terrorist organizations. Section 412 of the Act provides for the Mandatory detention of suspected terrorists. In contrast to our jurisdiction, the law does not allow individuals to be declared as terrorists.

United Kingdom

Section 41 of the Terrorism Act, 2000 empowers a constable to "*arrest a person reasonably suspected by him or her of being a terrorist*". Once arrested, custody procedure in England and Wales is based on the Police and Criminal Evidence Act 1984 (PACE) and the associated Codes of Practice. However, Schedule 8 to the Terrorism Act provides further enhanced and specific provisions for detention for individuals arrested under section 41.

There is also a specific PACE Code (Code H) which deals with those detained under section 41 of, and Schedule 8 to, the Terrorism Act 2000. Under the PACE Codes, a prisoner (if a foreign national) has the right to have his or her embassy informed of his or her detention. Under Schedule 8 a person also has the right to a solicitor and to have one named person informed of his or her detention. These rights can be delayed for a maximum of 48 hours if there are reasonable grounds for believing that their exercise may lead to one of a number of consequences. These include interference with evidence, 'tipping off' a person involved in terrorist activity, or physical injury to a person.

Persons detained under the Terrorism Act 2000 provisions must be informed of their rights as soon as practicable. If they appear to be unable to understand English, the custody officer must arrange for an interpreter to assist. The Terrorism Act 2006 extends the maximum period that a terrorist suspect can be held prior to charge to 28 days. This is a maximum which will only be reached in a very small number of serious cases.

Thus, a suspected terrorist can only be held without charge for a period of 28 days and unlike India, there is no such law which gives the government the power to declare the individual a terrorist.

7. Section 38

> *"(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation: Provided that this sub-section shall not apply where the person charged is able to prove—*
>
> *(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and*
>
> *(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation."*

The burden of designating a person as a terrorist and the burden to discharge such liabilities is absolute on both the state as well as the accused. It is for the state to provide clinching proof of the involvement of the accused as stated in Section 38 (1). But in the case of absolute liability, no exceptions are provided to the defendant. The defendant will be made liable under strict liability no matter what.

The accused persons shall be offered free legal aid and be given sufficient opportunities to defend himself in matters involving the Unlawful Activities (Prevention) Act, 2019 as per the guidelines enumerated under Sections 12 and 13 of the Legal Services Authority Act.

In the case of ***State of Maharashtra v. Mohd. Ajmal Kasab***[362], the Apex Court opined that they had no hesitation in holding that right to legal aid may be granted as per Article 39-A and in furtherance to the ideal of Article 39-A, Sections 12 and 13 of the Legal Services Authorities Act, 1987. By providing free legal assistance to an accused person who is in detention, and not being able to afford the services of a lawyer either for bail or for trial or for that matter in appeal, further evens out the disparities and the lacuna that can be created by the absolute liability brought forth/imposed by the Act.

[362] *State of Maharashtra v. Mohd. Ajmal Mohd. Amir Kasab*, (2012) 9 SCC 1.

Under the Code of Criminal Procedure, police must inform a person "forthwith" of the "full particulars of the offence for which the person is arrested".[363] The proposed amendment would now require the Director-General of the NIA to first inform the Special Judge in order to obtain the warrant after which an arrest may be caused. Without a warrant, no person can directly be arrested which previously would have resulted in individuals remaining unaware of the reasons for their arrest, and undermine their ability to take appropriate action. This raises particular safety concerns in the aftermath of a terrorist attack since in India the authorities' labelling an individual/organisation as a "terrorist/terrorist organisation" is likely to get widespread media dissemination.

The provision violates India's obligations under the International Covenant on Civil and Political Rights (ICCPR), which requires that anyone arrested "shall be informed, at the time of arrest, of the reasons" for their arrest.[364] According to the Human Rights Committee, merely referencing the legal basis for arrest without any indication of the substance of the complaint is insufficient. An individual needs to be sufficiently informed of the reasons for arrest to be able to take immediate steps to secure their release in the event the reasons given are invalid or unfounded.[365]

The presumption of guilt is nearly negated in this amendment because the evidence collected by the Director-General of the NIA is scrutinized after which the suspected perpetrator is taken into custody. However, if the accused sets an appeal in motion and applies for bail, it becomes important that he is able to prove that he is not guilty.

The court presumes the guilt of an accused person for engaging in terrorism where certain inculpatory evidence is proved but without a showing of criminal intent during the trial.[366] These are where:

Arms, explosives, or any other substances specified in section 15 of the Act were recovered from the possession of the accused, and there is reason to believe that the items or other substances of a similar nature were used in the commission of the offence.[367]

[363] The Code of Criminal Procedure 1973, §50(1).
[364] International Covenant on Civil and Political Rights (ICCPR), Art. 9(2), Oct, 14, 1977, ASA 20/027/1997.
[365] Human Rights Committee *Adolfo Drescher Caldas v. Uruguay*.
[366] The Unlawful Activities (Prevention) Act, 1967, §43(E).
[367] The Unlawful Activities (Prevention) Act, 1967, § 15.

The fingerprints of the accused or other "definitive evidence" suggesting the involvement of the accused in the offence were found at the site of the offence or on anything used in connection with the commission of the offence.

If a court determines that either of these two forms of evidence against the accused is proved beyond a reasonable doubt, "*the Court shall presume, unless contrary is shown, that the accused has committed the offence.*" This provision is highly problematic because it permits an individual to be convicted of acts of terrorism solely on the basis of material evidence, without any showing of intent to commit a crime. It shifts the burden of proof onto the defendant to prove there was no such intent, even though there is a great risk that police could plant such evidence to ensure detention.

The end result could be that persons prosecuted under UAPA do not benefit from the presumption of innocence, leading to an unfair trial. The ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty.[368] The Human Rights Committee has stated that the presumption of innocence is "fundamental to the protection of human rights" and "imposes on the prosecution the burden of proving the charge" beyond a reasonable doubt. It cannot be derogated from, even during a public emergency or other declared state of exception.[369] While the Indian Constitution does not expressly guarantee the presumption of innocence, the Supreme Court of India has included such a presumption in its holdings concerning the constitutional right to a fair trial.[370] This provision of the UAPA encourages abusive prosecution, undermines the basic right to a fair trial and creates enormous risks of wrongful conviction.

8. Organization to be categorized as terrorist

The Act does not afford an opportunity to an individual, being categorized as a terrorist, to present his/her case and let such individuals to live on the whim and caprice of the society thereinafter. The amended Section 35 of the Act directly and adversely affects the fundamental right to free speech and expression as enshrined under Article 19 (1) (a) of the Constitution of India. It also empowers the ruling government, under the garb of curbing

[368] International Covenant on Civil and Political Rights (ICCPR), art. 14(2), Oct, 14, 1977, ASA 20/027/1997.
[369] Human Rights Committee, General Comment No. 32, Art. 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), sec. IV.
[370] State of Punjab v. Baldev Singh, AIR 1999 SC 2378.

terrorism, to impose indirect restriction on the right of dissent which is detrimental for our developing democratic society.

9. National Crime Records Bureau Statistics

The National Crime Records Bureau is a statistical institution set up in 1986 to function as a repository of information on crime and criminals so as to assist the investigators in linking crime to the perpetrators.[371]

According to the National Crime Records Bureau, under the Unlawful Activities (Prevention) Act, in the year 2014, there were 1,144 pending cases, of which 106 were tried and 33 cases completed. Of the total 33 completed, only nine people were convicted. The percentage of acquittal was 73 per cent. In 2015, there were 1,209 pending cases. The trial was completed in 76 cases. Of these, 11 were convicted and 65 were acquitted. The conviction rate was 14.5 per cent. No trials happen, no bail is given and people languish for years in prison.[372] As per the data submitted by the Union Home Ministry in the Rajya Sabha, only 2.2 % of cases registered under the Unlawful Activities (Prevention) Act between the years 2016-2019 have ended in convictions by court. Union Minister of State for Home G. Kishan Reddy informed the Upper House that as per the 2019 Crime in India Report compiled by the National Crime Records Bureau (NCRB), the total number of persons arrested under the Act in 2019 is 1,948.[373]

The low evidentiary bar in cases filed under the Unlawful Activities (Prevention) Act, coupled with the arbitrary bail provisions and an absence of the requirement of First Information Reports, charge-sheets or trials have paved the way for a gross miscarriage of justice, in that a large quantum of persons are arrested without sufficient evidence and are subject to lengthy and harsh trials only to get acquitted a number of years later.

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[371] Ministry of Home Affairs, *National Crime Records Bureau,* (Nov. 16, 2020). https://ncrb.gov.in/en/crime-india-2019-0.
[372] Business Line, *Rajya Sabha: UAPA Bill passed despite Opposition fears*, The Hindu, Aug. 2, 2019, https://www.thehindubusinessline.com/news/uapa-amendment-bill-gets-rajya-sabha-approval/article28796520.ece#.
[373] Special Correspondent, *Parliamentary Proceedings/2.2% of cases registered under the UAPA from 2016-2019 ended in court conviction*, The Hindu, Feb. 10, 2021, https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece.

10. The need for a separate procedure of the designation of individuals as terrorists

Under the new amendment to the Unlawful Activities (Prevention) Act, the Government has the power to designate any individual as a terrorist. S. 35(2)[374] of the Unlawful Activities (Prevention) Act allows the Centre to list individuals as terrorists under the fourth schedule without establishing their affiliations to a terrorist organisation. This designation is not subject to any First Information Report, charge sheet, trial and conviction.

There needs to be a separate procedure of the designation of individuals as terrorists. Global terrorists recognised by the United Nations are already targeted under S. 51A[375] of the Unlawful Activities (Prevention) Act, which states that

> *"Certain powers of the Central Government. —For the prevention of, and for coping with terrorist activities, the Central Government shall have power to—*
>
> *(a) freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism*
>
> *(b) prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism;*
>
> *(c) prevent the entry into or the transit through India of individuals listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism."*

The procedural ambiguity in designating individuals as terrorists is extremely dangerous and has a huge scope for misuse. The discretion of the Government in this regard can be used as a tool to further political agendas and stifle the voices of oppression.

11. Interference with privacy and liberty of individuals

The Unlawful Activities (Prevention) Act interferes with the privacy and liberty of persons, thus circumventing the provisions which protect against arbitrary or unlawful interference

[374] The Unlawful Activities (Prevention) Act, 1967, §35(2).
[375] The Unlawful Activities (Prevention) Act, 1967, §51A.

with a person's privacy and home. It allows for searches, seizures and arrests[376] based on the 'personal knowledge' of the police officers without a written validation from a superior judicial authority.[377] This is in direct violation of the principles of natural justice as well as Article 21[378] of the Constitution of India, 1950.

SUGGESTED AMENDMENTS

1. Section 2(o)

Some terms in the provision such as "questions" should be either omitted or be defined separately to provide clarity and remove ambiguousness in the section.

2. Section 15

Certain terms in the provision such as "likely to threaten", "likely to strike terror" should be omitted.

Original Provision

"[(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [, economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, -

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause –

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or……"

[376] The Unlawful Activities (Prevention) Act, 1967, §43A.
[377] Ujjaini Chatterji, *UN Special Rapporteurs Express Concerns Over UAPA*, The Scroll, May. 18, 2020, https://www.theleaflet.in/un-special-rapporteurs-express-concerns-over-uapa/#.
[378] The Constitution of India, 1950, Art. 21.

Suggested Provision

"[(1)] Whoever does any act with intent to threaten the unity, integrity, security [, economic security,] or sovereignty of India or with intent to strike terror in the people or any section of the people in India or in any foreign country, -

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause–

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

[(iii-a) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or [an international or inter-governmental organisation or any other person to do or abstain from doing any act; or] commits a terrorist act

[Explanation.—For the purpose of this sub-section,—

(a) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;

(b) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorised or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.]

[(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.]

3. Section 20

The term "member" should be defined in order to understand what constitutes membership of a terrorist gang or organization.

Suggested Explanation

Explanation – "Membership" means an individual who participates in activities with an intention to cause fear among the citizen.

4. Section 35

This provision fundamentally goes against the principle *'Audi alteram partem'.* Therefore, this section should be so amended that it gives an opportunity to the accused to be heard. Therefore, the below-mentioned proviso should be added.

Suggested Proviso

"Provided that no such investigation shall be made without giving the accused an opportunity to be heard before the court."

5. Section 43 D

This section should be amended to allow the application of section 167 of the Cr. P.C or the setting aside of default bail must be on conclusive proof and after a procedural and systematic establishment of the fact that the individual involved is prima facie involved in terrorist activities.

6. Schedule 4

After evaluating the Lacunas in Schedule 4 of the Unlawful Activities (Prevention) Amendment Act, 2019, this report suggests the following amendments:

Keeping in mind the laws of various international jurisdictions, such as the United States and the United Kingdom, which do not give authority to the government to tag an individual as a terrorist, even India should adhere to this, as it was done before 2019 amendment. Hence the law should be amended to take this power from the government.

If the abovementioned amendment cannot be implemented, the law should be amended to at least give the suspected individual the right to be heard, and due process of law should be followed before terming him as a terrorist. The consequences of the same are violative of the basic fundamental rights of an individual and may lead to arbitrary exercise of power by the government and failure of justice.

7. Section 38

Suggested Provision

> *Only such person/s, suspected to be found active of being involved, influencing, professing or promulgating the views in consonance with a terrorist organisation encouraging terrorist activities, may it be a single/one instance or several instances SHALL be held to have committed an offence relating to being a terrorist or a member of a terrorist organisation.*
>
> *After an initial enquiry, comprising of the Director General of the National Investigation Agency shall forthwith report the findings to the Special Judge designated under the act, who shall issue a warrant of arrest in writing and shall bear the seal of the Court.*
>
> *Provided that such persons accused of activities mentioned in sub-section 1 will only have to probabilise their version/theory/stand of not being present at the time, place and event of the activities mentioned in sub-section 1 of section 38.*

The amendment proposes to streamline the expansive power vested in the Director-General of the National Investigation Agency by setting up a system of checks and balances under which the evidence/information gathered as a result of the enquiry set in motion is scrutinized

by the Special Judge designated under the act, who shall issue a warrant of arrest in writing and shall bear the seal of the Court. After the warrant has been issued the NIA can proceed and cause arrest, seize properties and freeze accounts. This removes the arbitrariness from this fine piece of legislation allowing it to be exercised freely and fairly. International law protects against such arbitrariness/unlawful interference with a person's right to privacy, home and compounds.[379] Under article 17 of the ICCPR, searches and seizures of persons or their personal properties/homes require a specific decision by a state authority expressly empowered by law to do so—usually a judicial authority.[380] The Human Rights Committee has ruled that the prohibition against arbitrary searches under article 17 "*is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*"[381]

8. Organization to be categorized as terrorist

It states that "*under the Act, the central government may designate an organisation as a terrorist organisation if it: (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes terrorism, or (d) is otherwise involved in terrorism*." It allows for the Government to designate individuals as terrorists on the same grounds.[382]

The Parliament, through the Unlawful Activities (Prevention) (Amendment) Act, 2019, made significant amendments to the Unlawful Activities (Prevention) Act, 1967. One of the primary amendments was introduced under Section 35 of the Act which, unlike the pre-amendment provision of only allowing organizations to be categorized as 'terrorist, empower the government to categorize individuals as a terrorist, if the government believes that the particular individual is involved in the illegal and punishable act of terrorism against the Union of India. The amendment also ensures that once the government ratifies an individual as a terrorist under Section 35, the name of such individual will be incorporated under Schedule 4 of the Act.

The Section shall be amended and must provide for specific criteria to hold an organization liable for the act of terrorism. The Section should not be vague, arbitrary, and unreasonable.

[379] International Covenant on Civil and Political Rights (ICCPR), art. 17(1), Oct, 14, 1977, ASA 20/027/1997.
[380] International Covenant on Civil and Political Rights (ICCPR), art. 17(2), Oct, 14, 1977, ASA 20/027/1997.
[381] Human Rights Committee, Rafael Armando Rojas García v. Colombia.
[382] The Unlawful Activities (Prevention) Act, 1967, §35(3)(b).

The Section should establish a proper test or guidelines to hold an organization as a terrorist organization and the government should follow such structure objectively as to avoid any arbitrariness and to ensure that due process of law is followed ensuring the followance of the Rule of law.

9. National Crime Records Bureau Statistics

The Unlawful Activities (Prevention) Act received widespread criticism in the Rajya Sabha. Former Home Minister P. Chidambaram raised pertinent questions including the need for designation of terrorists when they are already being prosecuted. He further pointed out various procedural ambiguities in the legislation. He said,

"If you look at the statement of objects and reasons, the real mischief Paragraph 3, Sub Paragraph 2, where it is mentioned in passing that it is to empower the Central Government to add and remove the name of an individual. This is the mischief and this is why we oppose the act. We are opposing the mischievous amendments which have empowered the Centre to name an individual. You are effectively amending Sections 35 Sub Sections 1, 2 and 3 and Section 36 Sub Sections 1, 5 and 6. The real mischief in Section 35 Sub Section 2."[383]

Furthermore, renowned advocate Kapil Sibal urged the government to send the bill to a Select Committee. He highlighted the disproportionate number of people who were booked under UAPA but not convicted. Sibal said, "*You are using your brute majority in the Lok Sabha and manufactured majority in the Rajya Sabha to push these patently unfair amendments*."[384]

In light of the aforementioned critiques, it is suggested that the Unlawful Activities (Prevention) Act be sent to a Select Committee, and every provision of the statute be reviewed in light of the appalling statistics.

10. The need for a separate procedure of the designation of individuals as terrorists

It is critical that an amendment be inserted specifying set criteria pertaining to the designation of individuals as terrorists. Pursuant to the basic norms of protecting the fundamental rights

[383] Business Line, *Rajya Sabha: UAPA Bill passed despite Opposition fears*, The Hindu, Aug. 2, 2019, https://www.thehindubusinessline.com/news/uapa-amendment-bill-gets-rajya-sabha-approval/article28796520.ece#.
[384] *Id.*

of individuals, the United States of America has a proper established procedure in place for the designation of individuals as being affiliated with a terrorist organisation. This is highlighted in Section 802 of the United States of America Patriot Act, which expands the definition of terrorism to cover 'domestic', as opposed to international, terrorism.

'A person engages in domestic terrorism if they do an act "dangerous to human life" that is a violation of the criminal laws of a state or the United States, if the act appears to be intended to:

i. *intimidate or coerce a civilian population;*
ii. *influence the policy of a government by intimidation or coercion; or*
iii. *to affect the conduct of a government by mass destruction, assassination or kidnapping.'*[385]

11. Interference with privacy and liberty of individuals

The aforementioned provisions must be struck down as unconstitutional. Under the Criminal Procedure Code, search and seizure of persons booked under non-cognizable offences must be approved by a magistrate.[386] However, due to the cognizable nature of the offences under the Unlawful Activities (Prevention) Act, search and seizure is conduct without a proper warrant.

S. 806 of the Patriot Act of the United States of America calls for

> *"a seizure of all assets, foreign or domestic*
>
> *of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism against the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization or*
>
> *(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism against the United States, citizens or residents of the United States or their property or*

[385] ACLU, *How The USA Patriot Act Redefines Domestic Terrorism,* American Civil Liberties Union, 2020, https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism.
[386] The Code of Criminal Procedure, 1973, §102.

(iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism against the United States, citizens or residents of the United States, or their property."[387]

Due to the prescription of a clear mandate and ambit of the search and seizure power of authorities under the anti-terror legislation of America, there is little to no scope for misuse and arbitrariness. Furthermore, this asset forfeiture is subject to a hearing in a civil court, as opposed to the discretionary provision of the Unlawful Activities (Prevention) Act.

RECOMMENDATIONS

Section 15 – (Terrorist Act)

In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, inscribed in its resolution that terrorism includes "*criminal acts intended or determined to encourage a state of terror in the general public, a group of persons or particular persons for political purposes*"[388] and that such acts "*are in any situation unjustifiable, whatever the concerns of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them*."

The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, while discussing about the characterization of "terrorist" offences have mentioned[389] that an act becomes a 'terrorist act' when (a) the means used are deadly, (b) the intent behind the act is to cause fear among the population or to compel a government or international organization to do or refrain from doing something and (c) the aim must be to encourage an ideological goal. But the definition of 'terrorist act' under the legislation is contrary to the definition mentioned above as the definition is ambiguous as it includes '*likely to threaten*' or '*likely to strike terror in people*'[390] giving

[387] ACLU, *How The USA Patriot Act Redefines Domestic Terrorism,* American Civil Liberties Union, 2020, https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism.
[388] United Nations High Commissioner for Human Rights on Human Rights, Terrorism and Counter-terrorism, (July, 7, 2008).
[389] Commission on Human Rights, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, (Jan, 27, 2007).
[390] *Association for Protection of Civil Rights (APCR) v. Union of India*, W.P.(C) No. 001096 - 001096/2019.

unrestrained power to the government to label any citizen or a terrorist without the actual execution of these acts. It is this uncertain nature of the Act that has brought so much criticism to it. Therefore, such international standards must be followed.

CONCLUDING REMARK

The Unlawful Activities (Prevention) Act is an arbitrary legislation on various counts as mentioned in the report as it harbours unconstitutional provisions and goes against eminent principles of criminal jurisprudence, natural law and international conventions. This report is an effort to pose loopholes in the legislation as it warrants extensive and urgent scrutiny by the governmental authorities.

Terrorism has emerged as a nucleus of power politics across the globe due to its vastness and potential for mass destruction. The Unlawful Activities (Prevention) Act can lead us to become a terrorism-free nation if the authorities are able to work their way around the provisions, which in their present form, are believed to be prone to misuse. However, misuse of the provisions leading to any actual abuse of human rights will give rise to situations that will add on to the predicament of the government which for now, is emphatic to mitigate all acts of terrorism through the new amendment.

Combating terrorism is a noble goal but the legislature has cogently gone wrong in pursuing it at the cost of eroding human rights. In today's world, where all countries are combating against global terror, stringent anti-terror laws are justified. However, at no cost can these laws be justified if the most fundamental human rights of individuals are abolished.

D: Indecent Representation of Women's Act, 1986

CONTENTS

PART – I

INTRODUCTION

In the last decade, women's organizations have agitated with regard to how the media portrays their gender. Women struggle to prohibit the publication of such advertisements that, *inter alia*, encourage parents to save dowries for their children. It is true that, because of unrest among women's organizations, the number of advertisements promoting dowry has decreased. However, these campaigns have little effect on advertisements promoting sexist stereotypes and pornographic images.

Keeping in mind the Indian social structure, the law seeks to regulate the representation of women in the various sects. Special attention must be given to the feelings of the community in dealing with the diverse society from a cultural point of view, and the State must also be protected. In India, morality remains a very subjective issue reflecting a broad range of values and attitudes that are culturally and historically changing.

From a societal point of view, it is difficult to view the cause-and-effect relationship, but it can be understood from the impacts illustrated in different mediums of media, that this kind of disgraceful portrayal of women leads to a deterioration of the social environment in the form of ever-greater crime and abuse against the individual. The Central Government enacted the Indecent Representation of Women (Prohibition) Act, 1986, to put an end to the obscene and indecent representation of women and punish those who are responsible for committing such crimes.

METHODOLOGY AND APPROACH FOR RESEARCH

This report is based on research and analysis of the Indecent Representation of Women Act, 1986. The Indecent Representation of Women (Prohibition) Amendment Bill, 2012 and Report 258 of the Parliament of India by the Standing Committee have been studied. The suggested recommendations of the Amendment Bill and the report have been compared and examined to study the lacunas in the Act and how they can be amended for effective application of the legislation. Certain other statutes which are in line with the concept of curbing indecent representation such as Self-Regulation Code for Online Curated Content Providers, 2019, Cable Television Network Rules, 1994 and Cinematograph Act, 1952 have also been referred to. Judgements which have commented on the meaning and scope of obscenity and indecent representation have also been relied upon.

PART – II

ABOUT THE ACT

The Indecent Representation of Women (Prohibition) Act, 1986 (hereinafter, "Act") is a legislation to prohibit indecent representation of women through advertisements or through publications, writings, paintings, figures or in any other manner.[391] When it was introduced in the Rajya Sabha, the main intention of the bill was stated to be the prohibition of indecent representation of women through media, books, publications etc., and the scope was said to not be purely based on obscenity but on the *"perverse representation of the anatomy of a woman through advertisement, or through any other media"*. The Bill was introduced in the Rajya Sabha by Margaret Alva, and as per her, the issue of whether a matter was obscene would have to be left to judicial interpretation. At the same time the aim of the Bill was the introduction of safeguards against denigration of women and the adverse effect of such references on the status of women, as such instances would not be covered under the existing provisions of the Indian Penal Code, 1860 (hereinafter, "IPC") i.e., Ss. 292, 293 and 294 which deal with obscenity. A reference was also made to instances of sati being glorified through media, sexism being promoted through advertisements etc.[392] Thus, the main aim of the Act was to penalize the objectification of women and their degrading and "indecent" portrayal through publications.

The Act provides for a punishment of up to two years and a fine of up to two thousand rupees on first conviction in the offence of publication of indecent representation of women and imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees in case of a subsequent conviction.[393] The Act also provides certain exceptions to *bona fide*

[391]The Indecent Representation of Women (Prohibition) Act, 1986.
[392]RAJYA SABHA OFFICIAL DEBATES, Session No. 140, November 12, 1986.
[393]The Indecent Representation of Women (Prohibition) Act, 1986, § 6.

representation of women for purposes of science, literature, art, learning, objects of general concern and other historical and religious purposes.[394]

Further, in 2012, a Bill was introduced in the Rajya Sabha, which sought for the following major amendments to the Act:[395]

i) Inclusion of electronic forms of advertisement under the ambit of the Act;

ii) Inclusion of electronic forms of distribution under the ambit of the Act;

iii) Inclusion of digitally published material under the ambit of the Act;

iv) Amendment to the meaning of the term "indecent representation of women".

v) Increased punishment under the Act.

The Standing Committee submitted its report on this Bill on 24th September 2013, but the Bill is still pending before Parliament.

As per the Standing Committee, the existing legislation that deal with obscenity such as the Information Technology Act, 2000, Cinematograph Act, 1952 and Sections 292, 293 and 294 of the IPC had certain limitations as they didn't refer to the indecent representation of women, which is a topic that required utmost attention and protection.[396]

LACUNAS

1. Meaning of "Indecent Representation"

As per S. 2(c) of the Act, *"indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals".*

The first part of the definition refers to representation which would be indecent or derogatory to women, but the Act does not specify what would qualify as indecent. When

[394]The Indecent Representation of Women (Prohibition) Act, 1986, § 4.
[395]The Indecent Representation of Women (Prohibition) Amendment Bill, 2012.
[396]The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 1.4.

one refers to the discussion of the aforementioned Bill in the Rajya Sabha, one can assume that the intention behind the introduction of the Act was to put an end to sexism and objectification of women, and glorification of practices like sati or giving of dowry.[397] However, the Act goes on to mention that indecent representation would include the representation which is *"likely to deprave, corrupt or injure the public morality or morals"*, without giving concrete meanings to these terms. Morality is an extremely subjective concept, which not only differs from person to person but also changes with the passage of time. The Act, which was introduced in 1986, hasn't been amended since its inception and one can easily assume that the moral principles of the public would have changed drastically over the years. Such ambiguous terms leave legislations open to several interpretations, which could pose the threat of being interpreted in a manner which could be harmful to the empowerment of women by classifying their freedom and sexual expression as "indecent".

On the other hand, the Indecent Representation of Women (Prohibition) Amendment Bill, 2012 does suggest an amendment to the Act, which provides that:

"indecent representation of women means- (i) publication or distribution in any manner, of any material depicting women as a sexual object or which is lascivious or appeals to the prurient interests; or (ii) depiction, publication or distribution in any manner, of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or derogatory to or denigrating women or which is likely to deprave, corrupt or injure the public morality or morals"

The suggested amendment attempts to introduce the important aspect of including the objectification of women under the ambit of the Act, but the proposed Bill also introduces aspects of S. 292 of the IPC, according to which something is considered obscene if it is *"lascivious or appeals to the prurient interest or if its effect, or the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it"*.

[397]RAJYA SABHA OFFICIAL DEBATES, Session No. 140, November 12, 1986.

Thus, as per the suggested amendment, indecent representation should be brought in line with obscenity as per the IPC. However, even the IPC does not explicitly explain what public morality or depravity would mean.

The Standing Committee on the Bill too expressed concerns with regards to the use of such vague terms.

"Not defining the terms 'deprave', 'public morality' and 'morals' could also pose a problem. It may leave scope for unnecessary harassment and nuisance by certain groups who imagine themselves to be the custodians of public morality and engage in moral policing, thereby causing trouble. The Committee agrees with the suggestion of the stakeholders that an expert body should decide on the contentious issue of whether any content/material is objectionable or not. It would then leave no scope for subjective interpretations by the police authorities or by certain groups upholding public morality."[398]

With regards to the interpretation of terms like indecency or obscenity, the judgement of the Apex Court in ***Aveek Sarkar v. State of West Bengal***[399] provides valuable insights. The Court stated:

"We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey."

Thus, as per this interpretation, the classification of material as an indecent representation of women would require for it to be viewed in its entirety and in light of the purpose of such representation.

2. Need for the Inclusion of Electronic and Digital Representation under the Act

S. 2 Cl (a) of the Act defines advertisement as including *"any notice, circular, label, wrapper or other document and also includes any visible representation made by means*

[398]The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 3.19.
[399]*Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

of any light, sound, smoke or gas" and Cl (b) states that distribution includes *"distribution by way of samples whether free or otherwise"*.

These provisions do not specifically refer to digital and electronic forms of transmission and distribution. From the time the Act was introduced, massive changes have occurred, and the digital and electronic medium has flourished. As correctly pointed out in the statement of objects of the Indecent Representation of Women (Prohibition) Amendment Bill, 2012, the Act in its present form relates primarily to the print media but there is a need for the inclusion of *"internet and satellite-based communication, multi-media messaging, cable television"* etc. under the ambit and scope of the Act.

3. Need to incorporate the aspect of stereotyping

The scope of the definition of "indecent representation", while commendably incorporates the aspect of female objectification and 'prurient interest' (derived from the IT Act), it is suggested that its scope be broadened to incorporate stereotyping. The reason being, that representation of women in Indian media is regressive. Such forms of representation include *"portrayal of women as subordinate to man, low in intelligence, incapable of making decisions, and positioned low in social hierarchy."*[400] Stereotyping is harmful because it *"it limits women's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans."*[401] Hence, it is suggested that stereotyping be specifically included in S.2 (c) of the Act. The reference for the scope of stereotyping can be taken from Cable Television Network Rules, 1994 which reads *"Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society."*[402]

[400] Institute for Studies in Industrial Development, Portrayal of Women in Indian Advertisements: A Case for Policy Intervention, 3, (Nov. 2019).
[401] United Nations Officer of the High Commissioner of Human Rights, Gender stereotypes and Stereotyping and women's rights, 1 (Sept.,2014).
[402] Cable Television Network Rules, 1994, ¶ 7 (2).

4. Need for a Centralized Authority

The Parliamentary Standing Committee had recommended the creation of a Central Authority which would be vested with the power to take *Suo moto* cognizance, receive complaints as well as appeals against objectionable material, direct the Gazette Officer to enter, search and seize any material which is deemed objectionable and take action under S.292-294 of the IPC.[403] The proposed centralized authority shall comprise members from the National Commission for Women, Advertising Standards Council of India, Press Council of India, Ministry of Information and Broadcasting and a member specializing in women's issues.[404] However, to incorporate the aforementioned suggestions a separate chapter on 'Regulator' would be required. The 'regulator' would assume the authority of a quasi-judicial entity to discharge its intended powers and functions.[405] While the above modification to the suggestion has been agreed to, in principle by the Parliamentary Standing Committee, the same has not been reflected in the Amendment Bill of 2012. It is suggested that this suggestion, hence, be incorporated.

5. Need to include OTT platforms within the ambit of the Act

The Act completely excludes the possibility of including content hosted on Over-the-top (OTT) platforms within its ambit. This is mainly because at the time of its drafting in 1996 and proposed amendments in 2012, content hosted on OTT platforms did not seem to be a major concern. However, due to the emergence of several OTT platforms offering a myriad of web series to consumers, the question of including such content has to be certainly dealt with in order to maintain the contemporary relevance of the Act. As of this date, there are no regulations (even those of a general nature) governing the OTT platforms. However, the OTT platforms (officially known as Online Curated Content Providers) have come up with a Self-Regulation Code which prohibits certain forms of content which are responsible for the indecent representation of children.[406] While *prima facie* the said provision does not appear relevant, the code also has a proviso for

[403] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 7.4.
[404] *Id.*
[405] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 7.5.
[406] Self-Regulation Code for Online Curated Content Providers, 2019, ¶ 2.1.

prohibited content guidelines specifically, which provides that "*notwithstanding the generality of the foregoing, the signatories to this Code shall ensure that all applicable laws, rules and regulations are complied with."*[407] This means that the general guidelines prescribed for prohibited content are not limited to those guidelines only, and shall be subject to laws of the land. Therefore, a direct inference may be drawn that indecent representation of women (as decreed under the Act) may also be considered as "prohibited content" for OTT platforms and content providers.[408] Hence, any code for OTT regulation (whether self-regulated or state-enforced) is suggested to be made subject to the concerned provisions of this Act.

6. Need to include cinematographic works within the ambit of the Act

Bringing cinematographic works (as defined in the Cinematograph Act, 1952) under the ambit of S.4 of the Indecent Representation of Women (Prohibition) Act[409] is problematic since sub-section (c) of S.4 specifically excludes cinematographic works under the purview of the Act. Additionally, S.5A (2) of the Cinematograph Act, 1952 provides *"any distributor, exhibitor or any entity to whom film rights have been passed"*, protection against obscenity laws so long as the film is certified in accordance with the guidelines laid down in the Act.[410] The Parliamentary Standing Committee rightly exercised caution because bringing the Cinematograph Act under the ambit of the Act would have had infringed upon the Central Board of Film Certification's (CBFC) jurisdiction. It is noted that the Cinematograph Act provided for the CBFC as the 'regulator', whereas the other Act in question was a 'punitive legislation'[411]. Hence, the Committee concluded that "*the Cinematograph Act could not be brought under the ambit of the Indecent Representation of Women (Prohibition) Act".*[412]

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[407] *Id.*
[408] Sushovan Sircar, *Explained: What OTT Platforms' 'Toolkit' for Self-Regulation Means*, The Quint, 15th Feb,2021, https://www.thequint.com/explainers/ott-platforms-toolkit-self-regulation-code-ib-ministry-explained#:~:text=According%20to%20IAMAI%2C%20the%20core,the%20signatories%20of%20the%20Code .
[409] The Indecent Representation of Women (Prohibition) Act, 1986, § 4.
[410] Cinematograph Act, 1952, § 5.
[411] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 4.5.
[412] *Id.*

Nevertheless, it is suggested that the aforementioned provisions of law excluding cinematographic works be deleted and cinematographic works be included within the ambit of S.4 of the Act. However, this has to be achieved in tandem with the CBFC, since introducing such an amendment isn't entirely within the scope of the Act. The rationale has been amply explained by the Parliamentary Standing Committee report and has been reproduced below:

"The Committee finds that in spite of such categorical guidelines, many of the films certified by the Board do not adhere to the same, depicting scenes which are regressive in nature, portray women in bad light and indecently represent them. Nobody can deny the fact that the increasing number of cases of women exploitation in the country in recent times is to an extent influenced by the uncalled-for projection of women in films which has an adverse impact on the young minds. The content, lyrics, songs, story etc. of films influence the behavior and attitudes of youngsters who tend to imitate and learn from them".[413]

7. Issues concerning enter and search

The primary issue concerning S.5 (1) of the Act[414] (which deals with power to enter and search)- is that the requirement of a Gazette Officer authorized by the State Government has been replaced by the amendment and the following has been inserted in its place:

"*Notwithstanding anything in the Code of Criminal Procedure, 1973, any police officer not below the rank of Inspector, or any other officer of the Central Government or a State Government authorized by the Central Government or the State Government may"*[415]

The apprehension, in this case, is that the police officers are usually not sensitized enough to deal with crimes involving indecent representation which invariably include an element of subjectivity. To alleviate these concerns the Parliamentary Standing Committee recommended that "*opinion/orders of senior police officers must be taken, and action*

[413] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 4.8.
[414] The Indecent Representation of Women (Prohibition) Act, 1986, § 5.
[415] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, § 5.

taken accordingly"[416] and *"police officers need to be trained properly for dealing with cases of indecent representation of women so that there is no room for subjective and personal interpretations of the term 'indecent'"*[417]. It is suggested that delegation of responsibility to deal with cases of indecent representation be left not just in the hands of the police, or for that matter, an officer of the State or Central Government. Owing to the subjective interpretation of the term 'indecent', it is suggested that such an Inspector or Officer (as may be authorized) should be preferably a female since the Act pertains specifically to women. Furthermore, to provide context-specific interpretation of 'indecent representation', a provision should be incorporated which would direct the Inspector or Officer in question to consult any of the bodies which form part of the proposed centralized authority depending on the form of media through which such indecent representation is disseminated. For example, complaints pertaining to an indecent representation of women in film songs may be consulted with the CBFC.

AMENDMENTS SUGGESTED (SUMMARY)

1. Amendment to S. 2(c) of the Act

The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, suggests the following amendment to S. 2(c):

"(c) indecent representation of women means- (i) publication or distribution in any manner, of any material depicting women as a sexual object or which is lascivious or appeals to the prurient interests; or (ii) depiction, publication or distribution in any manner, of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or derogatory to or denigrating women or which is likely to deprave, corrupt or injure the public morality or morals"

This report agrees with this suggestion as it classifies the term "indecent representation" to a greater level as compared to the Act in its present form. However, keeping in view the interpretation of S. 292 of the IPC and S. 4 of the Indecent Representation of Women

[416] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 5.6.
[417] *Id.*

(Prohibition) Act, 1986 in ***Aveek Sarkar v. State of West Bengal***,[418] more emphasis should be laid on the context of the representations. This would ensure that the sexual freedom of women is not snatched in the name of curbing indecent representation, and at the same time, the stereotyping, degradation and objectification of women can be curbed. Furthermore, the representation of women must be looked at while keeping in mind cultural and social context[419]. In ***Chandrakant Kalyandas Kakodar vs The State of Maharashtra***[420], the Supreme Court highlighted that the concept of obscenity must be viewed as per changing standards of contemporary society. In ***S. Khushboo vs. Kanniammal***[421], it was reiterated that obscenity must be determined with reference to 'contemporary community standards' which reflect the sensibilities and tolerance level of an average reasonable person. Obscenity is subject to the moral context and social standards. Thus, the contextual understanding and social circumstances must be accentuated to ensure practical and effective application of the Act.

2. Inclusion of Digital and Electronic Media

The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, suggests the following amendments in this regard:

i) For Cl. (a) of S. 2, the following clause to be substituted:

"(a) advertisement includes any notice, circular, label, wrapper or other document or any audio or visual representation made by means of any light, laser light, sound, smoke, gas or electric form or through any other media, for the purpose of promotion of any goods, service, place, person, event or organization"

This report agrees with the amendment suggested by the 2012 Bill to the following extent:

[418] *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.
[419] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012, Report 258, Parliament of India, ¶ 2.8.
[420] *Chandrakant Kalyandas Kakodar vs The State of Maharashtra*, 1970 AIR 1390.
[421] *S. Khushboo vs. Kanniammal*, AIR 2010 SC 3196.

"(a) advertisement includes any notice, circular, label, wrapper or other document or any audio or visual representation made by means of any light, laser light, sound, smoke, gas or electric form or through any other media…"

ii) Insertion of the following after S. 2 Cl. (a)

"(aa) electronic form shall have the same meaning as assigned to it in clause (r) of section 2 of the Information Technology Act, 2000"

iii) Substitution of Cl. (b) of S. 2 as follows:

"distribution includes all method of distribution, either by way of samples or making available for public access through broadcast, transmission or uploading on website or in any other printed or electronic form, whether for profit or otherwise"

iv) Insertion of the following after Cl. (d) of S. 2:

"(da) material includes any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation in any form, figure or any other content in printed, audio, visual or electronic form"

v) Insertion of the following after Cl. (f) of S. 2:

"(g) publish includes- (i) to prepare or print in any book, newspaper, magazine, poster, graffiti, periodicals or any form of printed matter, digital or in any other format; or (ii) to distribute or broadcast through audio-visual media including cable, computer, broadband satellite transmission or any other form, to any person so as to communicate or make it available to the public"

These suggestions have also been endorsed by the Standing Committee, and this report too agrees with the need for the introduction of such amendments to the Act.

3. Insertion of 'or sale' to S.2(a) of the Amendment Bill

S. 2(a) of the Act defines the term 'advertisement' as follows:

"advertisement" includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas"

The 2012 Amendment bill proposes the inclusion of digital and electronic forms of advertisement in S. 2 (a). The suggested amended meaning of advertisement under S. 2(a) reads as follows:

> *"(a) advertisement includes any notice, circular, label, wrapper or other document or any audio or visual representation made by means of any light, laser light, sound, smoke, gas or electric form or through any other media, for the purpose of promotion of any goods, service, place, person, event or organization"*

This suggestion has been endorsed by the Standing Committee. During the consultation process of the Standing Committee, a recommendation was made by *Vakul Seema and Associates* that the words 'or sale' be added after 'promotion' under the amendment to S. 2(a) as proposed by the Indecent Representation of Women (Prohibition) Amendment Bill, 2012[422]. It was stated that there exists a distinction between selling and promotion. A seller may contend that he was merely carrying out a transaction by selling the product and did not promote the product in any manner. This recommendation should be included as it would expand the scope of the Act. Therefore, Cl. (a) of S. 2 should be amended as follows:

> *"(a) advertisement includes any notice, circular, label, wrapper or other document or any audio or visual representation made by means of any light, laser light, sound, smoke, gas or electric form or through any other media, for the purpose of promotion, or sale of any goods, service, place, person, event or organization."*[423]

[422] The Indecent Representation of Women (Prohibition) Amendment Bill, 2012. Report 258, Parliament of India, ¶ 3.3.
[423] *Id.*

CONCLUDING REMARK

The amendments have been suggested keeping in mind the importance of regulating the representation of women through various mediums and platforms. The definition of 'indecent representation' in its present form under the Act is vague and ambiguous, which leaves the Act open to several interpretations. This is extremely detrimental, as certain interpretations could push the movement for women empowerment further back by classifying their freedom and sexual expression as "indecent". Furthermore, the Act does not effectively combat the issues of stereotyping, gender biases and objectification of women. The suggested amendment brings such issues under the purview of 'indecent representation' while focusing more on the context and purpose of such representation, to ensure that progressive ideas and depictions do not get curbed.

Moreover, the suggested amendments also ensure that digital and electronic media, including OTT platforms, are successfully brought under the purview of the Act. The introduction of such provisions is essential, as a majority of the content is now released through these platforms. Lacunas in the accountability process under the present Act have also been identified, and measures for efficient management of cases of indecent representation have been suggested. The suggestions aim at bringing more modes of representation under the ambit of the Act, while ensuring that women's agency is not seized under the garb of preventing immoral and indecent portrayal of females.

E: Juvenile Justice Act, 2015

CONTENTS

PART – I

INTRODUCTION

Juvenile violence is a matter that has drawn attention from all the surfaces of society including all countries. The system of juvenile justice was first created around the twentieth century on western land which includes countries like Britain, the USA and Australia.[424] This emerged from the system of the jurisdiction of the state over incompetent persons (*De Prerogative Regis*)[425], and transformed to the regime of *parens patriae* or 'father of the realm' according to which the court has the jurisdiction or duty to protect the ones who are incompetent enough to manage their own affairs[426]. Children are needless to say the responsibility of adults until they reach the age of majority but according to the doctrine mentioned above the courts are the common guardian of the community which further empowers them to decide in the best interests of a child whenever required.[427]

The year 2020 marked the thirtieth anniversary of the United Nations Convention on the Rights of the Child. The Agreement which was ratified by India in 1992 which necessitated the State Parties to take proper measures in case the child is[428]:

"*accused of, violating any penal law, including*

a. *Treatment of the child in a manner inconsistent with the promotion of the child's sense of dignity and worth*

b. *Reinforcing the child's respect for the human rights and fundamental freedoms of others*

[424] CHRIS CUNNEN, ROB WHITE, KELLY RICHARDS, JUVENILE JUSTICE, (5th ed., Oxford University Press)(2015).
[425] Sallyanne Payton, *The Concept of the person in the Parens Patriae Jurisdiction over previously competent persons,* 17, J. Med. Philos, 605, (1992)
[426] *Id.*
[427] Eric L. Jensen, Jørgen Jepsen, Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems, (1st ed., Hart Publishing) (2006).
[428] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

c. *Taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*."

In India the laws relating to the child, transpire form the Indian Constitution and the United Nations Convention on the Rights of the Child. In 1986 the Juvenile Justice Act was enacted with a goal to create a child-friendly approach in the adjudication and disposal of matters which is in the best interest of the children, keeping in mind the objective of rehabilitation.

METHODOLOGY AND APPROACH FOR RESEARCH

This section of the report will make use of the qualitative research strategy, where the interpretivism approach to the research will be applied. The secondary sources will be used to analyse which include journal articles, news, commentaries, criticism and books. Very less numeric or quantitative statistics will be produced based on the restrictions of time and availability of data. The nature and conclusion can be biased because the research is not empirical in nature but analytical and judgemental skills are used in the context of this field.

PART – II

ABOUT THE ACT

The first legislation providing the uniform law on juveniles in the country was passed in 1986 as Juvenile Justice Act, 1986. This act was based on certain guiding principles which included the principle of presumption of innocence, the principle of best interest, the principle of restoration and repatriation, the principle of non-wavier of rights and fresh start etc. This set of principles were adhered to while setting up the juvenile system in the country to assure that every child is given safety, protection and care even in unprecedented situations.

After the Government of India ratified the United Nations Convention on the Rights of the Child in 1992, the Juvenile Justice Act 1986 was repealed and the Juvenile Justice (Care and Protection) Act 2000 came into place which included the International deliberations and standards. The UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), 1990, the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 were nursed in 2000's Juvenile Justice Act.

The Juvenile Justice Act, 2015 replaced the Juvenile Justice (Care and Protection of Children), 2000 after the incident of the Nirbhaya Delhi Gang Rape Case. The debate which arose was whether the juveniles in conflict of law involved in the Heinous Crimes, can be tried as adults? The Act of 2015 permitted for them (16 to 18 years old) being tried as an adult for heinous offences. Whereas if they commit a less serious offence they can be tried as an adult if they are apprehended after the age of 21. The Act further consolidates and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation

through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

Recently, the Lok Sabha passed the **Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021** that seeks to strengthen and streamline the provisions for the protection and adoption of children. The Bill amends the Juvenile Justice (Care and Protection of Children) Act, 2015. The Act contains provisions related to children in conflict with law and children in need of care and protection. The Bill seeks to introduce measures for strengthening the child protection setup. Further following are the changes brought through Juvenile Justice Bill 2021[429]:

- The Act provides that the Juvenile Justice Board will inquire about a child who is accused of a serious offence which now will also include offences for which maximum punishment is imprisonment of more than seven years, and minimum punishment is not prescribed or is of less than seven years. Further, it proposes all the punishments to be tried in Children's Court. Also, the offences which are punishable with imprisonment between three to seven years will be non-cognizable.

- Moreover, according to the bill, the District Magistrate will issue the adoption orders related to the adoption of children by prospective adoptive parents from India and abroad and also in the case where a person living abroad intends to adopt a child from his relative in India.

- The Bill specifies certain additional criteria for the appointment of CWC members for each district for dealing with children in need of care and protection. IT further removes the provision of no appeal for any order made by a Child Welfare Committee finding that a person is not a child in need of care and protection.

Though there are changes and upgradation made by the bill which is passed in Lok Sabha but there are still many institutional, organizational and important changes that can be incorporated in the Juvenile Justice System of our country, some of which are suggested in the Part of Report hereafter.

[429] The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021.

LACUNAS

Section 15: Preliminary assessment into heinous offences by Board.

As the act permits juveniles between the ages of 16-18 years to be tried as adults for heinous offences[430], it violates the clause of the UN Convention on the Rights of the Child which requires all signatory countries to treat every child under the age of 18 years as equal.

The famous Delhi gang-rape case (also known as the "Nirbhaya case") sparked significant reforms in India's criminal justice system. After widespread protests against the release of a juvenile prisoner in the Nirbhaya case, Rajya Sabha passed the Juvenile Justice Bill 2014. On January 15, 2016, the Juvenile Justice Act of 2015 repealed the Juvenile Justice Act of 2000.[431] The crimes were classified into three categories: petty offences, severe offences, and egregious offences. Section 2(45) defines 'petty crimes' as offences for which the maximum penalty under any statute, including the IPC, is imprisonment for up to three years. Serious offences are those for which the penalty is a sentence of imprisonment of three to seven years. 'Heinous offences' have been defined to mean offences for which the minimum punishment under any law is imprisonment for 7 years or more[432]. One of the most significant improvements concerned teenagers aged 16 to 18. Serious crime investigations must be handled according to the Code of Criminal Procedure, 1973's procedure for trial in summons cases.

As far as heinous offences are concerned if the child is below 16 years then the procedure prescribed for serious offences is to be followed; but if the child is above 16 years then assessment in terms of Section 15 has to be made, which reads that, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18 in which he can be ordered to be tried as an adult, The Board

[430] Section 15, Junvenile Justice (Care and Protection of Children) Act, 2015
[431] Mukesh & Anr vs State for NCT Of Delhi & Ors (2017) 6 SCC 1
[432] Shilpa Mittal v. State of NCT of New Delhi (2020) 2 SCC 787

may take the assistance of experienced psychologists or psychosocial workers or other experts.[433]

In the provision, it has been explained that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. On satisfaction that the matter should be disposed of by the Board, the procedure, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974) is followed provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101. This was a departure from the previous legislation on the subject where the offences had not been categorised as heinous or serious.

According to a literal interpretation of the categories of offences (petty, severe, and heinous), there is a fourth category of offences not protected by the Act of 2015. The fourth group of offences includes those with a minimum sentence of less than seven years or no minimum sentence but a maximum sentence of more than seven years, for example, abetment to suicide (Sec. 306 IPC), attempt to murder (Sec. 307 IPC), collecting arms to wage a war (Sec. 122 IPC), etc. The Act has this textual flaw, and it is thus important to present the real and simpler scheme of things, in order to prevent errors and anomalies in judicial orders issued by the High Courts and District Courts in juvenile matters, where the accusation is “heinous”.

It was in the case of ***Shilpa Mittal v. State of NCT of New Delhi***[434], the Supreme Court of India explained the ambiguity of heinous crimes in this case. The two-judge bench, consisting of Justice Deepak Gupta and Justice Aniruddha Bose, recognised the legislature's error in leaving an unfortunate vacuum in relation to 4th category offences. While exercising powers conferred under Article 142 of the Constitution, the bench favouring the juvenile's viewpoint ordered that, as of the date the Act of 2015 came into force, all juveniles who have committed offences falling into the fourth category be treated in the same manner as juveniles who have committed “serious offences.” It also stated that the legislature should make a decision on the issue. As a result, an offence that does not carry a minimum penalty of seven years cannot be considered heinous. The Supreme Court pointed out that the Act would not cover the fourth group of offences, including those with a mandatory penalty of more than seven years in prison or a minimum sentence of less than 7 years is provided.

[433] Section 101 (2), Juvenile Justice (Care and Protection of Children) Act, 2015
[434] Shilpa Mittal v. State of NCT of New Delhi (2020) 2 SCC 787

The important thing to remember and address is that the Act of 2015 emphasises the fact that even though the juvenile has committed a heinous crime, the scheme of Sections 14, 15, and 19 of the Act indicates that the Legislative purpose would have been to carry out a thorough study/assessment of the juveniles. Before the juvenile is prosecuted as an adult, the Juvenile Justice Board shall perform a preliminary examination of the mental and physical capacity of such child to commit such offence, the child's ability to recognise the consequences of the offence, and the circumstances under which the said offence was allegedly committed, and that even though s/he commits a heinous crime, he should not be automatically punished as an adult.[435] The Board has the authority to enlist the assistance of experienced psychologists, psychosocial therapists, or other field experts.[436] The aim of the preliminary evaluation is to avoid delving into the merits of the case or the allegations levelled against the child.

Given this context, it is highly recommended that juveniles who commit heinous crimes be treated differently than those who commit petty or serious offences, since the former requires more intense care than the latter. As a result, a model based on rehabilitative principles should be considered for such juveniles. Although the 2015 act does differentiate punishment for inmates who commit heinous offences, this treatment is limited to the juvenile justice system and does not include a subsequent transition to adult prisons. Similar was the opinion of Justice D. S. Naidu in the case of ***Mohamed Huzaifa Javed Ahmed vs. The State of Maharashtra***[437]**.** Thus, a 16-year-old can be tried as an adult depending on the judgement of the Juvenile Justice Board in almost all kinds of crimes where a child could possibly land in, or be forced into, thus defying all the logic behind a juvenile justice system.

The Standing Committee on Human Resource Development (Chairman: Dr. Satyanarayan Jatiya) also stated that the 2000 Act recognises the vulnerable age of 16–18 years old and is reformative and rehabilitative in nature. The theory of Articles 14 (unequal treatment of 16–18-year-olds) and 15(3) would be violated if juveniles were subjected to the adult judicial system (goes against the objective of protecting children). On some occasions, the Supreme Court has stated that children cannot be prosecuted as adults, according to the Committee.

[435] Section 15, Juvenile Justice (Care and Protection of Children) Act, 2015
[436] Section 101 (2), Juvenile Justice (Care and Protection of Children) Act, 2015.
[437] Mohamed Huzaifa Javed Ahmed … vs. The State of Maharashtra; CRIMINAL APPEAL NO. 1153 of 2018, Bombay High Court

Issues involving the treatment and safety of children are delicate and complicated. As a result, any legislation in this field must be approached with caution and objectivity, taking into account all relevant factors.

Section 19 (3) and 20 (2) (ii): Permits transfer of the child to prison

Sections 19(3) and 20(2)(ii), which permit the transfer of the child to prison clearly violates article 37(c) of the CRC, which talks of separation of juveniles from adults and does not mean '*that a child placed in a facility for children has to be moved to a facility for adults immediately after s/he turns eighteen.*'

Many children prosecuted as adults suffer from untreated mental illness. Unlike adults with mental illness, children have very limited experience managing their disabilities, anxieties, fear, and trauma. They often act impulsively, recklessly, and irresponsibly. In an adult jail or prison, this behaviour results in more aggressive punishment which can worsen a child's mental health problems. Many kids who are transferred to adult court for criminal prosecution are automatically placed in adult jails and prisons.[5] Some states strictly prohibit placing children in adult jails or prisons, but a majority still allow children to be incarcerated in adult prisons and jails, where they are at the highest risk of being sexually assaulted. Thousands of young people have been assaulted, raped, and traumatized as a result. Some statutes require "sight and sound" separation of children in adult facilities to shield them from physical and sexual violence. But in practice, this often means kids are put in solitary confinement, where they're at risk of significant psychological trauma from isolation.

IPC crimes by children constituted only 1.05 per cent of total IPC Crimes in 2016. If IPC and SLL crimes are both included, offences by children constitute 0.7 per cent of the total crimes in 2016. Over the years it has been recognized that juvenile delinquency, like other social issues, has complex roots embedded in the 'person-environment' and 'socio-cultural' contexts, and most often they may represent a transitory phase that children and adolescents commonly experience in their growing up 21years.

Year	Juvenile apprehended for a repeat offence	Total Juveniles Apprehended	Recidivism (in %)
2006	2545	32145	7.9
2007	293632145	34527	8.5

2008	357434527	34507	10.4
2009	370807	33642	11
2010	3674	30303	12.1
2011	3897	33887	11.5
2012	4476	39822	11.2
2013	4145	43506	9.5
2014	2609	48230	5.4
2015	2508	41385	6.1
2016	2289	44171	5.2[438]

Table 1

The study by ECHO a Bengaluru based organization showed that these children are in the need of, "*promotive and family enrichment intervention that prepare effective parenting skills and practice, which would in a way act as a buffer to the inclination to adopt criminal methods in the times of need or vulnerability*".[439]

Needless to say, these are children who have fallen out of the net of the most basic services as well as the protective net. In effect, they are also CNCP who have become vulnerable to offending. If the administration does not reach them with the support and services that they need, there is every possibility that they will re-offend. Hence the role and responsibility of the district administration and below are critical in providing both curative as well as preventive measures.

Some States in other countries have enacted provisions limiting when juveniles can be held in adult detention. In 2012, Ohio[440] enacted sweeping changes to its juvenile justice policies,

[438] Crime in India, National Crime Records Bureau. Government of India 2016.
[439] ECHO Centre for Juvenile Justice, Juvenile Crimes- A Peep into Reality. A Study on Root Causes of Juvenile Crimes and Alternative Strategies, p,31, 2014.
[440] 2012 Ohio SB 337.

including adding a presumption that young adults up to age 21 who are sent to adult court, or who turn 18 while under the juvenile court's jurisdiction, should be placed in juvenile, rather than an adult, detention facilities. Minnesota law[441] provides that even if a child is certified as an adult, the child must be detained in a juvenile detention facility pending the outcome of the case. The Mississippi law[442] provides that non-violent juveniles accused of a first offence may be committed to detention centres, pre-adjudication, for no more than 10 days. States are also statutorily limiting detention and confinement post-adjudication. In 2009, Georgia[443] decreased from 60 days to 30 the maximum time a court can order a juvenile to serve in a detention centre. And a North Dakota[444] law limits to four days in one year the total detention period of a child involved in a juvenile drug court.

Nevada law allows "corrective room restriction" only if other less restrictive options have been exhausted and the restriction cannot last more than 72 consecutive hours. Maine law does not include seclusion or segregation in its list of allowable punishments in a juvenile facility. Punishments may consist of warnings, restitution, labour at any lawful work and loss of privileges. In June 2014, the Juvenile Detention Alternatives Initiative[445] announced a revised Detention Facility Standards prohibiting "*the use of room confinement for discipline, punishment, administrative convenience, retaliation, staffing shortages, or reasons other than as a temporary response to behaviour that threatens immediate harm to a youth or others*."

Alternatives to Detention

Alternatives to detention and confinement are approaches taken to prevent juveniles from being placed in either secure detention or confinement facilities when other treatment options, community-based sanctions, or residential placements are more appropriate. Secure detention facilities generally hold youths upon their entering the juvenile justice system, frequently pre-adjudication, whereas secure confinement facilities house youths who have been adjudicated and are committed to custody. Such alternatives were developed in response

[441] 2012 Minnesota HB 229
[442] 2002 Mississippi HB 974
[443] 2009 Georgia HB 245, 2013 GA HB 242
[444] 2009 North Dakota SB 2159
[445] Richard A. Mendel, *Juvenile Detention Alternatives Initiative, Progress Report*, (BALTIMORE, MD: THE ANNIE E. CASEY FOUNDATION) (2014)..

to research indicating that detention and confinement may do more harm than good for vulnerable juveniles.

- Home confinement, or house arrest[446], is a community-based initiative that can be used both pre and post-adjudication to limit offenders' behaviour in the community. Offenders who are sentenced to home detention live at home, go to school or work (or both), and perform other responsibilities; however, they are closely monitored (either electronically or by regular communication with staff, or both) to ensure that they comply with the terms of their sentence. Offenders must adhere to this strict timetable, leaving their homes only for important tasks, for varying amounts of time depending on the circumstances. An electronic surveillance software introduced in Florida is an example of this form of alternative[447]. The offender wears a tamper-resistant bracelet and carries a tracking system that can measure the offender's location and send the information to a monitoring centre.

- Day (or evening) treatment (also referred to as day or evening reporting centres) is a highly structured, non-residential, community-based option that provides the offender with rigorous supervision. It can be used both before and after a decision is made. Offenders are expected to return to the treatment centre on a regular basis at prescribed times (either during the day or in the evening) for a certain number of days per week (generally at least 5 days a week), although they are entitled to leave the facility at night.[448]

- Shelter care is a nonsecure residential care option for youths who need short-term placement (between 1 and 30 days) away from home. Shelter treatment can be used both before and after adjudication for minors who need more supervision than non-residential alternatives, as well as for teenagers who need placement because no parent or family member can provide a home. Juveniles have a daily schedule of structured educational and recreational activities.[449]

- Group Homes are long-term alternative facilities located in the city where juveniles have direct interaction with the community. Group home residents can go to school,

[446] *Id.*
[447] Andrea J. Sedlak and Karla S. McPherson, Conditions of Confinement, NCJ 227729, OJJDP, (May 2010).
[448] Development Services Group, Inc. 2011. "Day Treatment." Literature review. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.
[449] *Id.*

work in the community, or do both. Each group home houses 5 to 15 juveniles who are held there through court order or with the assistance of public welfare agencies. Group homes are less stringent than juvenile detention centres, and they are usually staffed instead of locked. An example of this type of alternative is the Methodist Home for Children's Value-Based Therapeutic Environment (VBTE) Model. The VBTE Model[450] is a nonpunitive treatment model that concentrates on teaching juvenile justice-involved youth about prosocial behaviours as alternatives to antisocial behaviours. The VBTE Model is used in juvenile group homes operated by the Methodist Home for Children (MHC) in North Carolina, which provides residential services for youths involved in the juvenile justice system who are referred for treatment through the state's Department of Juvenile Justice and Delinquency Prevention. The MHC VBTE Model has five treatment components provided to youth in the group homes: service planning, a skills curriculum, learning theory, motivation systems, and therapeutic-focused interactions.[451] Youths are taught that their behaviour should reflect six important values: respect, responsibility, spirituality, compassion, empowerment, and honesty

Once a young person is in the juvenile justice system, alternatives to secure detention can still be employed. In 2013, New York passed the "Close to Home Initiative,"[452] which allows juveniles who have committed non-serious crimes to be placed in residential facilities closer to their homes, instead of insecure facilities hundreds of miles away. It keeps youth closer to their families, creating positive connections to their communities while they receive the services and support, they need. The program was designed to provide a continuum of services including diversion, supervision, treatment and confinement to ensure the most appropriate level of care while maintaining public safety. These types of facilities can provide nationally recognized best practices that give youth the best chance of becoming productive and law-abiding members of society.

[450] Strom, Kevin J. et.al , *Evaluation of the Methodist Home for Children's Value-Based Therapeutic Environment Model: Final Report* (Research Triangle Park, N.C.: RTI International) (2010).
[451] *Id.*
[452] Jeffrey A. Butts, Laura Negredo, & Evan Elkin, *Keeping Justice-Involved Youth "Close to Home" in New York City* (JOHN JAY COLLEGE OF CRIMINAL JUSTICE RESEARCH AND EVALUATION CENTER) (March 2015).

Relevant Sections can be added for Disclosure of records and FIR and destroying them in relevant cases

According to the laws as soon as the child alleged to be in conflict of law is apprehended by the police, s/he is placed under the charge of SJPU or the designated Child Welfare Police Officer and is produced before the board without any loss of time within 24 hours. Apprehension Memo and Personal Search Memo is prepared according to the law. But for registering the FIR age is the most important factor taken into consideration with the type of crime committed. If the offence where the imprisonment is less than seven years, no FIR is registered. If it is already registered before it is known that the child is involved, the same is investigated. FIR is also registered where there is no age proof but it seems to be a borderline case. Also, the FIR is registered for the offence against a child when the punishment for the offence involves more than seven years of imprisonment.

But there is no mention of handling of records in this aspect. Therefore, relevant sections need to be added which lays down the procedure of handling the records of such children who are involved in heinous crimes or who are on record due to other reasons including the unknown age of the age.

Section 81: Sale and procurement of children for any purpose.

The penalty of buying or selling a child[453] is comparatively very less. The penalty for buying or selling a child should be much more as it is a grave offence and human life has more value and if it lacks strong sanctions for the offences and it does not stipulate the criminal liability of legal entities.

India is a source, destination and transit country for the trafficking of forced labour and sex trafficking. In India, the number of trafficked children is undisclosed, but it is estimated to be in the millions.[454] In India, the majority of trafficking occurs within states or across states, but only within India. On the supply side, human trafficking for sexual exploitation and forced labour is caused by a complex network of drivers, the majority of which are related to extreme poverty and a lack of livelihood opportunities. Three in five or 9,034 of 15,379

[453] Section 81, Juvenile Justice (Care and Protection of Children) Act, 2015
[454] National Crime Records Bureau.

persons trafficked in 2016 were below 18 years of age, National Crime Records Bureau data show.[455] More than 23,000 victims were rescued in 2016, of which 61% or 14,183 were children. [456] The countries are in the process of giving more stringent punishment to the act like this. Some of the examples are:

- United States: Child Sex Trafficking is prohibited by 18 U.S.C.[457] § 1591. If the victim, under the age of 14 or if force, fraud, or coercion were used, the penalty is not less than 15 years in prison up to life. If the victim is aged 14-17, the penalty shall not be less than 10 years in prison up to life. Anyone who obstructs or attempts to obstruct the enforcement of this statute faces as many as 20 years imprisonment. Defendants who are convicted under this statute are also required to pay restitution to their victims for any losses they caused. Section 2422(b) makes it a crime to use the U.S. Mail or certain technology, such as the Internet or the telephone (whether mobile or landline), to persuade, induce, entice, or coerce a minor to engage in prostitution or any other illegal sexual activity. For example, it is a federal crime for an adult to use the mail, a chat room, email, or text messages to persuade a child to meet him or her to engage that child in prostitution or other illegal sexual activity. Under this statute, it is not necessary to prove that either the defendant or the victim crossed state lines. The penalty for this offence is not less than ten years in prison, up to life. Finally, U.S.C § 2425 makes it illegal for any person to use the mail, telephones, or the Internet, to knowingly transmit the name, address, telephone number, social security number, or email address of a child under the age of 16 with intent to entice, encourage, offer, or solicit any person to engage in criminal sexual activity.[458]

- Russia: Article 127.1[459] (trafficking in person) prescribed penalties of up to 10 years imprisonment for those involving a child victim. These penalties are sufficiently stringent and, with respect to sex trafficking, commensurate with punishments prescribed for other serious crimes, such as kidnapping.

- Italy: "*Whoever carries out trafficking in persons who are in the conditions referred to in article 600, that is, with a view to perpetrating the crimes referred to in the first*

[455] *Id.*
[456] National Crime Records Bureau, https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents?page=103
[457] United States Code
[458] Citizen's Guide to U.S. Federal Law on Child Sex Trafficking
[459] Russian Criminal Code

paragraph of said article; or whoever leads any of the aforesaid persons through deceit or obliges such person by making use of violence, threats, or 25 abuse of power; by taking advantage of a situation of physical or mental inferiority, and poverty; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to enter the national territory, stay, leave it or migrate to said territory, shall be punished with imprisonment from eight to twenty years."[460]

Apart from the psychological trauma of being separated from their parents, child trafficking victims often face the challenges of being an undocumented migrant in a foreign country, where factors such as language barriers make escapes or reaching out for help nearly impossible.[461] Isolation also makes it difficult for such children to refuse to work for fear of being punished, arrested, or deported. They work long hours and are often required to lift heavy loads or work with dangerous materials. There may also be physical or sexual assault, putting children at greater risk of severe physical and mental health consequences[462].

Unreasonably mild criminal punishment of a maximum of five years imprisonment has been established for committing criminal offences against a minor's sexual inviolability and morality. Many deeds have been unjustifiably defined by law as insignificant or not grave crimes, as is seen in non-violent sexual crimes against persons under 16 years of age; or failure to discharge duties of bringing up a minor. Due to a failure to recognise the gravity of these offences, immunity is granted for these laws, allowing the perpetrators to go free and allowing the sexual abuse of children for commercial gain to continue.

Section 71: Annual Report of Authority

Relevant provisions can be added regarding Annual Report Submission and working of institutions related to child welfare. The report should contain the data related to the number of juveniles taken into custody and trends related to that. It should contain the type of offences committed and the number of juveniles committing a particular offence with respect

[460] Italy, Penal Code, article 601
[461] J.G.M Silverman et.al., *Experiences of sex trafficking victims in Mumbai, India*, 97 INT J GYNAECOL OBSTET (2007).
[462] Jerry Markon, *Human trafficking evokes outrage, little evidence. U.S. estimates thousands of victims, but efforts to find them fall short*, THE WASHINGTON POST, September 23, 2007.

to each category and other relevant details which can portray the kind of environment they live in and how we can further change and use our resources in the best possible way so that the children can benefit from the same. The relevant provisions which can be added are provided in the subsequent section of the report.

AMENDMENTS SUGGESTED (SUMMARY)

I. Section 15: Preliminary assessment into heinous offences by Board.

Existing Section:

" *(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18*

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973.

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101.

Provided further that the assessment under this section shall be completed within the period specified in section 14."

Change Recommended:

- A new set of rules and regulations can be formed for the category of children who are involved in heinous crimes and are still below the age of 18 years instead of following the same set of rules as defined for an adult.

II. Section 19 (3) and 20 (2) (ii): Permits transfer of the child to prison

Existing Section:

19 (3): "*The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:*

Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety."

20 (2): "*After the completion of the procedure specified under sub-section (1), the Children's Court may –*

(i) decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay;
(ii) decide that the child shall complete the remainder of his term in a jail.

Provided that each State Government shall maintain a list of monitoring authorities and monitoring procedures as may be prescribed."

Changes Recommended:

- Dividing the category of children in conflict with the law who can be sent to prison and formation of programmes like House Arrest or Home Confinement, Day Treatment Centres, Shelter Care and Group homes, hence, taking the reformatory steps to change them instead of retributive thereby preventing them from committing the offence again.

III. Relevant Sections can be added for Disclosure of records and FIR and destroying them in relevant cases

- The applicable period can be set for keeping the record of children in conflict with the law who committed the heinous offence. The provision that after the end of the applicable period no records which are kept may be used or should define that child.

- The records kept regarding the child who committed the heinous offence, may, in the discretion of the person or body keeping the record or according to the specified rules set out regarding the same, be destroyed or transmitted to the archives at any time before or after the end of the applicable period set out.

- The records are removed from the police system and a separate directory to be maintained under the Child Welfare System after the applicable period decided. Further, the records can be sealed and will be accessed only in very exceptional circumstances.
- Provision related to a person who is given access to a record or to whom information is disclosed under this Act cannot disclose that information to any other person unless the disclosure is authorized under this Act.
- Exceptions can be carved out for these kinds of records as deem fit by the appropriate authority.
- Definition of 'destroying' or 'transmitting', 'sealed' to be added while adding these provisions. Also, the description of records which will come under this kind of provision should be defined.

IV. Section 81: Sale and procurement of children for any purpose

Existing Section:

"Any person who sells or buys a child for any purpose shall be punishable with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine of one lakh rupees

Provided that where such offence is committed by a person having actual charge of the child, including employees of a hospital or nursing home or maternity home, the term of imprisonment shall not be less than three years and may extend up to seven years."

Changes Recommended:

- The term of punishment should be extended to at least 10 years with a fine of at least five lakh rupees.
- Emphasise the qualification of criminal elements and introduce more severe criminal punishment for organised, corrupt, incestual and other activities which are the most dangerous forms of child molestation, child trafficking and circulation of child pornography.
- Incorporate into the criminal code an additional provision, criminalising trafficking in children (or other child-related criminal dealings) even where there is no intent to exploit them.
- Undertake steps to improve legislation focused on protecting children against information hazardous to their health, spiritual and moral development, with the goal of establishing a state strategy and integrated policy that ensure minors information security and prevent their involvement and coercion into human trafficking and commercial sexual exploitation.
- Incorporate into the existing victim and witness protection law special provisions protecting the interests of minors who are victims or witnesses of human trafficking offences.
- Encourage adoption of laws permitting human trafficking victims to remain and work in India when they are exported to different country due to human trafficking and have lost their livelihood in India.

V. Section 71: Annual Report of Authority

Existing Section:

"*(1) The Authority shall submit an annual report to the Central Government in such manner as may be prescribed.*

(2) The Central Government shall cause the annual report of Authority to be laid before each House of Parliament."

Changes Recommended:

(1) The Authority shall submit an annual report to the Central Government not later than 180 days of each financial year. The report shall contain the following with respect to such financial year:

a. A detailed summary and analysis of the most recent data available regarding the number of juveniles taken into custody, the rate at which juveniles are taken into custody. Such summary and analysis shall set out the information required separately for each type of offence committed and charged, age of juveniles, type of facilities used to hold the juveniles in custody, including detention facilities, correctional facilities, jails (or home detention facilities, group homes, shelter care, treatment centres in case they are introduced), race, gender and ethnicity, age of juveniles, educational status including information related to learning and other disabilities, failing performance, grade retention and dropping out of school, number of juveniles who died in the custody and the circumstances of their death, number of juveniles released from custody and type of arrangements to which they are released, number of juveniles in custody or detention or correctional facilities who report being pregnant or have suffered any violence. Data under the relevant criminal code articles into law enforcement statistics reports, using categories to differentiate according to victim's characteristics (gender, citizenship), forms of trafficking (sexual exploitation, labour exploitation, etc.), and other indicators.

b. Evaluation of programs funded under the title of child care and protection. (A criterion can be defined under which the programs can qualify as evidence-based or promising programs for the juvenile system.)

c. Analysis and evaluation of internal controls of Offices of Juvenile Justice System.

(2) The Central Government shall cause the annual report of Authority to be laid before each House of Parliament.

VI. Other Recommended Changes:

- Provision or special law should be made for the child who falls into the category of
    - homeless child,
    - A child with a terminal or incurable disease and having no one to support or look after or having parents or guardians unfit to take care,
    - A neglected or uncared child who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated to care for and protect the safety and well–being of a child.
    - Missing or runaway child or whose parents cannot be found after making a reasonable inquiry in such a manner as may be prescribed.
    - Children affected by armed conflict or civil unrest.
    - Children affected by natural calamity
- Identity Proof of a Child: In India today, the Aadhaar card has come to be not only an identity proof but also mandatory to avail benefits of various government schemes and services. Unfortunately, most inmates of CCIs do not have the Aadhaar and thus are deprived of many welfare schemes as well. Provision can be included which provide the Aadhar card to the child before they are given for adoption or are entered into child care system present in the country. If not Aadhar Card directly at least a temporary recognition certificate or card can be provided. It should be ensured by the proper authorities that the child is registered before handing it over to any institution or foster care. This will help in preventing child trafficking and other harms which the child can face.
- While the state has made several provisions for the wellbeing of CICL and CNCP, there is a lack of awareness among the relevant service providers of the available

means and resources. A system can be formed for convergence and linkages with the line of departments and NGOs.

CONCLUDING REMARK

The children who are not born criminal, are being transformed due to a diabolical social environment and a non-deterrent law. So, a different justice procedure is provided by Juvenile Justice Act and it can be efficacious from the root only if the system is being administered with uttermost care, where the maximum part of the reformation of the child is done. The problems should be addressed through a two-track system:

- Quality prevention programs that work with juveniles, their families, community-based organisations which try to reduce the risk and rate of violent delinquent behaviour.
- Programs that can assist in holding juveniles accountable for their actions thereby developing the competencies necessary to become a responsible and productive member of society.

The legislative trends in juvenile detention reflect lawmakers' efforts to reduce the over-reliance of secure confinement, promote collaboration in the justice system, address racial and ethnic disparities, and improve conditions of confinement in detention and corrections facilities. State policies and practices across the country are helping to bring to scale local detention alternatives and to sustain successful efforts to reduce further juvenile incarceration. These actions seek to better serve youth in the juvenile justice system and reduce costs.

Although there have been increases in the use of detention and confinement, their prevalence still varies across jurisdictions and states. There are indications that serving juveniles in the community, where they have a greater chance of receiving appropriate rehabilitation and being surrounded by prosocial others, is a less expensive and equally if not more effective alternative. With the increasing use of alternatives to detention, the overall goal can be

achieved to create and implement a juvenile justice system that has a myriad of alternatives at its disposal so that the most appropriate, yet least restrictive, sanction can be chosen for the juvenile.

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