

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

---

Volume 3 | Issue 3

2021

---

© 2021 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

---

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at [submission@ijlsi.com](mailto:submission@ijlsi.com).

---

# Analysis of the Loopholes in the Indian Evidence Act 1872

---

SHREEYA AGRAWAL<sup>1</sup>

## ABSTRACT

*Evidence is an integral part of Indian legal, investigation and judicial system. The primary legislation governing evidence in India is the Indian Evidence Act 1872. This act has not been substantially amended to keep up with the changing social and technological advancements. The advancements which have been incorporated in practice in India has been through the direction of judiciary through legal precedents, however the same cannot be found in the the statute.*

*In this paper, two such lacunas in the Indian Evidence Act have been analyzed and recommendations have been provided to improve the same. One of those lacunas is with Section 112, which decides on what forms a conclusive proof of legitimacy of a child born out of wedlock, but it does not consider circumstances like adultery, etc. and operates on morality. Moreover, there is no mention of DNA testing in this Act, because these tests had not been invented at the time of its enactment and no amendments to this section have been made since. As a result, there is no legislation governing DNA tests and laying down the correct procedure for the same.*

*Another lacuna further explored in this paper is with respect to expert opinions. Who is an expert and what must be his/her exact qualifications and experience have not been mentioned in the Act. Further, there are no provisions for ensuring the unbiased nature of an expert and the scenario of contradicting expert opinions has been left to the discretion and best judgement of the judges. Also, there are very little provisions for the protection of experts in cases where their opinions are relied upon.*

*Further, this paper studies and reviews the 185th report of the Law Commission of India and lays down drawbacks of this report as well as the lacuna of non-applicability of the recommendations made by the Law Commission.*

**Keywords:** *Indian Evidence Act, DNA tests, Expert Opinion, Law Commission Report.*

---

<sup>1</sup> Author is a student at NMIMS's Kirit P. Mehta School of Law Mumbai, India.

## **I. INTRODUCTION**

The Indian Evidence Act 1872 is the primary legislation on the subject of legislations in India. This statute has eleven chapters and 167 sections. It is divided in three parts namely- Part I- Relevancy of Facts, Part II- On Proof and Part III- Production and Effect of Evidence. Even though it has been almost 149 years since its enactment, this Act has seen little to no substantial amendments to keep up with the changing social and technological advancements. The Evidence (Amendment) Act of 2002 amended Section 146 and Section 155 of the Indian Evidence Act, 1872. In 2010, the Information Technology Act laid down various aspects of electronic evidence and its regulation.

In India, the law governing evidence is very important for both, civil as well as criminal matters. The word 'evidence' finds its origin from the Latin word- *Evidere*, which literally means to show clearly or to prove. The Indian Evidence Act contains the definitions, procedures and various aspects of evidence, and is applicable in court proceedings. The kind of evidences that get accepted and the provisions which govern their applicability are integral in matters of justice.

Various legal experts have urged towards the need for the amendment of the age-old legislation. The Indian Evidence Act has not been significantly amended since. The 69<sup>th</sup> Law Commission report made the most comprehensive analysis on the subjects of amendments and recommendations with respect to the Act. This report was made in 1997. It has been the opinion of the Commission that to review the law of evidence is a very huge and challenging task. In the 185<sup>th</sup> report of the Law Commission, the 69<sup>th</sup> report was analyzed and reviewed. Furthermore, the stance of judiciary on various subjects of the Indian Evidence Act has been incorporated in the report, with little to no chances to the position of the Supreme Court on a matter.

In this paper, Section 112 and Section 45 of the Indian Evidence Act 1872 have been studied and analyzed, along with an analysis of the 185<sup>th</sup> report of the Law Commission, which is the latest report of the Commission on the subject of Indian Evidence Act. The lacuna in these sections and the reports have been explored, and alongside, recommendations have been suggested in this paper for the same.

### **(A) Research Methodology**

Research methodology primarily deals with the techniques that have been used to study the topic of research in a particular systematic manner. It helps in better understanding the flow in which a paper works and thus the workings of the analysis of the paper.

**(B) Objectives of the research**

The study has the following objectives:

- To analyze the lacuna in Section 112 of the Indian Evidence Act and the aspects of DNA testing.
- To further analyze the anomaly with respect to Section 45 of the Indian Evidence Act.
- To study and review the 185<sup>th</sup> report of the Law Commission of India.

**(C) Scope and Limitation**

The scope of this paper is to analyze the various anomalies in the Indian Evidence Act 1872, and discuss the same briefly, along with certain recommendations. There are various texts which study the anomaly of a particular topic under the ambit of evidence law, but this paper analyses a few changes required in the evidence act, reviews the 185<sup>th</sup> law commission report and lays down certain recommendations for the same.

The limitations of this paper are that various subjects on the topic of loopholes have been explored in this paper, but this study does not make an in-depth attempt to study these loopholes; only the gist of the issues have been mentioned in this paper. There is a scope for further research and analysis on each of the subjects discussed in this paper.

**(D) Research Questions**

- What are the loopholes with respect to DNA testing and expert opinions in the Indian Evidence Act, 1872?
- How can these lacunas in the statute be improved for the better functioning of the evidence law?
- What is the review of recommendations given in the 185<sup>th</sup> report of the Law Commission?

**(E) Source of data:** In order to achieve the objectives of the study, doctrinal method of research has been adopted, wherein extensive research has been done on various provisions of the Indian Evidence Act and the commission reports on the same. Sources such as bare act, cases, research papers, articles and reports have been referred for the analysis of the topic.

**(F) Method of writing:** The present paper is a mixture of exploratory and analytical research.

## **II. SECTION 112 OF THE INDIAN EVIDENCE ACT 1872**

This section deals with a conclusive proof of legitimacy of birth. It lays down that if a child is born during wedlock, or within 280 days after its dissolution, such that the mother of such child remains unmarried; then this would be taken as conclusive proof of the fact that the child is a legitimate child of the mother and her husband. The only exception given here is that if it can be proved that both these parties to the marriage did not have access to each other at any time when the child could have been begotten. The spirit behind this section of the act is such that the legitimacy of a child born out of wedlock is proved. There is no presumption of dishonest act on the account of a party, unless conclusive proof can be provided. This section is thus based on presumption of public morality and public policy.<sup>2</sup>

It is important to note that it is integral to establish the legitimacy of a child for a variety of cases. This section presumes the legitimacy of a child born out of wedlock as a conclusive proof. The exception which has been relied upon is that of non-access between the parties of the marriage. The legal loophole here is in regard of a child being illegitimate even if the parties to the marriage had access to each other, say adultery. In such a case, access to circumstances of sexual intercourse between parties would be taken as conclusive proof as mentioned in this section, and there shall be no remedy due to no evidence to the contrary. This law has little to no relevancy in this modern era of science and technology.

Section 112 uses the words conclusive proof in relation to proof of legitimacy. Section 4 of the Evidence Act while defining conclusive proof lays down that if the proof of a certain fact is considered as conclusive proof and it so proved before the Court, then the Court shall not allow further evidence submitted to disprove the same. So, if the conditions of Section 112 are met, then according to Section 4, no further evidence disproving the same may not be given. Such a legislation is impractical since many matters of custody, maintenance etc. are based on the fact of legitimacy. The only exception provided here is that of non-access. The part of non-access of parties of the marriage to each other has to be proved beyond reasonable doubt, it can't be based on just a balance of probabilities.<sup>3</sup>

Furthermore, the subject of DNA Tests has seen a lot of criticisms when it comes to right to privacy under Article 21 and right against self-incrimination under Article 20(3). On the subject of right to privacy, the constitutionality of medical tests has been held up. In the case of *Govind Singh v. State of Madhya Pradesh*<sup>4</sup>, it was held that a fundamental right is subject

---

<sup>2</sup> *Sham Lal v. Sanjeev Kumar* (2009) 12 SCC 454

<sup>3</sup> *Gautam Kundu v. State of West Bengal* 1993 Cri LJ 3233

<sup>4</sup> *Govind Singh v. State of Madhya Pradesh* 1975 AIR 1378

to certain restrictions on the basis of public interest. In the same way, the right to privacy is also not absolute and medical examinations are thus allowed.<sup>5</sup>

On the subject of right against self-incrimination under Article 20(3), it was held that medical processes do not violate this right. This is because in the case of *State of Bombay v. Kathi Kalu Oghad*<sup>6</sup>, it was held that self-incrimination is based on personal knowledge being disseminated by a person and does not involve the mechanical processes like producing documents in court which do not contain personal knowledge based on a person giving it. Medical tests are mechanical processes and do not require an exchange of personal knowledge, thereby not violative of Article 20(3).

In the case of *Gautam Kundu v. State of West Bengal*<sup>7</sup>, it was held by the Apex Court that courts can't just order a blood test in the course of a case because the same has been requested. It needs to be established first, by the contesting party which is usually the husband, that there existed the requirement of non-access as mentioned under Section 112; further the court should also analyze the social impact of allowing such a test on the mother and the child. Thereby, it is not necessary that the court may allow for a DNA test if these conditions aren't fulfilled.

Even in the case of *Sharda v. Dharampal*<sup>8</sup>, the Supreme Court laid down that- 1. It is within the powers of matrimonial courts to order for medical tests, 2. Such an order does not violate the right to personal liberty guaranteed under Article 21 and 3. The appellant must provide a very strong prima facie case and provide proper materials; only then the court must order for medical tests.

Thereby, it is clear that even though the courts have the power to order for such tests, first the non-access provision given under Section 112 needs to be satisfied. Further, this particular section ascertains access as conclusive proof and does not mention the aspect of DNA tests. When this legislation was formulated, science had not advanced and there were no such tests, but this section has not been amended or revised since, which makes this section age-old and non-operative in its entirety in the present world.

### **III. SECTION 45- OPINIONS OF EXPERTS**

In this particular section of the Indian Evidence Act, expert opinion has been inferred upon in

---

<sup>5</sup> Presumption as to legitimacy of a child under Section 112 of the Indian Evidence Act, Anusha Satapathy, iPleaders Blog, October 2018.

<sup>6</sup> *State of Bombay v. Kathi Kalu Oghad* 1962 SCR (3) 10

<sup>7</sup> *Gautam Kundu v. State of West Bengal* AIR 1933 SC 2295

<sup>8</sup> *Sharda v. Dharampal* (2003) 4 SCC 493

the context of foreign law, science, art, identity of handwriting and finger impression. However, this section does not mention the degree of qualifications that are required for a person to be called an expert. The ambiguity here is that the law does not lay down specific qualifications as to who is an expert in a particular field. The only qualification given in Section 45 is that a person who is skilled in the subject areas mentioned is an expert, but skilled is a very broad and vague requisite. Thereby, it is left to the judges to determine whether a person can be considered skilled on the subject matter for him/her to be eligible for expert opinion.

The evidentiary nature of expert opinion is corroborative, it is not considered as conclusive proof<sup>9</sup>. There are two types of expert evidence- Expert Opinion and Data Evidence. Among the two, the latter is given more preference or weightage in courts. However, in both these cases, sole reliance is not placed upon expert evidence. Where there is a conflict between the testimony of the eye-witness and the opinion of an expert, the eye witness's statement is given an upper hand.<sup>10</sup>

However, when it comes to medical expert opinion, the opinion of the expert takes an upper hand. In the case of *Golappa Avana Naik v. State*<sup>11</sup>, the eye-witnesses' statements indicated that only one blow was rendered on the head of the accused, however the medical evidence showed that it was infact 4 external injuries. Thereby, medical evidence was given an upper hand and the court held that the eye-witnesses had not seen the crime.

The lacuna in law here is as to the appointment and selection of an expert. No procedure for the same has been mentioned in the Evidence Act. Whether an expert is biased towards prosecution or the other party is an ambiguous area where little research is done. Furthermore, in cases of conflicting expert opinions, it is left to the knowledge of the judges to decide which one is best. Further, Section 45 only mentions the broad subjects and there is nothing on who can be named an expert in a field. There are no provisions for how the court will ensure that the expert opinion is not biased. This is because of this ambiguity and lack of proper procedure, that expert opinion is considered as a weak evidence in India.

#### **IV. ANALYSIS OF THE 185<sup>TH</sup> LAW COMMISSION REPORT**

The 185<sup>th</sup> report of the Law Commission of India on 'Review of The Indian Evidence Act 1872' was released in March 2003. This is the latest report of the Law Commission on the subject of the Evidence Act, and a draft bill for amendments were also formulated. The task

---

<sup>9</sup> *Fakhruddin v. State of Madhya Pradesh*, AIR 1967 SC 1326

<sup>10</sup> *Bhagaban Barik v. State* 1961 27 C.L.T. 116

<sup>11</sup> *Golappa Avana Naik v. State* Cr. App. No. 16 of 1967

before the committee for this report was to review the 69<sup>th</sup> report of the Law commission. The 69<sup>th</sup> report of the law commission is considered as one of the most comprehensive and in-depth works of the Law commission, and to review that report to match the current times is a task itself.

The role of the Law Commission is to recommend changes to the laws and update them, in line of changing social and technological advancements. Further, the role of the committee is to incorporate the developments made by judiciary through pronouncement of judgements, in the statute.

This particular review has reviewed various aspects of the Indian Evidence Act, like the definition of court, document, DNA evidence, changes in Section 10 as to admission of evidence in case of conspiracy, explanation of Section 13, analysis of Section 23, Section 24, Section 26A, Section 27, dying declaration under Section 32(1), definition under Section 45, advancement to the protection of women in working places, rephrasing of Section 90, introduction of DNA tests in Section 112, etc. A wide ambit of recommendations were made, which were in addition to the 69<sup>th</sup> report, some of the recommendation of the 69<sup>th</sup> report were refuted while some were added upon.<sup>12</sup>

Even though the Commission undertook an extensive research on the subject matter, there still remain certain grey areas on the subject matter. Firstly, the commission recommended that the result of lie detector test or polygraph should not be made admissible, but the supporting reasoning for the same was not provided. Secondly, the Commission mentioned that there is a need to define the word 'evidence' in more detail, however it did not make any attempt or recommendation to do the same. Thirdly, the Commission simply relied on the reasonings and judgements of the Supreme Court to decide on various matters and applied it, it did not undergo justified research of its own of the subject matter to either agree with or refute the understanding of the court on various subjects. The Commission did not undergo research to take an independent opinion on the same.

In its essence, the Commission intended to review the Evidence Act, but ended up merely reviewing the recommendations made in the 69<sup>th</sup> report of the Law Commission. In majority, the recommendations of the 69<sup>th</sup> report were agreed and accepted as it is. Only a few recommendations have been refuted or modified. Total disapprovals of the recommendations have only been made as per the decisions of the Supreme Court. Thereby, it can be said that this report merely updated the 69<sup>th</sup> report.

---

<sup>12</sup> 185<sup>th</sup> report of the Law Commission of India, Summary of Recommendations.  
<https://lawcommissionofindia.nic.in/reports/185thReport-PartIV.pdf>

## V. CONCLUSION AND SUGGESTIONS

While exploring the lacuna revolving around Section 112 of the Indian Evidence Act, it was noticed that the act lays down provisions which would be considered as conclusive proof when it comes to determining the legitimacy of a child born out of wedlock. This provision does not take into consideration things like adultery, DNA tests, etc. and is based on the concept of morality, focusing on the mother and protection of the child from being declared a bastard. However, science has developed since, and the only exception of non-access given under this section is not enough to prove or disprove legitimacy of a child.

The current legal practice is such that a DNA test is only ordered by a court if the fact of non-access can be sufficiently proved. This practice has evolved through judgement and precedents and the act itself does not mention DNA tests, denial of DNA test leading to waiving of defense to paternity or further provisions apart from non-access like adultery. Thereby, there is a need to amend this section of the act to make it operative in the current times.

Further, on the subject of expert evidence under Section 45, it is important to note that there are various ambiguities in the Indian Evidence Act. First of all, the Section does not specify who is an expert, or how will the court ensure that an expert appointed is actually skilled in the subject area or not. Also, provisions for how the court will ensure that the expert appointed is not biased towards a party is absent from the law. Due to these reasons, expert opinion is considered as weak evidence in India.

Steps need to be taken in order to lay down the qualification of experts as a mixture of professional qualifications and practical experience in the field.<sup>13</sup> Further, there is an urgent need for laying down provisions for the protection of expert witnesses. In most cases, experts are harassed, thereby, it is important to widen the ambit of witness protection of his self and his family and close friends.

On the subject of the Law Commission report, it is important to note that the Commission has been given a role of giving recommendations to update the statutes to the changing social and technological advancements. Thereby, the study that is undertaken by the Commission needs to be holistic in nature and not a mere review of a previous report. It has also been observed that for various issues, the opinion of the Supreme Court has been as it is applied by the Commission in the report. This method should not be undertaken by the Commission, it

---

<sup>13</sup> Sadhana S., "A study on the admissibility of expert evidence in Indian Evidence Act", *International Journal of Pure and Applied Mathematics*, Volume 120, No.5, p. 1123-1136, 2018.

should do its own independent study on the topic to arrive at a conclusion which could or could not be in support of the Supreme Court's verdict.

Another issue with the Law Commission reports is that its applicability is not binding, and several recommendations made by the commission go unheard. This particular report of the Law Commission had an attached annexure which is the Indian Evidence Amendment Bill, 2002. However, the only amendment made was in the Evidence (Amendment) Act of 2002, wherein Section 146 and Section 155 of the Indian Evidence Act were amended.

Evidence is a very wide and integral area in the Indian Legal system. It is very important that the laws with respect to evidence are updated from time to time to incorporate the changing social and technological advancements. However, there has no substantial amendment to the Indian Evidence Act 1872, even after various recommendations. In practice, some of the principles of scientific advancement has been incorporated by way of judicial precedents, but the same is not corroborated in the legislation governing evidence in India.

\*\*\*\*\*