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The Bharatiya Sakshya Bill, 2023: A New and Unimproved Evidence Act

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The secrecy in drafting the bill to replace the Evidence Act is reminiscent of colonial legislation by committee. The lack of consultation has meant that the interpretative confusions in existing law remain unresolved.

In August, the government introduced a bill in Parliament to replace the 150-year-old Indian Evidence Act, 1872. Part of a set of reforms of general criminal laws, the Bharatiya Sakshya Bill has been presented as an exercise to indigenise the legal landscape of the country from one that was created during colonial rule.

The Indian Evidence Act is the principal statute governing proof and adjudication across criminal and civil laws in the country. It applies to all judicial proceedings except for contempt of court and public interest litigation. Over the years of its operation, courts have developed a large body of judicial interpretations of its provisions and there is now an intuitive understanding of its working. The act has been amended at times to incorporate provisions necessitated by technological advancements, such as electronic documents and records. Several Law Commissions have studied the act and recommended various amendments to specific provisions. These are on varying subjects within the statute, from evidentiary privileges to statements made before commissions of inquiry.

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The reform of any area of law has far-reaching implications on persons governed under it. The stakes are much higher when it comes to the reform of laws which form the backbone of all judicial proceedings in the country. Needless to say, such reform or amendment should take place after a wide-ranging consultation with stakeholders and experts in the subject.

Yet, the working of the committee that drafted the bill has been shrouded in secrecy, giving us little insight into the rationale for its structure. The notes appended to the bill state little but the substance of each provision and do not capture any discussions within the committee.

We do not know what kind of consultations was held, what materials were considered by the committee, or whether prior reports of the Law Commission were consulted. Nor do we know whether its deliberations engaged with the large body of scholarly work that has evaluated the conceptual soundness of the Evidence Act.

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We only have for analysis the finished product as released to the public. From that, it emerges that the Sakshya bill fails to make any important improvement on the Evidence Act, and has been drafted in ostensible ignorance of the development of the law of evidence both within and outside India. At best, it appears to be a rehashing of most of the provisions already existent within the statute, and at worst, impliedly encourages the tampering of evidence.

A lost opportunity

The Sakshya bill retains the structure of the Evidence Act with most provisions unchanged. More importantly, the scheme of legal relevance and conceptual definitions of the categories like “fact” and “evidence” have been left unaltered but for incorporating electronic evidence. This is not necessarily a bad thing, because the logic of the act is sound and has worked well. Further, this also ensures that the working of evidence law will not get majorly disrupted due to the enactment of the new bill. For the most part, then, courts may have to substitute the provision number to reflect the change, but otherwise proceed with what they had been doing.

What the bill has missed is sorting out some of the interpretative confusions that have occurred with the Evidence Act in order to clarify the position of law. I highlight three major ones here.

The Special Rule of Criminal Conspiracy

A criminal conspiracy is generally considered a difficult crime to prove. This is because conspiracies to commit crime are executed in secrecy and only the conspirators are aware of its existence. In order to aid the prosecution of criminal conspiracies, a special rule of evidence has historically applied in such cases.

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Simply put, under this special rule, conduct and speech of one conspirator may be made relevant against all other conspirators, and may be used to prove the existence of the conspiracy. This is a deviation from the general rule that a person is responsible only for their actions, and not the actions of others. This special rule forms Section 10 of the Evidence Act and Section 8 in the Sakshya bill.

A longstanding dispute has existed on the scope of this provision in India. Would the section make statements made by a conspirator relevant against other conspirators even if it was made at a time after the conspiracy had ended? Or would it apply only to acts and statements made during the conspiracy?

The common law rule on the point was to limit its application to the period of conspiracy alone. The logic was that acts of one conspirator could be attributed to others only when they all shared a common intention to commit the crime. Statements made after the conspiracy had ended could not be made relevant under the rule because a conspirator could not be said to be acting on behalf of the others anymore.

However, the terms used in Section 10 of the existing act are not very clear and may be interpreted to mean that the Indian rule is more expansive in its application.

The point as to the proper scope of the section has been litigated before courts in India repeatedly.[1] Though the position of law as it currently stands follows the common law position, the Supreme Court has in passing stated that the alternative position is a reasonable construction of Section 10.[2]

The Sakshya bill could have resolved this source of confusion to bring the law in line with the common law construction. It is not clear whether the committee even considered the controversy in the area of criminal conspiracy, for the proposed Section 8 reproduces the current provision verbatim.

Proof of documents

Documentary evidence is a separate class in itself and their use in evidence law is governed by a distinct set of provisions. Prior to their admission into evidence, documents need to be authenticated. The presented document should be established as what it purports to be, before it can be considered evidence. For example, if I produce a sale deed through which I claim title to property, I must first prove to the court that the document is, in fact, a validly executed sale deed.

Authentication of documents is a procedural step that is well entrenched in evidence law across common law jurisdictions. Authentication becomes tricky when it comes to electronic documents that may be created, stored, and transferred using computers. For instance, how do we authenticate a printout of an email as being a true and correct copy of what was stored on a computer or on a server in another country?

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In the United Kingdom, the Civil Evidence Act, 1968 attempted to solve this problem by introducing what was called the certifying requirement to authenticate computer output in the form of secondary evidence (documents such as printouts). A certificate identifying the source of the computer output, or describing the process of its production, or relating to the working of the computer device on which the document was stored needed to be produced to authenticate a computer output. This certificate had to be produced by a specified set of individuals, including those who exercised lawful control over the said computer. Only if the certificate accompanies a computer output does the latter become admissible as evidence.

This requirement was done away with in the UK in 1995 as it was felt to be outdated and inadequate as a method of authentication. However, India adopted the repealed provision into its Evidence Act in 2000, and required certification of all secondary electronic evidence. These form part of the Evidence Act as Sections 65A and 65B. It is not very clear what the thinking behind adopting this method into the act was. Even the 185th Report of the Law Commission in 2003 is silent on the aspect of authentication.

These sections have had a tortured history of judicial interpretation. The Supreme Court has gone from holding that certificate requirement is non-mandatory to mandatory twice over in the 20 years since the amendments.[3] In what is famously referred to as the Parliament attack case, where extremely serious charges – punishable by death – had to be proved, the Supreme Court admitted uncertified electronic evidence holding the certificate requirement non mandatory. This position was reversed by the court later in a different case. The question that does arise is: was the Parliament attack case decided in a particular manner at least partially on the basis of what was inadmissible evidence?

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Indian scholars of evidence law have flagged the inadequacies of authentication through certification for years. The certification requirement incorporated under the act is no safeguard against advanced tampering of electronic devices. They also may not encompass an analysis of metadata (the background information of an electronic file) or rule out the operation of sophisticated malware.

Partly due to these reasons, the UK as well as the USA do not have similar authentication requirements in place. It is therefore quite surprising that the committee persists with the certification requirement entirely in the Sakshya bill. Perhaps the colonial influence of the UK is far deeper than the resolve of decolonising the statute.

The most dangerous part of the sections on the proof of documents in the bill is that it amends the definition of primary evidence of documents to include electronic records which is produced from "proper custody" unless the same is disputed as primary evidence. In simple terms, primary evidence means the original document, or a document simultaneously created with the original. The operation of this clause as of now is unclear, but it may imply that electronic records from devices seized by the police and produced in court become primary evidence, and may be admitted without even the certificate requirement (Section 57, Explanation 5).

The bill's provisions would imply the possibility that if a seized device is tampered with by the investigative agencies to plant incriminating material, the same would still qualify as primary evidence. To dispute an electronic record which has been produced from the custody of the police is not an easy task in court. This amendment may be abused by law enforcement agencies, as has already been alleged in some cases.

Subsequent discovery of facts

The Evidence Act disincentivises the police from extracting confessions under torture. Under its provisions, confessions made by accused persons to the police, or confessions made while an accused is in police custody cannot be used in evidence against them.

However, if an accused voluntarily discloses a hitherto unknown fact, and such a fact is actually discovered in pursuance of the disclosure, the part of his statement which relates distinctly to such discovery is allowed to be proved. (A statement is voluntary when it is not made as a result of inducement, threat, or promise.)

This provision is often used to effect recoveries of objects which the accused may have concealed, such as the murder weapon, stolen objects and the like. Whether this information has been disclosed by the accused voluntarily is a question of fact, and has to be determined in each case.

Procedurally, this is established through independent witnesses, who are required to be procured at the time the statement is recorded, and who accompany the accused and the police to the spot from where an object may be recovered. These witnesses, as well as the recorded statement, have to be produced during trial, where the witnesses can be cross examined.

The 69th Law Commission Report on the Evidence Act had proposed that any statement which was made as a result of inducement, threat or promise should be excluded from the scope of this section. Further, the law laid down by the Supreme Court over multiple judgements also points to the direction that the disclosure statement leading to the discovery must be made voluntarily.

The committee drafting the Sakshya bill had an opportunity to ensure that this position of law was made clear in the provision, thereby giving effect to the Law Commission Report as well as the case law. However, it does not do so.

Another controversy is around the construction of the provision relating to discovery of facts. As it currently stands in Section 27 of the act, the provision applies to accused persons in the custody of the police. It does not apply to a person who may not be in custody, but gives information disclosing a fact.

This was challenged for unconstitutionality in the Allahabad High Court, which on appeal came to the Supreme Court in the case of *State of Uttar Pradesh v. Deoman Upadhyaya*.[4] Amongst other things, it was argued that the section treated accused persons differently based on whether they were in police custody or not. An accused in the custody of the police is ostensibly more vulnerable to being coerced, yet the provision would make a disclosure made by such a person relevant. The same disclosure, made by an accused not in custody, would not be covered by the section. It was argued that this distinction was arbitrary and deprived accused persons of the equal protection of the law.

The majority opinion in that case upheld the constitutionality of the provision by holding that there was an intelligible differentia between accused persons in custody, and those outside police custody. However, in a dissenting opinion, Justice Subba Rao pointed out that the provision was meant to apply to both classes of accused persons, and a crucial word had been inadvertently left out of the provision while it was transferred from the Code of Criminal Procedure, 1861, to the Evidence Act.

In the Sakshya bill, we find that the provision has been reworked into two sub sections. The first prohibits confessions made to police officers from being proved. The second prohibits the same for confessions recorded in police custody. Section 27 is worded as a proviso after the second sub section.

A construction of the provision would probably lead to the result that the proviso applies only to sub section 2. This would give effect to the majority opinion in Deoman, but the issue raised in the dissenting opinion remains unaddressed and is unclear. The rule could have been clarified to ensure that this issue could be laid to rest. However, the bill does not make an attempt towards the same.

Final comments

At the time the Indian Evidence Act, 1872 was enacted, the English law on the subject had not been codified into a single statute. It depended on principles that had evolved gradually from a large set of cases, and were dispersed across the body of substantive law. This led to a fundamental lack of clarity on key concepts and caused significant confusions in evidence law.

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The act was an attempt to rationalise the subject to a singular code, which would operate on a set of basic principles, and would be easy to use. Simultaneously, because the law could be stated simply for the first time, it was also used to clear up persistent confusions in evidence.

James Fitzjames Stephen, who drafted the Evidence Act, wrote extensively on his idea of judicial evidence and the principles behind the statute (Stephen 1902). Whereas the colonialists at least made clear to us why they chose a particular model of a statute, the supposedly decolonial committee which has drafted the bill has not engaged in such an explanatory exercise. An elaborate renaming exercise seems to have passed muster as a viable replacement of a crucially important statute.

During the 19th century, several important laws were introduced into British India without any system of electoral democracy or public accountability to the Indian people. These laws were enacted by nominated and selected councils of the Viceroy and imposed on the country. This method of legislation was even lauded by Macaulay, who considered it more efficient than the process of legislation by a large elected body.[5] However, if in the present, we continue to draft laws through selected committees which shun public participation and constructive engagement, and enact them through Parliament with little debate, not much can be said to have substantively changed.

In this light, the Sakshya bill is far more similar to the colonial practice of legislation through fiat. It most obviously does not represent any decolonising moment in any true sense of the term. One should hope that the discourse around the amendment and transformation of laws in the country would move beyond a change of nomenclature to work to improve the application of laws for citizens. Till then, we may content ourselves with the replacement of English words with Hindi.

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Footnotes:

1 This point was argued before the Privy Council in Mirza Akbar v. Emperor (1940) 67 IA 336.

2 State (N.C.T. of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820.

3 State (N.C.T. of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820 to Arjun Panditrao Khotkar v. Kailash Kushalrao Gorantyal, (2020) 7 SCC 1.

4 AIR 1960 SC 1125.

5 Lord Macaulay, 'A Speech Delivered in the House of Commons on 10 July 1833' in The Miscellaneous Speeches and Writings of Lord Macaulay (Longmans, Green & Co 1889); Lord Macaulay, Speeches (Redfield 1853) 277.