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## Topic-judicial versus extrajudicial confessions

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### Abstract

This paper mainly investigates the difference between the evidentiary and probative value of Judicial and extra- Judicial confessions. The competency of a witness is provided by the Indian Evidence act but which piece of evidence to trust on, is always the discretion of the court and the judge. This forms a crucial part of the process of appreciation of evidence and helps the judge to write a judgement that is well reasoned. So the way these aspects have been dealt with in context of Indian law is elaborated below.

**Keywords:** Confessions, probative value, corpus delicti, competent witness, self-incrimination

### Introduction

Judicial confession has an evidentiary value. According to the Section 80, Indian Evidence Act a confession recorded when the person is under oath in the presence of magistrate or in the court in accordance to the law will be presumed true. Therefore, it is considered an authentic confession and the accused can now be charged and tried under different offences. The Judicial Magistrate is empowered to record confessions under section 164, CRPC, therefore it is not necessary that which magistrate records confession unless he is restricted to record the confession by the law. Hence, for the purposes of raising the presumption under the Indian Evidence Act, the identity of the accused must be clear and proved in the confession so as to be able to persecute him for offence that he has committed.

Extra-judicial confessions on the other hand, don't have much evidentiary value when compared to judicial confessions. In case the confession is in written form, the writing of the accused is taken as the best evidence this can now be compared to his writing with the help of experts who now can identify that the genuineness and authenticity of the confession which will now lead the accused to be tried for different offences. When we come to extra-judicial oral confessions, in that case, the court has the power to test the oral confession of the accused which was made to any other person. It is the court's discretionary power and level of satisfaction after the appreciation of evidence that decides the admissibility of the statements made by the accused in front of any other person. And only thereafter the accused may be prosecuted for the offence on which he is charged.

The Evidentiary value of extra-judicial confessions to a large extent depends upon their trustworthiness and probable truth. Such extra-judicial confessions in a criminal case, as a rule of prudence, must be supported by corroboratory evidence which is specifically relative to the *corpus delicti* (a crime must be proved to have occurred before a person can be convicted of committing that crime).

Chanakya allowed the use of torture for extracting the truth from the persons who have been accused, though he also cautioned that a conviction based entirely on a confession may lead to injustice. The rules of burden of proof which are contained in the Dharam Shastras are were ahead of their times and forms the basis for the modern Indian Evidence Act. For example, if the defendant admits the charge levied on him, no evidence is required to be produced and if the defendant totally denies the charge then the burden of proving it is on the plaintiff. The competency of witnesses is dependent upon the seemingly truthful nature of a witness and his capacity to withhold and resist temptations; and in place of prescribing the qualities of a competent Witness, the persons, who are likely to possess these qualities, are described, such as persons who are of virtuous conduct, simple by nature, persons who practise religion, charitable persons, or those who are of noble birth and those who are free from malice etc.

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### On the other hand, persons who are taken to be as incompetent witnesses are

- who are themselves interested in the subject-matter of the issue at hand and thus would have a tendency to be partial, including the parties themselves
- who lack sufficient reasoning capacity like children and old persons
- who do not believe in religion;
- who are fickle minded;
- Who belonged to the lower castes?

### Judicial Confession

Judicial “confessions must not be mixed up with extra-judicial confessions which although are a part of the same branch but the evidentiary and probative value of both is different in determining the guilt of the accused. Some might argue that a conviction can also be based upon an extra-judicial confession, but at the same time, we must also see that there is no reason in neglecting the arrangement of conviction solely based on the judicial confession. “So a confession made by the accused where his statements are leading himself to the bar is probative evidence to prove his guilt but all such confession shall be made in the presence of a magistrate or in a court of law. On the other side the court must take care of all the necessary steps to check if the confession made by the accused which may prove his guilt must be voluntary and true, so that no innocent can be charged for wrongful act of others as provided in Article 20(3) of the Indian Constitution which talks about ‘self-incrimination’.”

### Extra-Judicial Confession

In the case of an “extra-judicial confession, exact words uttered by accused are required to be proved. It would neither be safe nor prudent to rely upon the impressions of the accused alone. A mere general statement relating to the confession of the accused would be insufficient in law. Oral extra-judicial confession as a piece of evidence is without a doubt a very weak piece of evidence and it to make it the entire and sole basis of conviction would be dangerous. That being said it still can be taken into consideration along with other material evidences. It is not the law that extra-judicial confessions have to be rejected and cannot be acted upon or that they are to be taken as an inferior category of a confession or an admission. They must be accepted and acted upon as a whole. It is not permissible for the Court acting upon and using this evidence to do so with regards only to a portion of the confession and to reject another portion of it because the person accused is now not able to offer further evidence. It is the duty of the Court to carefully appreciate the evidence for the purposes of ascertaining whether the confession was made voluntarily or not. If the court feels that it is not possible to hold, on the basis of the circumstances alone that it may come to a conclusion that the confession has not been freely made and now cannot be relied upon for conviction of the accused <sup>[1]</sup>.

<sup>1</sup> Pattenden, R. (1983). Informal Judicial Admissions of Criminal Activity: A Comparative Study of England, Canada and the United States. *The International and Comparative Law Quarterly*, 32(4), 812-831. Retrieved February 19, 2021, from <http://www.jstor.org/stable/759348>

### Difference between Judicial Confessions and Extra-Judicial Confessions

Judicial “confessions relate to those confessions which are either made before a magistrate under Section-164, CRPC or before the court during the course of the trial. On the other hand, extra-judicial confessions are those which are made to any person other than those authorised by law to take confession. For example – confessions made to police during the investigation of an offence. The defendant must have sufficient information to assess the chances of acquittal or conviction at trial and to weigh those chances against the other consequences, positive and negative, of the contemplated guilty plea <sup>[2]</sup>. An extra-judicial confession is one made by the party made at a place other than before a judicial magistrate or in court, in contrast to a judicial confession which has to be made before a magistrate or in court in the manner prescribed by law <sup>[3]</sup>.”

For the purposes of proving the reliability of a judicial confession, it is not necessary that the person to whom judicial confession is made, is summoned as a witness. Whereas in an extra-judicial confession it now becomes necessary to call the person before whom the extra-judicial confession is made as a witness.

Judicial confessions can be relied as proof of guilt of the accused person if it appears to the court to be true and made voluntarily. Extra Judicial confessions on the other hand are not sufficient on their own and require the support of corroboratory evidence. An extra-judicial confession has to be corroborated by independent evidence which must particularly concern the corpus *delicti* in order to warrant a conviction <sup>[4]</sup>.

A judicial confession can form the sole basis of a conviction. But it is against the rule of prudence to base conviction on an extra-judicial confession.

### Case Study

Babubhai Udensinh Parmar v. State of Gujarat, (2006) 12 SCC 268 [Supreme Court of India] <sup>[5]</sup>

In “this case a labourer had been awarded the death penalty, which was imposed by the sessions court relying upon one amongst a series of judicial confessions made by him, which had been recorded without duly complying with all the procedural requirements and without even complying him and giving him the provisions of free legal aid. The Gujarat High court upheld the conviction and the sentence of the trial court. The Supreme Court, however, noting down the defects by not following the proper procedure in the recording of the confession of the accused, set aside the conviction. Further on 20th July, 2009, the Gujarat High Court, in the same case, on the basis of another of those

<sup>2</sup> CALIF. L. REV. (1978). A Constitutional Law of Remedies for Broken Plea Bargains *Westen & Westin*, 471, 501-08.

<sup>3</sup> Sadler, P. (1950). The Crime of Arson. *Journal of Criminal Law and Criminology (1931-1951)*, 41(3), 290-305. doi:10.2307/1138064

<sup>4</sup> Evidence. Extra-Judicial Confession Uncorroborated by Independent Evidence of Corpus Delicti Will Not Warrant Conviction. (1922). *Virginia Law Review*, 8(8), 619-620. doi:10.2307/1063646

<sup>5</sup> Sinha, S. (2012). To Kill Or Not To Kill: The Unending Conundrum. *National Law School of India Review*, 24(1), 1-29. Retrieved February 19, 2021, from <http://www.jstor.org/stable/44283747>

series of confessions, upheld the conviction and sentencing despite the appellant having retracted his confession later and despite the judgment of the Supreme Court involving the same person.”

Such instances where “the perilous susceptibility of trial processes are exposed, are aplenty and have been lamented by the Supreme Court in various cases before it. It is a well-known fact in India that trial processes are not immune from errors, mistakes and deficiencies.”

### Suggestions

Extra-judicial confession must not be relied upon by the courts as these confessions are dangerous and untrustworthy and the circumstances under which they are given creates a fair chance of injustice being imparted, amplified by the well documented use of undesirable methods used by the law enforcement agencies that impair the individual's ability to assess his options rationally and objectively. This becomes violative of the Fundamental Rights of the accused and also is not in consonance with the principles of Natural Justice. During the course of interrogation, unrepresented by any legal professional, the accused is vulnerable to inducements and it is also susceptible to coercions that even a mirage of leniency renders for any confession. Confessions procured as such must not be relied upon. Therefore presence of competent advocate during confession ensures the voluntariness. Such rules should be mandatory<sup>[6]</sup>.

That being said, Extra-judicial “confessions can be accepted and can be the basis of a conviction if it is considered to be credible by the court. Extra-judicial confession are made before private person which includes even judicial officer in his private capacity. It also includes a magistrate who is not empowered to record confessions under section 164, CRPC or a magistrate who has been so empowered but receiving the confession at a stage when section 164 does not apply.

### Conclusion

The extra judicial confession is a very weak piece of evidence by itself. So as a result the court has to be on its guard while examining such evidence. It should be made voluntarily without any duress and should be such that it inspires confidence. “An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. “For an extra-judicial confession to become the basis of conviction, it should not suffer from any inherent improbabilities or material discrepancies. Such confessions essentially have to be proved like any other fact would need to be in accordance with law. The mere fact that a confession is extra-judicial does not mean that it liable to be rejected. The only major difference between a judicial and an extra-judicial confession is that the former is recorded by a Magistrate with all the formalities provided by Section 164 CrPC in order to facilitate ascertainment of the confession having been given voluntarily, the aid of these formalities and the evidence of the Magistrate are not available in the case of an extra-judicial confession. And there is need of corroborative evidence to support extra-judicial confession.”

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