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Critical Analysis of the Indian Evidence Act in accordance with Bharatiya Sakshya Adhiniyam

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ABSTRACT

On August 11th, 2023, the Home Minister, Sri. Amit Shah, introduced three bills: the Bharatiya Sakshya Adhiniyam, 2023, which aims to replace the Indian Evidence Act, 1872; the Bharatiya Nagarik Suraksha Sanhita, 2023, intended to supplant the CrPC; and the Bharatiya Nyaya Sanhita, 2023, aiming to replace the IPC. If these bills are approved, they have the potential to bring about a new era of Indian sovereignty by reforming the country's criminal law. Amit Shah's statement emphasizes that these bills will not only introduce changes but also incorporate the "Indian Spirit and Ethos," reflecting the cultural and ethical values of India. The focus on humanitarian values and ethics is a crucial aspect of these proposed reforms. It is important to note that the passage of these bills would require thorough debate and scrutiny in the Indian Parliament, and they would need to gain approval from both houses before becoming law. The objective seems to be a significant transformation in the Indian criminal justice system, aligning it more closely with the values and requirements of contemporary Indian society.

As stated by Richard Garth, Chief Justice of Bengal in 1875, "The law of evidence is not merely a principle governing the process of proof; it also serves the purpose of governing the rules related to the process of proof in court proceedings."

The law of evidence and the right to present evidence before a court of law are fundamental in ensuring every citizen a fair trial or hearing, which is a component of Audi Alteram Partem as a Principle of Natural Justice.

Keywords: *Indian Evidence Act, New Criminal Code, Colonial Area, Bharatiya Sakshya Adhiniyam, Digital Evidence.*

I. INTRODUCTION

The Indian Evidence Act of 1872 has been superseded by the Bharatiya Sakshya Adhiniyam of 2023 as part of the criminal law reorganisation. The Bharatiya Sakshya Bill, 2023, was tabled in the Lok Sabha on August 11, 2023, together with the Bharatiya Nyaya Sanhita and Bharatiya

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Nagrik Suraksha Sanhita, the other two laws that would replace the Indian Penal Code and the Criminal Procedure Code.

The introduction of the Indian Evidence Act in 1872 was a watershed moment for the government, changing the whole process of evidence admissibility in Indian courts. It is also worth noting that India was ruled by the British at the time the old Indian Evidence Act was created.

This demonstrates that a big portion of the aforementioned law was impacted by the circumstances prevailing in the nation then and the aims that the then-British administration desired to attain. The introduction of the new criminal legislation by our Current Minister of Home Affairs displays the requirement to advance towards a new and modern India based on evolving objectives aimed to be reached via the criminal justice system.

The Bharatiya Sakshya (Second) Bill, 2023 was approved by the Lok Sabha on December 20, 2023. The Rajya Sabha approved it on December 21. On December 25, 2023, President Droupadi Murmu signed the bill, converting it into an Act known as Bharatiya Sakshya Adhiniyam, 2023 or Bharatiya Sakshya Act, 2023.

II. PROVISIONS DELETED

Section 3 (j) of IEA, 1872³ – “India” denotes the geographical area of India, excluding the State of Jammu and Kashmir. The region of Jammu and Kashmir was divided into two union territories as per the Jammu and Kashmir Reorganization Act of 2019. This significant change occurred 86 days after the special status under Article 370 was revoked by Parliament. Therefore, the region is now considered part of Indian territory. Consequently, Section 3 (j) should be eliminated.

Section 82 of IEA, 1872⁴ - Presumption as to document admissible in England without proof of seal or signature. – When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same

³ Section 3 in The Indian Evidence Act, 1872

⁴ Section 82 in The Indian Evidence Act, 1872

purpose for which it would be admissible in England or Ireland.

Prior to attaining independence, India adhered to the legal framework established by the laws promulgated by the British colonial authorities. However, subsequent to India achieving independence, this particular section of legal provisions has become obsolete and irrelevant.

Section 88 of IEA, 1872⁵ - Presumption as to telegraphic messages.- The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission. The telegram services, once an indispensable means of communication, have become obsolete in the contemporary era characterized by the prevalence of email, dependable landline telecommunications, and widespread availability of mobile phones. The telegram services have been disbanded in the year 2013. The last telegram was sent by Ashvini Mishra to Rahul Gandhi on July 14, 2013.

Section 113 of IEA, 1872⁶ - Proof of cession of territory. – A notification in the Gazette of India that any portion of British territory has [before the commencement of Part III of the Government of India Act, 1935 (26 Geo. 5, c. 2)] been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification. Cession of territory is not permissible by law as the Government of India Act, 1935 has been repealed. Hence, the following section be deleted.

Section 166 of IEA, 1872⁷ - Power of jury or assessors to put questions. – In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper. System of trial by Jury has been abolished in India in 1973. In the context of assessors, specific legislative measures have been enacted to comprehensively address their roles. Therefore, it is proposed that Section 166 be expunged from the legal framework. The Nanavati Case⁸ is commonly recognized as the final jury trial held in India.

III. KEY POINTERS OF THE BILL

The Bharatiya Sakshya Bill, 2023 (BSB) replaces the Indian Evidence Act, 1872 (IEA). It maintains most of the provisions found in the IEA, including those pertaining to confessions,

⁵ Section 88 in The Indian Evidence Act, 1872

⁶ Section 113 in The Indian Evidence Act, 1872

⁷ Section 166 in The Indian Evidence Act, 1872

⁸ K. M. Nanavati vs State Of Maharashtra; 1962 AIR 605

relevancy of facts, and burden of proof. The IEA recognizes two types of evidence - documentary and oral. Documentary evidence encompasses primary documents (original documents) as well as secondary documents (which prove the contents of the original). The BSB maintains this distinction and expands it to include electronic records within the definition of documents. While the IEA categorizes electronic records as secondary evidence, the BSB classifies them as primary evidence. Furthermore, the BSB broadens the scope of such records to encompass information stored in semiconductor memory or any communication devices such as smartphones and laptops. Under the IEA, secondary evidence may be required under certain circumstances, such as when the original document is in the possession of the person against whom it is being presented or if it has been destroyed. The BSB introduces an additional condition, stating that secondary evidence may also be necessary if the authenticity of the document itself is in doubt.

(A) Key Issues and Analysis

The Supreme Court has acknowledged the potential for tampering with electronic records. While the BSB permits the admission of such records, there are no measures in place to prevent tampering or contamination during the investigative process. Currently, electronic records must be verified by a certificate to be considered admissible as documents. The BSB upholds these regulations for admissibility. Additionally, the BSB categorizes electronic evidence as documents, which may not require certification, leading to a contradiction. According to the IEA, information obtained from an accused in police custody can be used as evidence. The BSB maintains this provision. Concerns have been raised by Courts and Committees regarding the discovery of facts in police custody through coercion, lacking adequate safeguards. The IEA (and the BSB) allows such information to be admissible if obtained while the accused was in police custody, but not if obtained outside. The Law Commission has suggested eliminating this distinction, among other recommendations, which have yet to be implemented. One such recommendation is the presumption that a police officer caused injuries if an accused was harmed while in police custody.

(B) New Additions

1. Clause 61-

- **Admissibility of electronic or digital record.**

Nothing in the Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall have the same legal effect, validity and enforceability as paper records. This

clause is inserted for the admissibility of electronic or digital records in the court of law. They would have the same weightage as the paper records.

2. Clause 170 (1)

- **The Indian Evidence Act, 1872 is hereby repealed.**

(2) Notwithstanding such repeal, if, immediately before the date on which this Act comes into force, there is any trial, application, trial, inquiry, investigation, proceeding or appeal pending, then, such application, trial, inquiry, investigation, proceeding or appeal shall be dealt with under the provisions of the Evidence Act, 1872, as in force immediately before such commencement, as if this Act had not come into force. This Clause is inserted for repealing the Indian Evidence Act, 1872.

Summary of some notable differences in the provisions

Point of Differences	Indian Evidence Act	Bhartiya Sakshya Adhinyam 2023
DEFINITIONS	The definitions of ‘conclusive proof’, ‘may suppose’, and ‘shall presume’ have been combined into a single definition phrase in Section 2. Evidence is specified under Section 2(e) of the BSA. It now expressly encompasses both electronic assertions and documents, such as electronic or digital records. The Adhinyam also allows for the interpretation of terms used in the Bill but not clearly defined by it. Such terminology must	Section 3 of The Indian Evidence Act has an interpretation clause. Section 4 of the Act specifies the phrases may presume, shall presume, and conclusive evidence.

	<p>have the same meaning as those defined in the Information Technology Act of 2000, Bharatiya Nagarik Suraksha Sanhita, 2023, and Bharatiya Nyaya Sanhita, 2023, as applicable.</p>	
<p>CLOSELY CONNECTED FACTS</p>	<p>A new heading is added in Chapter 2 that provides closely connected facts (which include provisions relevant to facts forming part of the same transaction, facts being an occasion, cause or effect of facts in issue, facts showing existence of mind, etc.) identical to equivalent provisions in the Evidence Act of 1872.</p>	<p>There is no such heading in Chapter 2 of the Indian Evidence Act, 1872.</p>
<p>ON CONFESSIONS</p>	<p>Two additional clauses have been added, allowing specific sorts of confessions to be considered relevant. Sections 25 and 26 of the Evidence Act, which deal with confession to a police officer and confession, have now been combined while adding a proviso. Sections 22, 23, and 24 summarise the provisions pertaining to</p>	<p>Sections 24-29 contain provisions respecting confessions.</p>

	confession.	
ON DIGITAL SIGNATURE	Section 45 ⁹ of the Evidence Act has been amended, and the new provision states that the examiner's view on electronic evidence under Section 79A ¹⁰ of the IT Act is a relevant fact for material held digitally. Furthermore, provisions relating to views on handwriting and digital signatures that were formerly contained in Sections 47 and 47A of the Evidence Act have been consolidated into a single Section with no textual changes.	Sections 47A, 67A, and 73A each had provisions pertaining to digital signatures.
FACTS NEED NOT TO BE PROVED	Section 52 of Chapter III of the Bill, which deals with 'facts which need not be proved', is comparable to Section 57 of the Evidence Act. The Section's scope has been enlarged to encompass India's foreign treaties, agreements, and conventions with other nations, as well as decisions taken by India in	Section 57 of Chapter 3 allows for facts about which the court shall take judicial notice.

⁹ Section 45 in The Indian Evidence Act, 1872

¹⁰ Section 79A in The Indian Evidence Act, 1872

	international organizations and other bodies.	
PRIMARY EVIDENCE	5 new explanations are added to the definition of primary evidence under Section 57 ¹¹ , recognizing (i) where documents made using a uniform process such as printing, lithography, or photography, where each is primary evidence of the contents of the rest; but where they are copies of a common original, they are not primary evidence of the contents of the original, (ii) where electronic or digital records are recorded or stored, each file is a primary-evidence.	Section 62 of the act defines main evidence. Only two explanations are available.
ON SECONDARY EVIDENCE	The definition of secondary evidence has been amended; the equivalent Section contains additional categories including oral admissions, written admissions, and evidence of a person examining a document within the meaning of secondary evidence.	Section 63 of the Indian Evidence Act 1872 provides for the definition of secondary evidence.

¹¹ Section 57 in The Indian Evidence Act, 1872

ELECTRONIC EVIDENCE	The laws concerning electronic evidence have been simplified, and Section 63 ¹² allows for the admission of electronic or digital records, which, according to Section 61 ¹³ , must have the same legal effect, validity, and enforceability as paper documents. Electronic or digital records are admissible only if specific requirements are met.	Section 65 B of the Indian Evidence Act 1872 specifies the admission of electronic documents.
PUBLIC DOCUMENTS	Sections 74 ¹⁴ and 75 of the Evidence Act have been integrated in the Act to encompass descriptions of both public and private documents; the new provision is identical in content to the provisions in the Evidence Act.	Sections 74 and 75 of the Act define public and private papers, respectively.

Aside from the aforementioned substantial variations, some additional minor adjustments have been made to the current Evidence Act to achieve the goal of dispensing a fair trial procedure.

IV. COMPARISON WITH INTERNATIONAL STANDARDS

(A) Alignment with International Evidence Acts

- i. The Bharatiya Sakshya Act, 2023 (BSA, 2023) recognises electronic records as

¹² Section 63 in The Indian Evidence Act, 1872

¹³ Section 61 in The Indian Evidence Act, 1872

¹⁴ Section 74 in The Indian Evidence Act, 1872

main evidence, comparable to the Chinese Criminal Procedural Law, which likewise considers electronic data as statutory evidence.

- ii. Unlike the EU's e-Evidence package, the BSA, 2023 does not address international collaboration or cross-jurisdictional difficulties in electronic evidence collecting.

(B) Global Best Practices in Handling Electronic Evidence

- i. The BSA, 2023 uses modern verification procedures for electronic evidence, including hash value verification, a global best practice to assure data integrity. This technique is also prevalent in countries such as China, where blockchain technology is employed for similar objectives.
- ii. The BSA, 2023 lacks measures included in other international frameworks, such as the EU's regulation that requires service providers to assist with law enforcement demands, resulting in a more efficient access to electronic evidence across EU states.
- iii. International groups like as INTERPOL require strong measures to ensure the integrity and admissibility of electronic evidence through standardized forensic techniques, which are not completely integrated into the act.

(C) Electronic Record

The Bharatiya Sakshya Bill, 2023, has various clauses regarding electronic evidence. These regulations aim to establish a framework for the admission and certification of electronic evidence in court proceedings. Some of the important provisions concerning electronic evidence include:

1. Definition of electronic record: According to the law, an electronic record is any data, record, or data-generated picture or sound that is saved, received, or communicated in electronic form, microfilm, or computer-generated microfiche.
2. Admissibility of electronic records: The law states that an electronic record can be admitted as evidence in any judicial procedure and has the same legal impact, validity, and enforceability as a paper record.
3. Certification of electronic records: In any action in which an electronic record is used to provide a statement in evidence, a certificate must be filed alongside the electronic record. The certificate must identify the electronic record holding the assertion and detail how it was created. It shall also give particulars of any device involved in the

generation of that electronic record and deal with any of the subjects to which the criteria indicated in sub-section (2) apply.

4. Matters to be indicated in the certificate: The certificate must be signed by the person in charge of the computer or communication device as well as an expert (whichever is appropriate) and shall serve as proof of any matter described in the certificate. The certificate must state the facts about the electronic record, such as the method of production, the date and time of creation, and the name of the person who generated it.
5. Hash value of the original record: The certificate must also include the matching hash value of the original record, which is acceptable as proof of evidence in the form of secondary evidence.
6. Burden of proof: According to the law, the individual seeking to rely on an electronic record is responsible for demonstrating its legitimacy. These regulations aim to establish a framework for the admission and certification of electronic evidence in court proceedings. They are meant to guarantee that electronic evidence is handled equally with paper documents and that its legitimacy is verified through a certification procedure. The regulations attempt to ensure that the rules of evidence are followed equally throughout all courts in India.

V. THE CHALLENGES MAY ARISE IN IMPLEMENTATION

The implementation of the Bharatiya Sakshya Bill, 2023 is likely to face several challenges. Some of the challenges that may arise in the implementation of the bill are:

1. Legal professionals may lack understanding and training on new evidence ideas and regulations introduced by the law. The bill's implementation may need intensive training and awareness programs to ensure that legal practitioners are fully prepared to apply the new evidence rules.
2. Resistance to change: The Indian judicial system has been governed by the Indian Evidence Act, 1872 for more than a century. The implementation of new legislation may meet opposition from legal experts who are used to the old norms of proof.
3. The bill's new evidence rules may be interpreted and applied differently by various courts. This may result in discrepancies in the implementation of the regulations in various courts.
4. Technical challenges: The measure expands the admission of electronic and digital

recordings as evidence. The application of these regulations may necessitate extensive technological infrastructure and skill.

5. Resource constraints: Implementing the bill may require considerable financial, human, and technological resources. The availability of these resources may provide a barrier, especially for smaller courts and legal organizations.
6. New mechanisms for certification of facts and evidence are included in the law to address enforcement difficulties. Enforcing these regulations may prove difficult, especially if the certification procedure is not followed effectively.
7. Impact on case backlog: The bill's adoption may affect the Indian court backlog. The implementation of new rules of evidence may necessitate the re-examination of existing evidence in current cases, further delaying their conclusion. The ramifications for India's legal system.

(A) The Bharatiya Sakshya Bill, 2023 has several implications for the Indian legal system.

Some of the key implications of the bill are:

1. The bill aims to modernise the Indian legal system by creating more explicit and standard norms of practice for courts dealing with facts and situations using evidence. This is anticipated to align the Indian legal system with foreign best practices, making it more efficient and effective.
2. The measure makes electronic or digital records admissible as evidence, with the same legal impact, validity, and enforceability as paper documents. This is likely to boost the use of electronic evidence in court procedures, which is becoming more crucial in the digital era.
3. Improved evidence quality: The bill aims to provide more specific and consistent procedures for courts when dealing with case facts and situations through evidence. This is intended to raise the quality of evidence provided in judicial procedures, which is critical to achieving fair and just decisions.
4. The measure aims to reduce litigation time and expenses by establishing more precise and standard evidence-based court procedures. This is supposed to minimize the time and expenses of litigation, which is a key problem in the Indian judicial system.
5. Improved access to justice: The measure aims to improve court practice by

establishing more specific and universal guidelines for dealing with evidence-based cases. This is anticipated to increase access to justice for all citizens, particularly the marginalized and underprivileged.

6. **Increased burden on the judiciary:** The measure includes new evidentiary ideas and regulations that legal practitioners may not be familiar with. The bill's implementation may need intensive training and awareness programs to ensure that legal practitioners are fully prepared to apply the new evidence rules. This might raise the pressure on the judiciary in the short run.
7. **Technical infrastructure and knowledge required:** The measure expands the admission of electronic and digital evidence. Smaller courts and legal institutions may find it difficult to apply these laws since they may necessitate extensive technical infrastructure and experience.

Overall, the Bharatiya Sakshya Bill, 2023 has various ramifications for the Indian judicial system, including modernization, expanded use of electronic evidence, enhanced evidence quality, and improved access.

(B) Future Implications

1. Potential Long-term Effects on the Indian Judicial System.

- The Bharatiya Sakshya Act, 2023 (BSA, 2023) is projected to improve legal procedures' efficiency and effectiveness. Using electronic and digital documents as key evidence is expected to improve efficiency, reduce delays, and perhaps reduce case backlogs.
- The Act's current components are in line with technological improvements, perhaps leading to a more powerful framework for dealing with contemporary forms of evidence and cybercrime.

2. Role of the Judiciary and Legal Practitioner.

- The courts will play a significant role in interpreting and applying the new provisions of the BSA 2023. Judges will need to be taught on the subtleties of digital evidence and its legal ramifications in order to guarantee fair and reasonable trials.
- Lawyers and prosecutors must update their abilities and knowledge of digital technology and electronic evidence to keep up with the changing landscape. This change is necessary for the successful execution of the Act.

3. Challenges to facts discovered in police custody

- **Information obtained in police custody using coercion may be provable**

The IEA states that if a fact is found as a consequence of information obtained from an accused in police custody, the information may be accepted provided it is clearly related to the fact revealed. The BSB keeps this provision. Over the years, the Supreme Court and different Law Commission findings have underlined the possibility that facts were found in prison as a result of the accused's duress and torture. The Law Commission (2003) said that facts obtained in police custody by threats, intimidation, assault, or torture should not be proved.

- **Admissibility of fact depends on whether it was obtained outside or within police custody**

According to the IEA, information acquired from an accused in police custody is acceptable if it relates to a fact revealed, but identical information received from an accused outside of police custody is not admissible. The BSB maintains this difference. This provision's validity was challenged in 1960 on the grounds that it promotes unreasonable discrimination between those in and out of custody. The Court affirmed the legality, finding that the statute created a legitimate distinction by establishing separate standards for people outside and inside police custody. The Law Commission (2003) advised re-drafting the Article to ensure that information pertaining to facts is relevant whether the statement was delivered in or outside police custody.

(C) Positives and Negatives of the Bharatiya Sakshya Adhiniyam

The positives of the New Indian Evidence Act are - Electronic Records as Documents, Expanded Scope of Admissible Evidence, Electronic Evidence in Detail, Oral Evidence via Electronic Means and Joint Trials Clarification which are a few innovative positive measures that are upheld in the Bharatiya Sakshya Adhiniyam. The admissibility of the electronic evidence shall be highly beneficial to the legal fraternity at large and would definitely help in early disposal of cases.

At the same time The Bharatiya Sakshya Adhiniyam introduces significant changes regarding electronic evidence, but these advancements raise concerns about potential manipulation and ambiguity inadmissibility. The Concerns Regarding Electronic Records involves susceptibility to tampering, Conflicting Admissibility Rules and Learning from Other Jurisdictions become a bar for the admissibility of the Electronic Evidence. Another issue that arises is regarding Police Confessions and information gathering which upheld confessions under-duress and disparity between in-custody and out-of-custody information.

VI. CONCLUDING REMARKS AND WAY AHEAD

In conclusion, the Bharatiya Sakshya Bill, 2023, has the potential to significantly alter the Indian legal system. The bill intends to modernise the Indian legal system by establishing more specific and universal norms of court practice for dealing with the facts and circumstances of a case via evidence. The measure also aims to promote the use of electronic evidence, improve its quality, and minimise the time and expenses involved with litigation. However, the bill's execution may need extensive technological infrastructure and knowledge, perhaps increasing the judiciary's workload in the short term. Overall, the Bharatiya Sakshya Bill, 2023 is a step towards a more efficient and effective legal system in India. The current draft does not include the revisions made by the different law commissions and committees. The primary alteration is the acceptability of electronic records, which may have been included by Amendment. However, given the current circumstances, introducing a fully new Adhinyam does not constitute a change of the country's existing criminal laws. It entails achieving an aim far bigger than simply altering the name of the Act. The sole significant difference between the Indian Evidence Act of 1873 and the Bhartiya Sakhshya Adhinyam of 2023 is the shift from India to Bharat, as well as the name of the Act.
