

# Dispute Resolution Hotline

February 16, 2024

## NAVIGATING CRIMINAL LAW REFORMS: PART III - BHARATIYA SAKSHYA ADHINIYAM 2023

This is the third part of our series on criminal law reforms. The first two parts can be found [here](#) (Bharatiya Nyaya Sanhita, 2023 replacing the Indian Penal Code, 1100%) and [here](#) (Bharatiya Nagarik Suraksha Sanhita, 2023 replacing the Criminal Procedure Code, 1973).

### INTRODUCTION:

The Bharatiya Sakshya Adhinyam, 2023 ("BSA") repeals and replaces the Indian Evidence Act, 1872 ("IEA"). The Bharatiya Sakshya Bill, 2023) was introduced in the Lok Sabha on 11 August 2023. Pursuant to the recommendations of the Standing Committee on Home Affairs, Rajya Sabha ("Standing Committee"), the Bharatiya Sakshya (Second) Bill, 2023 was introduced on 12 December 2023 in the Lok Sabha. The revised bill was passed by the Lok Sabha and the Rajya Sabha on 20 December 2023 and 21 December 2023 respectively. It received presidential assent on 25 December 2023. The BSA is yet to be notified and come into force. The BSA retains most of the provisions of the IEA, flavoured with validity of electronic evidence.

### KEY CHANGES INTRODUCED IN THE BSA:

#### Removal of colonial and archaic terms

- References to colonial terms such as 'Parliament of the United Kingdom', 'Provincial Act', 'London Gazette', 'Commonwealth', 'Privy Council', 'Queen's Printer', 'Her Majesty', colonial proclamations and orders<sup>1</sup> have been removed. Archaic terms like 'vakil', 'pleader', 'barrister' have been replaced with 'advocate'.<sup>2</sup> Terms like 'lunatic' have also been replaced with more sensitive terminologies, like 'person of unsound kind'.<sup>3</sup>

#### Territorial Application of the BSA

- Earlier, Section 1 of the IEA stipulated that the IEA applied to the whole of India. Section 1 of the BSA does not contain such a provision. This is presumably to enable admissibility of digital evidence generated outside India.

#### Addition of Section 2(2) of the BSA

- Section 2(2) of the BSA is a new provision which states that words and expressions used herein and not defined but defined in the Information Technology Act, 2000, Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS") (replacing the Code of Criminal Procedure, 1973) and Bharatiya Nyaya Sanhita, 2023 (replacing the Indian Penal Code, 1100%) shall have the same meanings as assigned to them in the said Act and Sanhita.

#### Application to Courts-martial

- Section 1 of the IEA clarified that the IEA does not apply to courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act or the Air Force Act. Section 1(2) of the BSA omits the words "convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act or the Air Force Act". Thus, the BSA now applies to courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act or the Air Force Act.

#### Changes related to electronic and digital records

- Definition of "document" now includes electronic and digital records** – Section 2(1)(d) of the BSA<sup>4</sup>, while retaining the earlier definition of "document", adds "electronic and digital records" within its ambit. To illustrate this addition, the BSA adds an illustration "electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents."

To qualify as a "document" or "documentary evidence" under the BSA, now it is not necessary that a matter be expressed or described upon any substance by means of letters, figures or marks only. Any matter which is "otherwise recorded" upon any substance "by any other means" will also qualify as a document. Thus, video recordings on mobile phones may also qualify as "documentary evidence". Electronic or digital form of Official Gazette is also admissible as evidence.<sup>5</sup>

- Definition of "evidence" now includes information given through electronic means** – Section 2(1)(e) of the BSA<sup>6</sup> includes statements given electronically by witnesses are to be treated as evidence as well as oral evidence. Similarly, electronic and digital records are also included within the definition of documentary evidence. The BSA attempts to provide feasible solutions for issues related to physical presence in courts for oral evidence such as availability of witnesses, travel and related expenses. With the increasing relevance of technology, the BSA

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recognises the validity of information provided electronically. Reference may be drawn to Section 530 of the BNSS which provides for examination of witnesses and complainant in criminal proceedings in electronic mode, by use of electronic communication or use of audio-video electronic means.

- **Electronic or digital form of law books now relevant** – Section 32 of the BSA<sup>7</sup> now deems electronic or digital forms of law books 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 including in electronic or digital form purporting to be a report of such rulings the law of which the Court has to form an opinion on, relevant.
- **Primary evidence now includes certain electronic and digital records** – Section 57 of the BSA<sup>8</sup> specifically includes the following electronic and digital records as primary evidence –
  - Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence. (*Explanation 4 to Section 57, BSA*)
  - Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed. (*Explanation 5 to Section 57, BSA*)
  - Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence. (*Explanation 6 to Section 57, BSA*)
  - Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence. (*Explanation 7 to Section 57, BSA*)
- **Admissibility of electronic evidence** – The BSA introduces parity in validity and admissibility of electronic and digital records as evidence. Section 61 of the BSA provides that electronic or digital records shall have the same legal effect, validity and enforceability as other document.<sup>9</sup> Section 62 of the BSA<sup>10</sup> states that the contents of electronic records may be proved in accordance with Section 63 of the BSA.<sup>11</sup>
  1. Section 63 of the BSA now includes electronic records copied in semiconductor memory in addition to optical or magnetic media as provided in the IEA.
  2. It also enlarges the ambit of the provision by covering electronic records produced by any communication device or otherwise stored, recorded or copied in any electronic form (and not only a computer, as was the case in the IEA). Thus, the scope of devices through which electronic or digital records can be sourced as evidence has been enlarged.
  3. Further, Section 63(3) of the BSA now states that “*Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers or communication device, whether—*
    - (a) *in standalone mode; or*
    - (b) *on a computer system; or*
    - (c) *on a computer network; or*
    - (d) *on a computer resource enabling information creation or providing information processing and storage; or*
    - (e) *through an intermediary,**all the computers or communication devices used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer or communication device; and references in this section to a computer or communication device shall be construed accordingly.*”<sup>12</sup>
  4. Section 63(4) of the BSA now provides a specified format for a certificate to be submitted along with electronic evidence at each instance it submitted for admission. Earlier, this was done simply by filing an affidavit. The format of the certificate is appended as a Schedule to the BSA. This format will bring in certainty and make the process simpler and user-friendly.
  5. Earlier, Section 65B of the IEA required “*a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate)*” to sign the certificate. Now, Section 63 of the BSA requires a “*person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert*” to sign the certificate.
- **Electronic and Digital Signature** – Sections 85 (which speaks about electronic agreements affixed with electronic signatures of parties) and 86 of the BSA (which speaks about electronic records and electronic signatures)<sup>13</sup> now include *digital* signatures in addition to ‘electronic signature’.

#### Other key changes

- **Facts in issue** – Previously, Section 6 of the IEA stated that facts which, though not in issue, but which are so connected with a fact in issue as to form part of the same transaction are relevant. Section 4 of the BSA, in addition, states that facts though not in issue are connected with a relevant fact as to form part of the same transaction, are relevant.
- **Addition of “coercion” to disqualify a confession from being relevant** – Earlier, Section 24 of the IEA included elements of inducement, threat or promise to deem a confession irrelevant in a criminal proceeding. Section 22 of the BSA,<sup>14</sup> retains these elements, and adds the element of coercion to render the confession irrelevant in a criminal proceeding.
- **Joint trial where the accused has absconded or fails to comply with a proclamation issued under the BNSS** –

Section 24 of the BSA, while retaining the text of Section 30 of the IEA, its corresponding provision on joint trials, adds an explanation which states that a trial of more than one person held in the absence of the accused who (a) has absconded; or (b) fails to comply with a proclamation issued under Section 84 of the BNSS, shall be deemed to be a joint trial.

- **Experts** – Section 39 of the BSA<sup>15</sup> enlarges the fields an expert may give his/her opinion on by adding “*or any other field*” to “*foreign law, science or art*” as provided under Section 45 of the IEA, such that they are considered relevant facts.
- **Judicial notice** – Section 52(1)(a) of the BSA states that the Court shall take judicial notice of all laws in force in the territory of India, including laws having extra-territorial operation. This provision was absent in the corresponding provision in the IEA. Section 57 of the IEA simply referred to “all laws in force in the territory of India”. Section 52(1)(b) of the BSA states that the Court shall take judicial notice of international treaty, agreement or convention with country or countries by India, or decisions made by India at international association or other bodies, and seals of Tribunals in additions to seals of courts.
- **Secondary evidence** – Section 58 of the BSA<sup>16</sup> adds oral admissions, written admissions and evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents, as being secondary evidence.

Earlier, “oral admissions as to the contents of a document” were permissible where: (1) a party can show that he is entitled to give secondary evidence under Section 65 of the IEA; (2) the genuineness of a document is under challenge.<sup>18</sup> Similarly, a “written admission” was admissible “*when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest*”.<sup>19</sup> None of these were categorized as secondary evidence under Section 63 of the IEA. Now, the inclusion of oral and written admissions in Section 63 of the BSA has addressed categorically that they are deemed as secondary evidence. The qualifiers of when oral and written admissions are admissible are still retained.<sup>20</sup>

- **Proper Custody** – Section 80 of the BSA<sup>21</sup> states that “*The Court shall presume the genuineness of every document purporting to be the Official Gazette, or to be a newspaper or journal, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.*”

Section 81 of the IEA did not specify what “proper custody” meant. An Explanation added to Section 80 of the BSA does precisely that. It clarifies that for the purposes of Sections 80 and 92 (Presumption as to documents thirty years old) of the BSA, a document is said to be in proper custody if it is in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render that origin improbable.<sup>22</sup>

This definition of “proper custody” won’t be applicable to Explanation 5 to Section 57 of the BSA, presumably leaving it to the courts to decide what it shall mean in the context of the Section 57, BSA.

- **Accomplice** – Under the IEA, there was a conflict between illustration (b) of Section 114 which read – “*that an accomplice is unworthy of credit, unless he is corroborated in material particulars*”, and Section 133, which read – “*An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.*”

Thus, while Section 133 of the IEA made admissible the uncorroborated testimony of an accomplice, illustration (b), Section 114 of the IEA deemed it unworthy of credit unless corroborated with material particulars.

This conflict is resolved in the BSA. Section 138 of the BSA<sup>23</sup> now reads as “*An accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.*”<sup>23</sup>

## CONCLUDING REMARKS:

The BSA primarily seeks to broaden the IEA and address the admissibility of digital evidence to keep pace with the contemporary world. The Standing Committee while terming such changes as “*forward looking*” had, however, expressed concern about the possibility of tampering of electronic evidence when being channeled through the proper chain of custody during the course of investigation.<sup>25</sup> This is especially so in light of Section 57, Explanation 5 of the BSA which states that where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed. The Standing Committee recommended adding suitable safeguards in the BNSS to ensure authenticity and genuineness of such electronic or digital records in the BNSS. Except these modifications, most changes made by the BSA do not seem to be very substantial. Changes made by the BSA are in consonance with those made by the BNS and BNSS and will complement each other. These changes will accelerate the trial process resulting in speedy justice dispensation.

– Ansh Desai, Shweta Sahu, Alipak Banerjee and Vyapak Desai

You can direct your queries or comments to the authors.

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<sup>1</sup>Section 77 of BSA (corresponds to Section 78 of the IEA); Section 79 of BSA (corresponds to Section 80 of the IEA).

<sup>2</sup>Section 132 of the BSA (Corresponds to Section 126 of the IEA); Section 133 of the BSA (Corresponds to Section 128 of the IEA); Section 153 of the BSA (Corresponds to Section 150 of the IEA).

<sup>3</sup>See, Section 124 of the BSA (Corresponds to Section 118 of the IEA)

<sup>4</sup>Corresponds to Section 3 (definition of "document") of the IEA.

<sup>5</sup>Section 31 of the BSA.

<sup>6</sup>Corresponds to Section 3 (definition of "evidence") of the IEA.

<sup>7</sup>Corresponds to Section 38 of the IEA.

<sup>8</sup>Corresponds to Section 62 of the IEA.

<sup>9</sup>There is no corresponding provision in the IEA.

<sup>10</sup>Corresponds to Section 65A of the IEA.

<sup>11</sup>Corresponds to Section 65B of the IEA.

<sup>12</sup>The categories of "computers" has been replaced from the erstwhile corresponding provision of Section 65B(3) of the IEA – "(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers"

<sup>13</sup>Correspond to Sections 85A and 85B of the IEA respectively.

<sup>14</sup>Section 22, first proviso to Section 22, and the second proviso to Section 22 of the BSA correspond Sections 24, 28, 29 of the IEA respectively.

<sup>15</sup>Corresponds to Section 45 of the IEA.

<sup>16</sup>Corresponds to Section 63 of the IEA.

<sup>17</sup>Section 22 of the IEA.

<sup>18</sup>Section 65(b) of the IEA.

<sup>19</sup>Section 20 of the BSA (Corresponds to Section 22 of the IEA); Section 60 of the BSA (Corresponds to Section 65 of the IEA)

<sup>20</sup>Corresponds to Section 81 of the IEA.

<sup>21</sup>A similar explanation has been added to Section 81 of the BSA (Presumption as to Gazettes in electronic or digital record), which applies to Section 93 of the BSA (Presumption as to electronic records five years old) as well – "*For the purposes of this section and section 93 electronic records are said to be in proper custody if they are in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render that origin probable.*"

<sup>22</sup>Corresponds to Section 133 of the IEA.

<sup>23</sup>See Report No. 248, "*Bharatiya Sakshya Bill, 2023*" dated 10<sup>th</sup> November 2023, ("**Report No. 248**") at [4.10.3].

<sup>24</sup>Report No. 248, at [4.7.2].

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