

Induction Training Programme of Panchayat Executive Officers

Session I – *Bharatiya Sakshya Adhinyam, 2023*



©Dr. Sumiti Ahuja

Assistant Professor (Reader Grade), Faculty of Law,
University of Delhi

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Topics Covered

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- ▶ Statement of Objects & Reasons to the BSA
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- ▶ Key Changes incorporated in BSA, 2023
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- ▶ Discussion of Various Crucial Changes introduced under BSA
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- ▶ Steps to make BSA more effective
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“

Law must be conscious of the speed of change in society and accordingly adapt

”

Motto behind the changes in the law of evidence as introduced through the *Bharatiya Sakshya Adhinyam*, 2023

The stakes are much higher when it comes to the reform of laws, which form the backbone of all judicial proceedings in the country

Introduction

- ▶ Throughout our history, diff criminal justice systems have evolved & gained prominence in diff regions under various rulers
- ▶ During British rule, criminal laws were codified for the very first time, and these remained largely unchanged until recently: IPC is the official criminal code drafted in 1860 in the wake of the first Law Commission estd in 1834 under the Charter Act of 1833
- ▶ IEA was originally passed in India by the Imperial Legislative Council in 1872: provides a set of rules & allied issues governing admissibility of evidence in courts of law
- ▶ In Dec 2023, Parliament passed three pivotal Bills: Bhartiya Nyaya Sanhita, Bhartiya Nagarik Suraksha Sanhita & Bhartiya Sakshya Adhinyam to overhaul criminal justice system

Introduction (Contd.)

- ▶ Amongst the three newly enacted criminal laws, least changes in BSA, 2023 as compared to IEA, 1872: 170 sections (23 changed); retains key provisions of IEA
- ▶ Significant changes pertain to consolidation of sections and removal of references from the colonial era, while maintaining a construct largely similar to that of the IEA
- ▶ Scope of secondary evidence slightly broadened & some changes made in provisions relating to electronic evidence
- ▶ Long title of the BSA:
 - ▶ “An Act to consolidate and to provide for general rules and principles of evidence for fair trial”
- ▶ BSA recognizes that enunciating rules & principles of evidence is not an end in itself; the aim for providing for general rules and principles of evidence is to ensure a fair trial
- ▶ In contrast, aims & objects of the IEA, to consolidate, define and amend the laws of evidence

Statement of Objects & Reasons to the BSA

- ▶ 2. “The experience of seven decades of Indian democracy calls for comprehensive review of our criminal laws including Indian Evidence Act and adopt them in accordance with the contemporary needs and aspirations of people.....The existing law does not address the technological advancement undergone in the country during the last few decades”
- ▶ 3. “The proposed legislation, namely "Bhartiya Sakshya Adhiniyam", *inter alia*, provides as under,— (i) it provides that 'evidence' includes any information given electronically, which would permit appearance of witnesses, accused, experts and victims through electronic means; (ii) it provides for admissibility of an electronic or digital record as evidence and it shall have the same legal effect, validity and enforceability as paper records.....” It also seeks to expand the scope of secondary evidence and put limits on the facts which are admissible and its certification as such in the courts

Applicability & Commencement of BSA

- ▶ Section 1 of the IEA provided that it extended to the whole of India; whereas, Section 1 of the BSA omits this provision on territorial extent. It also omits definition of “India” as existed under section 3 of the IEA.
- ▶ Possible reason : any stipulation that the BSA extends to the whole of India would call into question the admissibility of evidence digitally generated outside the borders of India
- ▶ Applicability to courts-martial
- ▶ Relevance of section 170, sub-sections (1) and (2) of the BSA (**Repeal & Savings**)

Key Changes incorporated in BSA

- ▶ **Documentary Evidence:** Under IEA, a document includes writings, maps, & caricatures; under BSA, electronic records will also be considered as documents: Documentary evidence includes primary & secondary evidence
- ▶ Primary evidence includes original document & its parts, such as electronic records & video recordings
- ▶ Secondary evidence contains documents & oral accounts that can prove the contents of the original
- ▶ BSA expands secondary evidence to include: (i) oral & written admissions, and (ii) testimony of a person who has examined the document & is skilled to examine the documents (Sub-sections 6-8 of section 58, BSA)
- ▶ **Oral Evidence:** Under IEA, oral evidence includes statements made before Courts by witnesses in relation to a fact under inquiry, whereas BSA allows oral evidence to be given electronically, which would permit witnesses, accused persons & victims to testify through electronic means

Key Changes incorporated in BSA (Contd.)

- ▶ **Admissibility of Electronic/Digital Records as Evidence:** Under BSA, documentary evidence includes information in electronic records that have been printed or stored in optical or magnetic media produced by a computer
 - ▶ Such information may have been stored or processed by a combination of computers or different computers also
- ▶ **Joint Trials:** A joint trial refers to the trial of more than one person for the same offence
 - ▶ Under IEA, in a joint trial, if a confession made by one of the accused which also affects other accused is proven, it will be treated as a confession against both
 - ▶ The BSA adds an explanation to this provision: It states that a trial of multiple persons, where an accused has absconded or has not responded to an arrest warrant, will be treated as a joint trial
- ▶ **Accomplice Evidence:** provision in line with illustration (b) to section 138

Key Changes incorporated in BSA (Contd.)

- ▶ **Judicial notice of international treaties, agreements, and conventions:** BSA requires Courts to take judicial notice of international treaties, agreements, or conventions with countries by India or decisions made by India at international associations or other bodies.
- ▶ **Addition of ‘coercion’ as an act causing a confession to become irrelevant:** BSA also adds ‘coercion’ as an act causing invalidation of a confession by an accused. This affords greater protection to accused persons by ensuring that persons in authority apply no undue pressure to elicit confessions.
- ▶ **Non-production of documents containing communication between Ministers and the President of India**

Sections of IEA repealed by BSA

Section 3 para 10	India
Section 22A	When oral admissions as to contents of electronic records are relevant
Section 82	Presumption as to document admissible in England without proof of seal or signature
Section 88	Presumption as to telegraphic messages
Section 113	Proof as to cession of territory
Section 166	Power of jury or assessors to put questions

Glimpse into Various Crucial Changes introduced under BSA

- ▶ **Precise Definition of “Document”:** An illustration to the definition of “document” (which includes electronic and digital records) says that an 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”
- ▶ **Clarity With Respect to Primary (Electronic) Evidence:** Where a video recording is simultaneously stored in electronic form & transmitted or broadcast or transferred to another, each of the stored recordings shall be primary evidence (Explanations 4-7, BSA)
 - ▶ May help investigating agencies in fixing culpability of a cyber-criminal even if he destroys his original electronic record to deny various allegations, because evidence may be collected from other sources without its value getting diminished
- ▶ **Synchronization with IT Act, 2000:** S. 63, which deals with admissibility of electronic records, includes terms such as ‘semiconductor memory’ and ‘any communication device’ for better visibility: this does not change the impact of the provision because the definition of ‘electronic form’ given in the IT Act, 2000 includes information generated, sent, received or stored in ‘computer memory’

Glimpse into Various Crucial Changes introduced under BSA (Contd.)

- ▶ It should also be noted that the new provision retains the mandatory requirement of the certificate, but it clarifies that the certificate has to be submitted along with the electronic record at each instance where it is being submitted before a court
- ▶ Furthermore, earlier the certificate had to be given by a person ‘occupying a responsible official position’, now it is clarified that any person ‘in charge of the computer or communication device and an expert (whichever is appropriate)’ can give the certificate.

Concerns regarding various provisions of BSA

- ▶ **Issues Regarding Electronic Records:** In 2014, SC recognized that electronic records are susceptible to tampering and alteration: without adequate safeguards, if the whole trial is based on proof of electronic records, it may lead to a travesty of justice
- ▶ **Ambiguity in Admissibility of e-Records:** BSA gives court discretion to consult an Examiner of Electronic Evidence to form an opinion on such evidence, & includes electronic records in the definition of documents, while retaining the provision that all documents admissible as primary evidence, unless it qualifies as secondary evidence (original has been destroyed, or is with person against whom document must be proved)
- ▶ **Info Obtained in Police Custody May be Provable:** IEA provides that if a fact is discovered as a result of info recd from an accused in police custody, that info can be admitted if it distinctly relates to fact discovered, & BSA retains this provision: SC & various Law Commission reports have highlighted that facts may have been discovered in custody due to accused being subject to duress & torture
- ▶ **Discrimination Between Accused Within/Outside Police Custody:** Under IEA, info recd from an accused in police custody is admissible if it relates to a fact discovered, whereas similar info not admissible if it was received from an accused outside police custody, & BSA retains this distinction

Steps to make BSA more effective

- ▶ The **Standing Committee on Home Affairs (2023)** noted the importance of safeguarding authenticity & integrity of electronic & digital records, because they are especially prone to tampering
- ▶ It recommended mandating that all electronic & digital records collected as evidence during investigation be securely handled & processed through proper chain of custody
- **Guidelines Framed by Karnataka High Court:** In 2021, Karnataka HC introduced guidelines for minimum safeguards during search & seizure of electronic records:
 - qualified forensic examiner should accompany search team
 - IO prohibited from using seized electronic device during search & seizure of electronic records
 - electronic storage devices (pen drives, hard drives, etc.) should be packed in Faraday pouch to block transmission of electromagnetic signals, which can disrupt/destroy data stored in the device

Recommendations of Law Commission, 2003

- ▶ Facts discovered using any threat, coercion, violence or torture in consequence of info recd from accused in police custody should not be provable
- ▶ Facts should be relevant, whether discovered in police custody or outside custody
- ▶ Insertion of a new provision which states that if a person in police custody is injured, presumption that police caused injuries: reverse burden of proof upon the police
- ▶ Insertion of a new provision relating to prosecution of police officer for causing bodily injury to a person in police custody: presumption that such officer caused the injury
- ▶ Court should consider following before drawing a presumption:
 - ▶ period of custody
 - ▶ statements made by victim *w.r.t.* injury
 - ▶ examination report submitted by a regd medical practitioner
 - ▶ any recorded statements by a magistrate

Recommendations of Malimath Committee, 2003

- ▶ Introducing a new category of offences called ‘social welfare offences’ for minor violations that can be dealt with by imposing fines or community service
- ▶ Replacing adversarial system of criminal justice with a ‘mixed system’ that incorporates some elements of the inquisitorial system such as allowing judges to play an active role in collecting evidence and examining witnesses
- ▶ Reducing the standard of proof required for conviction from ‘beyond reasonable doubt’ to ‘**clear & convincing evidence**’
- ▶ Making confessions made before a **senior police officer admissible** as evidence

Provisions under IT Act, 2000

- ▶ **S. 43A:** if a body corporate that is possessing, dealing or handling sensitive personal data or information of an individual is negligent in ensuring reasonable security in the process, which results in wrongful loss or damage, then such body corporate is liable to pay damages
- ▶ Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data or Information) Rules, 2011, deals with protection of sensitive personal data like: financial information, sexual orientation, medical records, etc
- ▶ **S. 72A** of the IT Act: provides punishment of a fine extending to INR 5 lakhs or imprisonment for a term extending to three years in case of disclosure of information, knowingly and intentionally, without the consent of the person concerned, violating the terms of a lawful contract

Appreciation of Electronic Evidence

- ▶ Judge should understand & appreciate that info obtained is true & accurate representation of info originally contained, irrespective of whether acquisition was done entirely by law enforcement or in part, or entirely by civilian witness/victim
- ▶ *Mohd Ajmal Amir Kasab v. State of Maharashtra*: SC appreciated electronic evidence-CCTV footage, mobile devices, memory cards, data storage devices, intercepted VoIP calls & IP Addresses, while delivering judgment
- ▶ *Tukaram S. Dighole v. Manikrao Shivaji Kokate*, (2010) 4 SCC 329
- ▶ *Trimex Intl. v. Vedanta Aluminium Ltd.*, (2010) 3 SCC 1
- ▶ *Nidhi Kakkar v Munish Kakkar*, (2011)162 PLR113
- ▶ *Dharambir v. CBI*, 148 (2008) DLT 289
- ▶ *Gajraj v. State (NCT of Delhi)*, (2011) 10 SCC 675 - IMEI case

Conclusion

- ▶ Move aimed at contemporizing the justice delivery system in India, BSA has been introduced to replace IEA. While the BSA was published in the Official Gazette on 25 December 2023, due to administrative and logistical reasons, the said enactment is to come into force from July 01, 2024
- ▶ BSA introduces clarity in defn & admissibility of electronic records, particularly emphasizing importance of expert certification & hash algorithms for secure use of electronic mediums: may pose challenges for cyber laboratories, because of increased workload
- ▶ Crucial for enforcement agencies to raise awareness abt encryption methods & ensure that necessary infrastructure is in place before the law comes into effect

THANK YOU!