

Shortcomings of the Bharatiya Sakshya Adhiniyam, 2023: Challenges for Courts, Prisons, and Police

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Abstract:

The Bharatiya Sakshya Adhiniyam, 2023 (BSA) replacing the Indian Evidence Act, 1872 (IEA) introduces several new provisions that create challenges for courts, prisons, and police, impacting their operational efficiency. The increased focus on electronic evidence in judicial proceedings raises worries about the authenticity of digital records and the dependability of electronic testimony, which can easily be subject to manipulation and tampering. Moreover, the law's unclear provisions regarding the admissibility of electronic evidence add to the complexity of its application. Courts, Prisons and Police Units need infrastructural enhancements to support remote monitoring, which necessitates substantial financial investments in video conferencing technology and cyber security measures. For law enforcement agencies, the BSA calls for improved digital forensics capabilities and stricter protocols for evidence gathering in course of investigation, leading to additional administrative and logistical burdens. These deficiencies highlight the urgent need for secure authentication methods, ongoing updates to the legal framework, and increased technological investment to safeguard the integrity of digital evidence. Failing to address these issues could compromise the effectiveness and credibility of the justice system.

Keywords: Bharatiya Sakshya Adhiniyam, Indian Evidence Act, Digital Evidence, Electronic Evidence, Videoconferencing, Evidence Tampering.

1. Introduction:

The Bharatiya Sakshya Adhiniyam, 2023 (BSA) is an important legislative reform designed to update India's evidence laws. The Indian Evidence Act of 1872 (IEA), which was effective for more than a hundred years, was replaced by a new legislation in order to address present-day issues encountered in criminal and civil trials. The BSA is part of a comprehensive reform of India's criminal justice system, responding to advances in technology and shifting societal standards. Its main goal is to ensure that evidence can be admitted in a way that maintains due process while incorporating modern methods of evidence collection, such as electronic documentation and the use of technology for oral testimonies. Nonetheless, the success of the BSA will significantly hinge on its thorough execution throughout the extensive and varied legal framework of India, considering the country's unique regional differences and complexities.

While offering electronic oral evidence under the BSA comes with numerous benefits, it also presents notable challenges. A key concern is verifying the authenticity of electronic testimonies. With witnesses, victims, and defendants not physically present in the courtroom, the potential for tampering or

impersonation arises, jeopardizing the credibility of their statements. Accurately establishing the true identity of individuals providing electronic evidence is essential to uphold the integrity of the judicial process.



Additionally, technological malfunctions can significantly hinder the effective operation of this system. Issues such as unstable internet connections, power interruptions, or technical errors during virtual witness sessions may cause delays and result in misunderstandings or the loss of vital evidence. These difficulties highlight the necessity for courts, prisons and police to create a secure and dependable technological infrastructure that prevents such incidents.

To address these challenges, robust verification protocols are essential. These could involve secure logins, digital signatures, and real-time identity verification systems to authenticate individuals supplying electronic evidence. Furthermore, recording and archiving all electronic testimonies can enhance accountability and transparency, thereby safeguarding the integrity of investigations and trials under the BSA.

Legal experts have cautioned that without these protections, exclusive reliance on electronic evidence during trials could undermine the integrity of justice and possibly result in wrongful convictions. They emphasized the importance of exercising caution and ensuring procedural accuracy when dealing with electronic records.

2. Literature Review:

Researchers like Singh (2023) contend that although these developments are positive, they also bring forth worries regarding the credibility of the evidence, particularly due to the risks of tampering and manipulation in digital forms. It is vital to establish a secure chain of custody and conduct appropriate forensic validation to avoid potential miscarriages of justice.

Although the IEA concentrated mainly on oral and documentary evidence, the BSA recognizes the growing significance of digital footprints in the legal process. Nonetheless, critics note that despite the updates, some procedural uncertainties persist. For example, Rajagopalan (2023) contends that while the

BSA streamlines specific evidentiary standards, the ambiguity regarding the criteria for authenticating electronic records may result in inconsistencies in court decisions.

Critics such as Bhardwaj (2024) point out that the legislation offers increased safeguards for the accused by dismissing confessions acquired under coercion, thus aligning India with global human rights norms. Nevertheless, others contend that this could hinder investigations in cases where there is a lack of circumstantial evidence.

Due to the updated regulations concerning electronic evidence and remote testimonies, it's essential for judicial officers and law enforcement personnel to receive comprehensive training. Various research studies (such as Kumar, 2023) highlight the necessity of consistent training sessions and workshops to equip stakeholders with a better understanding of the complexities involved in digital forensics and managing electronic evidence.

The BSA significantly prioritizes technology; however, researchers such as Banerjee (2023) contend that the technological framework of the judiciary is not sufficiently advanced, especially in lower courts. It will be essential to guarantee that every court is equipped with video conferencing capabilities and secure systems for submitting electronic evidence.

Due to the dependence on digital information, there are ongoing worries regarding the privacy and security of this data. Patil (2024) expresses apprehensions about the methods of storing, transferring, and accessing digital evidence, emphasizing the necessity for well-defined protocols to safeguard this data against unauthorized access or alterations.

While the BSA is lauded for modernizing India's evidence laws, scholars have also pointed out potential areas for improvement. For example, Mehta (2023) criticizes the BSA for not adequately addressing growing concerns about artificial intelligence (AI) and machine learning when gathering and analysing evidence. As AI-based tools become increasingly prevalent in forensic investigations, the silence on these technologies could cause problems in future studies.

The BSA enhances the rules concerning secondary evidence. According to Pathak (2024), this enhancement seeks to modernize how evidence is collected and submitted, aligning with international best practices. Nonetheless, the hesitance to adopt the suggestions from the Law Commission's 69th report on secondary evidence has ignited discussions regarding whether the Act missed a chance for more comprehensive reform.

Sharma (2023) suggests that allowing oral evidence to be presented electronically under the BSA could greatly minimize trial delays by eliminating travel time and related logistical challenges. Nonetheless, there are ongoing concerns regarding the security and dependability of digital communications, prompting some experts to advocate for a strong infrastructure to guarantee the safety and integrity of these testimonies.

Additionally, many legal experts contend that the legislation continues to embody a conventional perspective on the adversarial justice system. Sengupta (2024) notes that there is a lack of focus on forensic and scientific evidence, which is vital in intricate criminal cases.

3. Shortcomings of the BSA:

Some of the significant shortcomings of the BSA are given below:

1. In the 2014 case of *Anvar P.V v. P.K Basheer*, the Supreme Court acknowledged the risk of alteration or manipulation of electronic records. Concerns were raised that relying solely on electronic records in court proceedings without sufficient safeguards could lead to wrongful convictions. While Section

- 61 and 63 of the BSA allows the use of electronic and digital records and empower the Court to consult with an electronic evidence examiner, there are no provisions to prevent tampering during the search, seizure, or investigation process. In 2023, the Standing Committee on Home Affairs emphasized the importance of maintaining the authenticity and integrity of electronic and digital records due to their vulnerability to manipulation. It recommended that all electronic and digital records collected during investigations be managed and processed securely in accordance with a defined chain of custody.
2. According to Section 81 of the BSA, courts should treat digital or electronic records from the Official Gazette as authentic if they meet statutory standards and are properly filed by authorized persons. However, the ambiguities surrounding the definition of "due care" pose a challenge. The flexible nature of the law opens the door to potential abuse, allowing individuals to submit forged or altered documents. Since the law presumes the authenticity of these records, less emphasis may be placed on rigorously verifying their validity, which would undermine their probative value in court, especially in light of concerns about tampering. In addition, heavy reliance on digital systems brings cybersecurity risks; if these systems face hacking or tampering, records can be altered, further reducing the reliability of the evidence.
 3. The BNS aims to substitute the term "unsound mind" with "mental illness" in its language. This change reflects a modern understanding of mental health issues and seeks to promote a more sensitive and accurate portrayal of individuals experiencing such conditions. However, it's important to note that the illustrations provided in sections 39 and 108 of the BSA still make reference to the concept of unsoundness of mind, indicating a lingering reliance on outdated terminology within certain parts of the document. This inconsistency highlights the need for further revisions to fully align the BSA's language with contemporary views on mental health.
 4. Section 124 of the BSA fosters inclusivity in legal testimony by affirming that everyone is allowed to testify unless their capacity to understand or respond rationally is compromised due to factors like age or illness. It gives the Court the authority to evaluate an individual's fitness to testify and to uphold justice. Nonetheless, the reliance on judicial discretion raises concerns about potential bias or inconsistencies in decisions, particularly regarding vulnerable populations such as the elderly or those with mental health issues. While the explanation is forward-thinking and clarifies that mental illness does not automatically render someone incompetent, it also highlights that the subjective evaluation of 'rational responses' can create challenges in its consistent application across different cases.
 5. In 2023, the Standing Committee on Home Affairs discovered that a certificate created by the individual responsible for electronic devices, along with an expert's input, failed to fulfil all the necessary criteria outlined for accepting electronic records. One key issue noted was that the certificate lacked information about the condition of the device. To address this shortcoming, the Committee suggested that the certificate be revised to comply with the rules regarding the acceptance of electronic records.
 6. Section 79 of the BSA states that documents presented in court, like evidence records and statements from accused individuals or witnesses that are signed by a judge, magistrate, or authorized officer, are presumed to be authentic. It is also assumed that any claims made by the signer about how these documents were created are true, and the evidence or confessions were obtained properly. However, there are valid concerns regarding the reliability of these documents, especially those made under Section 183 BNSS (recording of confessions and statements) and under Section 26 BSA (dying

declarations), since they could have been influenced by pressure or misrepresentation. Therefore, these documents need careful examination during the trial.

7. The illustration of Section 26 of the BSA presents critical ambiguities. First, the gender of "A" is unclear due to inconsistent pronouns - "she" suggests A is a woman, yet reference to A's "widow" implies a male. This gender inconsistency muddles interpretation. Second, "ravished" (referring to rape) could be replaced by "rape" for clarity and modern terminology. Additionally, the BSA recognizes both "disputed" and "relevant facts" in statements by deceased or missing individuals, whereas the IEA focuses only on "relevant facts." This discrepancy reflects evolving legal definitions, complicating evidentiary assessments in such cases.
8. Section 58 of the BSA widens the scope of secondary evidence by recognizing various forms, including certified copies, machine-made copies and testimony of qualified persons. However, it introduces complexity by involving oral and written admissions and verbal description of document content, which poses a risk of subjectivity and bias. While secondary evidence is necessary when originals are not available, the inclusion of oral testimony can lead to disputes over accuracy and potentially compromise the reliability of the evidence. By allowing such broad forms of evidence, the section balances practicality with legal safeguards, although it risks problems in cases where accuracy is critical.
9. The Law Commission Report No. 88, addressed Section 124 of the Indian Evidence Act, which provides protection to public officials from being forced to disclose confidential communications if a court deems that such disclosure would harm the public interest. The report advocates that courts should take into account privately the reasons behind an official's objection to the release of information prior to making a ruling. Nevertheless, this recommendation was not incorporated into Section 130 of the BSA. The BSA does not contain any stipulation that mandates courts to consider a public official's objection in the manner suggested in the report.
10. Section 65B of the IEA explains how electronic records, like emails or digital files, can be used as evidence in court. It requires these records to be certified to prove they are genuine. This certification helps ensure the integrity of the documents. On the other hand, the BSA, treats electronic evidence similarly to physical documents, which may lessen the need for this certification.
11. According to Section 2(d) of the BSA, electronic records are treated as regular documents, making them easier to handle in court. However, this could create issues because it might skip important protections like certification. While Section 63(4)(c) of the BSA still requires certification to ensure that electronic records are considered trustworthy evidence, Section 2(d) could make that requirement less important, potentially weakening the protections that the IEA offers. These protections are crucial for confirming the authenticity of digital evidence and ensuring it is reliable in legal cases.
12. According to Section 10 of the IEA, any statement, action, or document created by individuals involved in a conspiracy that pertains to their shared intention is deemed a relevant fact. Such evidence can be used to establish the involvement and presence of anyone accused of participating in the conspiracy. The Supreme Court emphasized this point in the case of *State of Gujarat v. Mohammad Atik* on April 3, 1998, noting that references to individuals should be understood as actions that support a collective purpose aligned with the furtherance of a common intention. However, this interpretation was overlooked by Section 8 of the BSA. The Supreme Court's ruling in *State of Maharashtra v. Damu* (2000) clarified that the only requirement for applying the rule in Section 8 is the existence of

"reasonable grounds to believe that two or more persons have conspired together to commit an offence."

13. The Standing Committee on Home Affairs (2023) recommended that the certification from someone in charge of electronic devices and a qualified expert does not fully meet the rules for admitting electronic records. A major issue with the certification under Section 63(4)(c) of the BSA is that it doesn't include information about the device's condition. They suggested updating the certification to meet the requirements in the electronic records rules, but this suggestion was overlooked in the BSA.
14. The Law Commission Report No. 113 of 1983 suggested a new rule that would hold police officers responsible if someone in their custody gets hurt. This rule would mean that the police are assumed to be at fault for the injuries. To determine this, the court would look at several factors, such as how long the person was in custody, what the victim says about their injuries, medical reports from doctors, and any statements made by the judge. However, this important suggestion was not added to Sections 22 or 23 of the BSA, resulting in a lack of accountability for police actions when people are detained.
15. Law Commission Report Number 69 discusses Section 21 of the IEA and outlines the various forms of admissions that can be substantiated by evidence. It recommends that the law should distinctly categorize admissions into two groups: those that can be verified and those that cannot. Nevertheless, this significant recommendation was omitted from Section 19 of the BSA, indicating that it was not incorporated into the new legislation.
16. The Law Commission Report Number 69 addressed Section 65 of the IEA and proposed that individuals permitted to present secondary evidence of documents should encompass those who possess the documents but are not obliged to disclose them, along with those who disregard court orders to submit such documents. However, this significant recommendation was not incorporated into Section 60 of the BSA (corresponding to Section 65 of the IEA).
17. The Malimath Committee (2003) had proposed the removal of certain sections of the IEA, namely Sections 25 to 29, which deal with confessions made to the police. The purpose of this recommendation was to ensure that confessions obtained under duress or coercion were not admissible in court. The Law Commission (Report Number 185 of 2003) further recommended that any information obtained by threats, violence or torture while a suspect is in police custody should not be admissible as evidence, regardless of where or how it was obtained. This highlights the importance of protecting the rights of suspects and maintaining the integrity of the judicial process. However, these recommendations were ignored while drafting the BSA and the original provisions were retained in Sections 22 and 23 of the BSA.
18. According to the Section 27 IEA, if a person in police custody shares information, that fact can be used as evidence. Proviso to Section 23 BSA follows this rule. However, courts and committees have pointed out that people can be forced to share facts without the proper protection of custody. The IEA (and the BSA) argue that this information can only be used as evidence if it comes from someone in custody, but not if he is out. The Law Commission (2023) suggested eliminating this distinction, but the creators of the BSA did not take this suggestion into account.
19. In Civil Appeal No. 20825-6, Arujun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, decided by the Supreme Court on July 14, 2020, it was determined that a certificate is unnecessary when the original document is presented in court by the device's owner. However, if the device is integrated into a computer system or network that cannot be physically brought to court, a certificate is required. The BSA (Section 63) did not address the distinction between these scenarios.

20. According to Section 123 of the IEA, it's not allowed to access unpublished official records related to state matters without getting permission from the relevant department head first. This permission might be denied if it's considered not in the public's best interest by the concerned official. The Law Commission of India, in its Report No. 88 (1983), suggested that courts should be able to ask for additional affidavits, see the records, and decide if the evidence can be accepted.

In relation to Section 124 of the IEA, public officials cannot be forced to reveal confidential communications if doing so would harm public interest. The Law Commission recommended that if a public officer refuses to answer a question that might reveal information, the court should hold a private inquiry to understand the reasons behind the refusal before making a decision. However, these suggestions were overlooked, and the original rules in Sections 129 and 130 of the BSA remain unchanged.

4. Challenges for Courts:

The provision to enable electronic oral evidence under the BSA requires a significant financial commitment to improve the infrastructure of the court. To facilitate virtual testimony, courts must invest in upgrading their technological resources, including the installation of secure video conferencing systems, high-speed Internet, and audiovisual recording equipment. These initial expenses are necessary to ensure the smooth flow of remote testimony, thereby minimizing disruption during critical court proceedings.

In addition to improving the infrastructure, it is necessary to allocate funds for the training of judges, court staff and lawyers in these new technologies. Key to the new system's effectiveness is ensuring employees are adept at using video conferencing tools, managing digital evidence and addressing cybersecurity issues. While such training programs and ongoing technical support may initially result in higher costs, they are vital to achieving long-term operational efficiency.

Although the initial costs associated with these changes may seem significant, they have the potential for future cost savings. For example, reducing costs associated with transporting prisoners/witnesses and ensuring their safety can lead to reduced logistical costs. Additionally, these advances can optimize court operations by minimizing delays caused by the non-availability of witnesses or the need for adjournments, ultimately reducing the costs associated with protracted trials. Overall, while careful planning is necessary to manage the financial implications of this provision, it promises significant long-term benefits for the efficiency of the justice system.

With technology progressing at an unprecedented speed, the legal system needs to evolve accordingly. This entails continuous review and updating of laws, regulations, and practices related to digital evidence to align with emerging advancements. Neglecting this responsibility could result in a discrepancy between technological realities and legal proceedings, jeopardizing justice and individual rights. Additionally, it is crucial to provide ongoing training for lawyers and court officials, ensuring they possess the necessary expertise to manage digital evidence effectively and ethically.

5. Challenges for Prisons:

Implementation of electronic oral evidence under the BSA requires significant financial investment in improving prison infrastructure. To facilitate remote testimony for accused persons, prisons must install secure video conferencing equipment in both city and far-flung rural areas. This includes creating dedicated spaces equipped with reliable Internet connections, high-quality audio and video systems, and secure transmission lines to maintain the confidentiality and integrity of testimony.

In addition, prisons will need trained staff to operate these technology systems and oversee remote witness-

ing processes, which will further increase the initial financial requirements. In addition, investments in cyber security measures are necessary to prevent unauthorized access or manipulation of electronic evidence, which increases the cost of upgrading infrastructure.

While the initial investment may seem substantial, it has the potential to yield long-term cost savings. By allowing inmates to testify from prison, the need for physical transportation to court is greatly reduced, along with the associated security protocols. This not only alleviates logistical problems and minimizes the risk of escapes during transport, but also reduces the overall operating costs of the prison system. Ultimately, such an investment increases the efficiency and safety of inmate trials and provides both financial and administrative benefits to the justice system.

6. Challenges for Police:

The BSA brings forth new provisions that pose distinct challenges for law enforcement. A primary concern is the focus on electronic evidence, necessitating that police officers possess advanced technical skills and expertise in digital forensics. This need for specialized training and technological enhancements imposes both logistical and financial strains on police departments.

Another significant challenge lies in the heightened scrutiny regarding the admissibility of confessions and oral testimonies. While the legislation seeks to minimize coerced confessions, it simultaneously pressures police to meticulously document all confessions and ensure adherence to legal standards. Any failure in this regard could result in evidence being deemed inadmissible, complicating the investigative process.

The law's provisions for witness protection and confidentiality introduce operational hurdles. Police officers are now required to take greater precautions to ensure the safety and privacy of witnesses, which can be resource-intensive. Shielding witnesses from threats or retaliation demands careful coordination and planning, thereby increasing the administrative workload for law enforcement.

The updated standards for evidence collection and preservation demand greater accountability from police officers. Any procedural misstep could jeopardize a case, compelling officers to rigorously follow prescribed protocols, further stretching already limited resources, and adding complexity to investigations. Officers will now be required to provide electronic depositions, which necessitates the establishment of appropriate infrastructure at each police unit, representing a significant financial investment. Furthermore, they will no longer be able to review case diaries in advance at the public prosecutor's office, as they must now submit their depositions from their own units. This eliminates the opportunity to refresh their memories regarding the case with the assistance of the public prosecutor.

Maintaining the integrity of digital evidence is crucial and demands a robust technical framework and specialized expertise. Law enforcement and judicial bodies should emphasize funding for advanced technology and thorough cybersecurity measures to safeguard electronic records against tampering and unauthorized access. This dedication to preserving digital evidence integrity bolsters public trust and ensures the legal system operates efficiently in a technology-driven landscape.

Legal experts are deeply divided on whether telephone calls recorded without the consent of either party should be admissible in court. Some believe that such recordings ought to be considered admissible, particularly when they serve as crucial evidence during legal proceedings. Conversely, others maintain that these recordings may infringe upon an individual's right to privacy, thus raising significant ethical issues. This disagreement underscores the intricate nature of digital evidence and emphasizes the pressing need for clearer regulations that reconcile the pursuit of justice with the safeguarding of individual rights.

The requirement to document search and seizure operations through audio-video electronic means on the personal mobile phones of police officers, as outlined in Section 185/105 BNSS, poses significant challenges for investigators due to numerous technical and ethical concerns. To ensure proper recording and preservation of these operations, the respective department should provide dedicated mobile phones for this purpose.

In 2021, the Karnataka High Court introduced guidelines to set essential protections for the search and seizure of electronic records. According to these regulations, a skilled forensic expert must be present with the search team to guarantee the correct management of digital evidence. Additionally, the investigating officer is strictly prohibited from utilizing any electronic devices that have been confiscated during the search and seizure operation. The guidelines also stipulate that electronic storage media, including USB drives and hard drives, must be securely placed in Faraday bags. These specialized bags are specifically designed to block electromagnetic signals, thereby protecting the data within the devices from being compromised or destroyed. Nonetheless, it remains uncertain whether police officers across India should adhere to these guidelines.

7. Conclusion:

The Bharatiya Sakshya Adhiniyam, 2023 represents a significant step forward in modernizing India's legal framework. This Act integrates provisions for electronic and digital evidence, enhances safeguards for confessions, and facilitates remote testimony, acknowledging the changing landscape of evidence in the 21st century. However, successful implementation hinges on overcoming technological barriers, making huge financial investment, and providing adequate training. Additionally, future amendments should consider emerging issues such as artificial intelligence, big data, data privacy, and forensic evidence, ensuring the law adapts to the swiftly evolving legal context. This proactive approach will help maintain the relevance and effectiveness of legal regulations in addressing contemporary challenges and technological advancements in evidence handling.

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