

Bharatiya Sakshya Adhinyam, 2023: An Overview of Key Amendments

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Abstract:

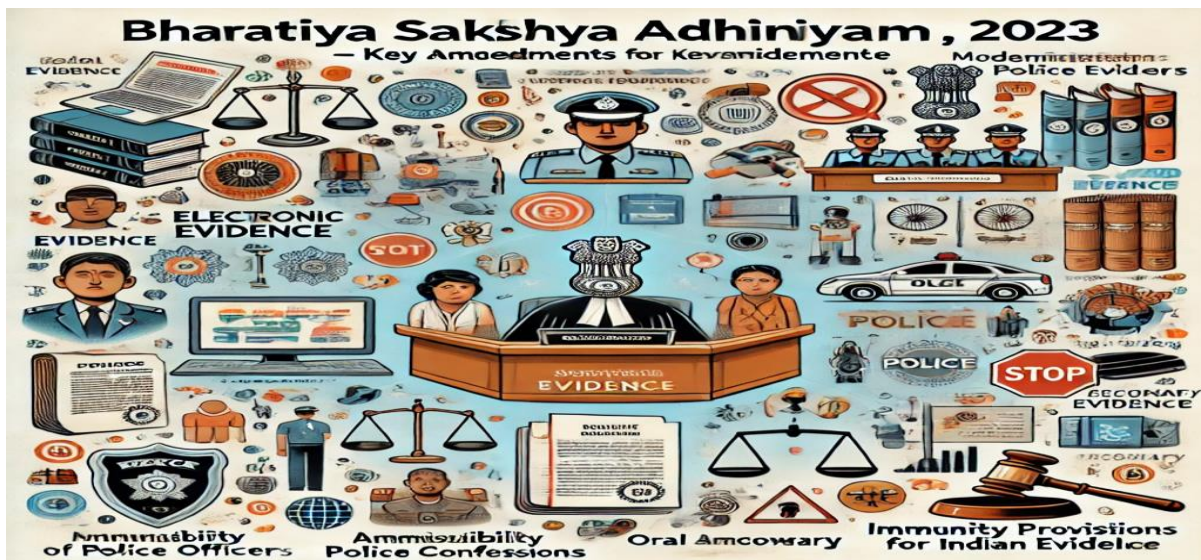
The Bharatiya Sakshya Adhinyam, 2023 (BSA) represents a pivotal legislative development in Indian law, serving as a comprehensive update to the Indian Evidence Act of 1872. This new Act modernizes the approach to legal procedures, placing a particular emphasis on the handling and acceptance of electronic evidence in courts. Comprising 170 sections, the BSA replaces the antiquated colonial terminology found in previous legislation with more relevant and contemporary language that reflects current practices and technological realities. One of the most significant reforms introduced by the BSA is the broadened acceptance of digital records as admissible evidence, which acknowledges the rapid technological advancements that have transformed communication and documentation methods in recent years. The scope of the BSA extends to military courts, indicating a major overhaul in the legal framework of India. Furthermore, the Act redefines key concepts such as "documents" and "evidence," explicitly incorporating digital formats to ensure clarity and consistency in legal proceedings. These vital changes set the stage for a more technologically adept legal system in India, representing a substantial evolution in evidence law while addressing the pressing need for modernization in legal practices and procedures.

Keywords: Bharatiya Sakshya Adhinyam, Indian Evidence Act, Modernization, Electronic Evidence, Digital Evidence. Hash Value, Digital Signature.

1. Introduction:

The Bharatiya Sakshya Adhinyam, 2023 (BSA), has superseded the IEA (Indian Evidence Act) of 1872 and consists of 170 Sections. While the BSA does not make many major changes to the IEA, it aims to streamline the process of managing electronic evidence. The language in the BSA has been updated, removing outdated terminology such as 'Vakil,' 'Pleader,' and 'Barrister,' replacing them with 'Advocate' in Sections 21, 64, 132, 133, 152, and 153.

References to terms related to the Parliament of the United Kingdom, Provincial Acts, Crown Representative Notifications, the London Gazette, and various colonial references like Dominion, Colony, Jury, and Her Majesty's Government have been eliminated from the BSA, as they are no longer applicable. These changes form part of a wider effort to eradicate any lingering remnants of colonial influence within India's legal framework.



2. Repealed Sections (Not included in the BSA):

The following Sections which were present in the IEA were repealed and not included in the BSA:

Section 3(j): This section outlined the jurisdiction of the Indian Evidence Act throughout India.

Section 82: This provision involved an assumption regarding the acceptance of documents in England without the need to authenticate seals or signatures.

Section 88: This section addressed the validity of telegraphic communications.

Section 113: This section specifies the evidence necessary for the transfer of territory.

Section 166: This provision allowed the jury or assessors the authority to ask questions.

3. Literature Review:

The rise of digital technologies has profoundly impacted evidence law, particularly in terms of the admissibility and authenticity of digital evidence, defined as information stored or transmitted in binary form for legal use (Casey, 2011). The surge in digital devices and internet usage has created a significant amount of data that legal professionals must navigate regarding collection, preservation, and presentation in court (Rogers, 2017).

A primary challenge in managing digital evidence is validating its authenticity and integrity. Under the Federal Rules of Evidence in the U.S., authenticating digital evidence is crucial for its admissibility, typically requiring the use of hash values and digital signatures to confirm data integrity post-acquisition (Freedman, 2014). Proper chain-of-custody documentation is vital, offering a traceable history of the evidence from collection to court presentation (Zatyko, 2019).

The legal landscape for digital evidence varies by jurisdiction, complicating its application in international cases. Different countries have unique data privacy, digital forensics, and admissibility laws. For instance, the EU's GDPR imposes strict data collection and processing standards, affecting how digital evidence is handled (Kane, 2018). Legal practitioners must stay informed about local and international regulations. Moreover, social media and online platforms have produced new forms of digital evidence, including texts, emails, and posts, which can be critical in legal cases but also raise privacy and admissibility concerns (McCormack, 2019). The potential manipulation of such evidence presents further risks, prompting courts to exercise caution (Sammons, 2020).

In addition to authenticity and jurisdictional issues, ethical considerations also arise when using digital evidence. Legal professionals must balance effective evidence collection with respect for individual rights and compliance with privacy laws (Dahl, 2020). Continuous education and training in these ethical matters are essential as digital evidence becomes more prevalent.

In conclusion, the integration of digital evidence into evidence law brings both opportunities and challenges. As technology advances, legal practitioners must continually adapt their strategies to maintain the integrity and admissibility of digital evidence. Ongoing collaboration and dialogue among legal experts and technologists will be crucial in shaping the future of evidence law in the digital era (Kahn, 2021), ensuring a balance between leveraging digital evidence and protecting individual rights.

4. Section 1:

BSA's Section 1 is similar to IEA's Section 1, which was repealed and stated explicitly that all of India was covered by its provisions. Nevertheless, the definition of "India" found in Section 3 of the IEA is absent from the BSA, as is this territorial clause. This absence could be important since it could cast doubt on the admissibility of digitally generated evidence obtained outside of the nation.

Furthermore, by incorporating "courts-martial under the Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, and the Air Force Act, the BSA" goes beyond the IEA's provisions. This inclusion is a significant step forward, acknowledging the requirement for a comprehensive legislative structure which takes military judicial systems into account.

5. Section 2(1)(d):

The definition of "documents" as outlined in "Section 2(1)(d) of the BSA (analogous to Section 3, paragraph 5 of the IEA) now encompasses electronic or digital records", such as emails, server logs, files on computers or other electronic devices (including laptops and smartphones), text messages, data from websites, and cloud storage, as well as locational evidence and voicemails stored on a device. It is not necessary for the information to be conveyed only by letters, numbers, or symbols; for instance, a mobile phone video recording could also be considered "documentary evidence."

Section 2(1)(e):

The BSA's Section 2(1)(e) and Section 3 of the IEA are consistent. Digital records were not specifically mentioned in the definition of "evidence" provided by the IEA, which only recognized electronic records as documentary evidence.

According to "Section 2(1)(e) of the BSA, the definition" of "evidence" now encompasses:

(i) Oral evidence is any verbal statements, whether given in person or electronically, about the facts under investigation that the court allows or mandates witnesses to provide.

(ii) Documentary evidence includes all types of records - including digital or electronic records - that are submitted to the court for review.

Section 2(1)(f):

Section 2(1)(f) of the BSA is in accordance with Section 3 of the IEA. The revised definition of "fact" in this section specifically excludes Illustration (e) from Section 3 of the IEA, which claims that "A man's reputation is a fact."

Section 2(2):

Section 2(2) of the BSA states that any terms and phrases in this document that are not specifically defined will adopt the meanings provided in the "Information Technology Act, 2000, the Bharatiya Nagarik Surak-

sha Sanhita, 2023, and the Bharatiya Nyaya Sanhita, 2023”.

6. Section 4:

Section 4 of the BSA correlates with Section 6 of the IEA, emphasizing the significance of facts that, while not directly contested, are closely connected to a contested fact within the same transaction. It asserts that such related facts hold considerable importance. Additionally, this section underscores that facts, even if they are not explicitly disputed, can still be pertinent if they are linked to a relevant fact and belong to the same transaction context. In essence, it highlights the importance of the contextual relationship between facts and their relevance in legal proceedings, reinforcing the complex interplay of related facts throughout transactions, which can shape the understanding of the case at hand.

7. Section 6:

The BSA's Section 6 and the IEA's Section 8 are compatible. Sub-section (1) of Section 6 of the BSA now contains the first paragraph that was originally part of Section 8 of the IEA, while Sub-section (2) is now part of the second paragraph. Additionally, in statutory illustration (d) of Section 8 of the IEA, the term "vakils" has been updated to "advocates." A typographical mistake in statutory illustration (e), where "proved" was incorrectly stated, has been corrected to "provided." In statutory illustration (f), the term "man" has been changed to "person" for gender neutrality. Lastly, "ravished" in statutory illustration (j) has been replaced with "raped."

8. Section 22:

Section 22 of the BSA incorporates the notion of 'coercion' as a consideration that may make a confession inadmissible, similar to Sections 25, 26, and 27 of the IEA. While Section 24 of the IEA specifies that confessions obtained through inducements, threats, or promises are inadmissible, it does not mention 'coercion.' Additionally, it should be noted that the explanations associated with IEA's Section 26, which clarify that a "Magistrate" does not involve a village head, have been omitted.

9. Section 24:

According to Section 24 of the BSA (Section 30 of the IEA), if two or more people are tried concurrently for the same crime and one of them confesses in a way that implicates the other defendants as well as themselves, the court has the authority to use that confession as evidence against all of the defendants. Further, based on Section 24 of the BSA and the updated interpretation, if a number of accused are brought before the court in respect of an offence and one of them happens to be a person who might have evaded the law or served a notice of proclamation "under Section 84 of Bharatiya Nagarik Suraksha Sanhita, 2023, then such situation shall be treated as a trial in collective under this Section".

10. Section 31:

Digital or electronic versions of the Official Gazette are recognized as admissible forms of evidence, according to Section 31 of the BSA. This provision is in alignment with Section 37 of the IEA.

11. Section 32:

Under Section 32 of the BSA, which corresponds with Section 38 of the IEA, judicial opinions on foreign laws may utilize official publications. This encompasses books printed or published electronically by foreign governments that claim to contain their laws, as well as court ruling reports that may be available in printed or digital formats and are considered official records of decisions from that nation's courts. Consequently, such materials are recognized as relevant evidence in assessing foreign law.

12. Section 35:

Section 35 of the BSA is aligned with Section 41 of the IEA. It further includes tribunal orders, stating that a court or tribunal's final judgment on matters such as probate, marriage, admiralty, or insolvency is

critical when there is uncertainty regarding an individual's legal status or rights. Such rulings either confer or revoke a person's legal status or confirm their entitlement to specific rights.

13. Section 39:

Section 39 of the BSA expands the definition of "expert" to encompass individuals who possess high levels of skill in diverse areas. It incorporates aspects from Section 45 of the IEA, clarifying that expert opinions regarding matters outside of foreign law, science, or art are admissible for the court's consideration. Subsections 39(1) and 39(2) of the BSA correspond with Sections 45 and 45A of the IEA.

14. Section 52:

Section 52(a) of the BSA is in alignment with Section 57 of the IEA. It requires that courts recognize all laws currently applicable within the territory of India, including those with extraterritorial effects. The IEA's Section 57(1) also covers "all laws in force within the territory of India." Furthermore, courts must recognize international treaties, agreements, or conventions involving India as well as judgments rendered by India in international organizations or other bodies, per Section 52(a) of the BSA. Crucially, neither public Acts passed or to be passed by the UK Parliament nor any local or private Acts designated by the UK Parliament are mentioned in Section 52 of the BSA.

As a result, Indian courts are not obligated to recognize Acts passed by the UK Parliament, owing to India's independence from British colonial rule in the year of 1947. Furthermore, "The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland," "All seals recognized by English Courts," and "all seals authorized for use by any individual under the Constitution or an Act of Parliament of the United Kingdom" are not mentioned in Section 52 of the BSA. The phrase "the territory of India" has replaced the original phrase "the territories under the dominion of the Government of India." Moreover, there are no mentions of "articles of war for the Indian Army, Navy, or Air Force."

15. Section 54:

Section 54 of the BSA aligns with Section 59 of the IEA. While Section 54 of the BSA does not refer to "electronic records," as included in Section 59 of the IEA, this lack of reference does not significantly change the context, since Section 2(1)(c) of the BSA defines the term 'documents' to include electronic records. Oral evidence may be used to establish any fact, with the exception of information contained in documents, as per Section 54 of the BSA.

16. Section 57:

Section 57 of the BSA, which corresponds to Section 62 of the IEA, defines Primary Evidence as the original document submitted for the court's review. Furthermore, new clarifications (namely, Explanations 4 to 7) have been added to Section 57 of the BSA.

Explanation 4: If the creation or storage of an electronic record involves the simultaneous or sequential execution of multiple functions, that record is only effective against the individual who, with awareness of such actions, obtains ownership rights to it.

Explanation 5: If the retrieval of any electronic record or digital copy from the custody of a person is demonstrated, that electronic record or digital copy is not considered primary evidence unless the custody is contested.

Explanation 6: Every record that is created when a video recording is made electronically and is shared, broadcast, or communicated to the public is considered primary evidence.

Explanation 7: Every instance of electronic or digital record storage - including temporary files - that occurs within a computer system is considered primary evidence.

17. Section 58:

According to Section 58 of the BSA (which corresponds to Section 63 of the IEA), Secondary Evidence also encompasses the following sub-sections:

(vi) oral admissions;

(vii) written admissions;

(viii) testimony from an expert who has evaluated a document, the original of which comprises multiple copies or additional papers that are impractical to inspect in court.

18. Sections 61 and 62:

As detailed in the newly established Section 61 of the BSA, electronic or digital records are explicitly recognized as admissible evidence, dismissing any challenges based solely on their digital format. Thus, it can be understood that electronic records carry the same legal weight as traditional documents. In addition, Section 62 of the BSA says that the information contained in electronic records may be proved using the process outlined in Section 63.

19. Section 63:

Section 63 introduces new provisions. According to Section 63(1) of the BSA, any information that is stored electronically - whether it is printed, saved onto a disk, or maintained in any digital format - can be regarded as a legitimate document. Provided those specific criteria (detailed in Sub-section (2) of Section 63) are satisfied, this electronic information may serve as evidence in legal proceedings without the necessity of presenting the original physical document.

Note: The essential takeaway from this Section is that outputs generated by computers in accordance with these guidelines "shall" be accepted in legal proceedings without the need for the original document. Courts should recognize electronic documents unless there are significant concerns regarding the certification process.

The criteria specified in Sub-section (1) of Section 63 BSA regarding computer-generated outputs include:

(1) The data was generated by the computer or other device while the individual operating it regularly used it for the purposes for which it was designed.

(2) During that period, similar information was consistently input into the computer or device as part of its regular operation.

(3) For the majority of the time, the computer or device functioned properly. Any malfunctions or periods of disrepair did not impact the accuracy of the electronic record.

(4) The information within the electronic record corresponds to or which is derived from the information that was routinely input into the computer or device during standard usage.

If the information was continually created, stored, or processed using one or more computers or devices over a particular time, whether these were operated separately, as part of a computer system, linked via a network, or utilized through intermediaries for information creation or storage, all such computers or devices will be regarded as a singular entity for this section purpose.

Section 63(4) "requires a certificate to be signed by an expert and the person in charge of the computer or communication device" to go with the electronic record. This certificate must identify the electronic record, detail its creation process, and specify the devices utilized. It must also conform to the conditions outlined in Section 63(2).

20. Section 64:

The BSA's Section 64 corresponds with the IEA's Section 66, which replaces references to "attorney or pleader" with "advocate or representative." Only after notifying the document holder or their legal

representative that the document must be produced in accordance with the law can secondary evidence pertaining to the documents listed in clause (a) of Section 60 be introduced. In instances where the law does not specify a certain notice, it must be deemed reasonable by the court based on the case's circumstances.

However, it is crucial to understand that notice is not obligatory for admitting secondary evidence in the following situations, or in other scenarios where the court finds it suitable to waive this requirement:

- (a) When the document being validated is a notice.
- (b) When the opposing party should reasonably expect they need to provide the document due to the case's nature.
- (c) when it is evident that the opposing party attained the original document under pressure or by fraudulent means.
- (d) When the original document is available in court with the opposing party or their representative.
- (e) When the opposing party or their representative has acknowledged the document's loss.
- (f) When the individual holding the document is beyond the reach of the court's jurisdiction.

21. Section 68:

Section 68 of the BSA and Section 69 of the IEA are identical. In accordance with this section, in the event that no attesting witness is located, it is necessary to demonstrate that at least one witness has attested the document in their handwriting, and the executor's signature must also be in their handwriting. In Section 68 of the BSA, the phrase "or if the document purports to have been executed in the United Kingdom" has been deleted.

22. Section 73:

Section 73 of the BSA is aligned with Section 73A of the IEA. The definition of 'controller' provided in the Explanation to Section 73A of the IEA has been excluded in light of Section 2(2) of the BSA.

To verify a digital signature's authenticity, the Court may direct:

- (a) the certificate of digital signature to be presented by the concerned person, the Controller, or the Certifying Authority;
- (b) any other person to verify the digital signature they have claimed by using the public key contained in the digital signature certificate.

23. Section 74:

In defining "Public and Private Documents" in Section 74 of the BSA, the phrase "of the Commonwealth" has been omitted, and "Union Territory" has been added following "State." Section 74(1) of the BSA correlates with Section 74 of the IEA, while Section 74(2) aligns with Section 75 of the same Act.

24. Section 74:

- (1) The below mentioned records are categorized as public records:
 - (a) documents that record actions or the outcomes of those actions -
 - (i) by sovereign authorities;
 - (ii) by governmental entities and tribunals;
 - (iii) by public officials across judicial, legislative, and executive bodies in India or any foreign country;
 - (b) Private documents are maintained as public records in every State and Union Territory.
- (2) All documents not mentioned in subsection (1) are designated as private.

25. Section 81:

Any digital or electronic record that appears to be the Official Gazette or any other electronic record that is mandated by law to be kept on file will be presumed authentic by the Court. This presumption is valid

as long as the record adheres closely to the mandated legal format and comes from an appropriate source. The explanation for Section 81 of the BSA specifies that, concerning this section & Section 93 BSA, electronic records are regarded as properly maintained if stored in the designated location and overseen by the appropriate individual responsible for their retention. Moreover, custody will not be considered improper if it can be shown to have a legitimate source or if circumstances imply such a source is probable. The corresponding Section 81A of the IEA does not clarify what constitutes the proper custody of electronic records.

26. Section 85:

Section 85 of the BSA indicates that the Court presumes any electronic document resembling a contract, which includes electronic or digital signatures from the parties involved, to be duly executed. Although both Sections mention 'electronic or digital signature,' Section 85A of the IEA references only 'electronic signature.' The key difference is that 'electronic signature' refers broadly to any signature created digitally, while 'digital signature' entails encryption for greater security and verification of document integrity. Furthermore, Section 86 of the BSA also exclusively refers to 'electronic signature.'

27. Section 86:

According to Section 86 of the BSA, the Court will presume, unless shown differently, that a secure electronic record has not changed since it was designated as such in any legal proceeding involving that record. When a secure electronic signature is used, the court will additionally presume, unless refuted, that: (a) the person who intended to sign or approve the document attached the secure electronic signature; and (b) this Section does not address the integrity or authenticity of electronic records or signatures that are not secure. Without any changes, Section 85B of the IEA and Section 86 of the BSA are equivalent.

28. Section 88:

In accordance with Section 88(1) of the BSA, if a document is certified in a way that has been acknowledged by a Central Government representative in that nation as the recognized procedure for certifying judicial record copies, the Court may presume that it is authentic and accurate. It no longer refers to "Her Majesty's Dominions" and instead says "place outside India" in place of "place not forming part of India." It has also been changed from "any country and not forming part of India" to "any country beyond India." The BSA's Section 88 and the IEA's Section 86 are compatible.

29. Section 93:

The Court may assume that an electronic signature that appears to belong to a specific person was attached by that person or by someone they authorized for that purpose when an electronic record that is claimed to be five years old is presented from a source that the Court deems appropriate in a given case. Section 90A of the IEA and Section 93 of the BSA are equivalent. The explanation to Sections 90 and 90A of the IEA, concerning document custody has been omitted, and the explanation to Section 81 of the BSA will apply to this Section as well.

30. Section 122:

No tenant of real property, or any person claiming through that tenant, may contest the landlord's title to the property at the tenancy beginning, during the tenancy, or at any later time, according to Section 122 of the BSA. The phrase "any time thereafter" does not appear in the corresponding Section 116 of the IEA.

31. Section 124:

Section 124 of the BSA is in alignment with Section 118 of the IEA. The phrase "lunatic" has been substituted with "person of unsound mind."

32. Section 129 of the BSA:

In Section 129 of the IEA, the term “legal professional adviser” has been substituted with “legal adviser” in Section 134 of the BSA, 2023.

33. Section 138:

According to Section 138 of the BSA, an accomplice can serve as a competent witness for the prosecution against an accused person. Unlike Section 133 of the IEA, which states that a conviction cannot solely rely on an accomplice's testimony, a conviction remains valid if it is supported by corroborating evidence alongside the accomplice's statements. Thus, corroborated testimony from an accomplice can be sufficient for a conviction.

34. Section 165:

A new clause has been inserted into Section 165 of the BSA (Section 162 of the IEA), stating that no Court shall mandate the submission of any communication among the Ministers and the President of India.

35. Section 170:

Section 170 of the BSA aligns with Section 2 of the IEA. This Section indicates that the IEA has been annulled.

36. Schedule of the BSA:

This is a new Schedule prescribing the Certificate referred to in Section 63(4)(c) of the BSA. There is no Schedule corresponding to it in the IEA.

Conclusion:

The evolving landscape of evidence law, driven by swift technological advancements, underscores the critical necessity for legal systems to adapt. Traditional frameworks frequently lag behind innovations that alter how evidence is collected, presented, and assessed. The introduction of the Bharatiya Sakshya Adhiniyam, 2023, signifies a vital progression, highlighting the difficulties faced by legal institutions in remaining pertinent amidst rapidly changing technologies. This legislation not only uncovers the shortcomings of current laws but also prompts essential reforms to integrate technology into legal processes. Establishing a robust legal framework to tackle the complexities of the digital age will require international collaboration, research, and information sharing to learn from best practices globally and enhance comprehension of digital evidence. To ensure the Adhiniyam evolves effectively, it must be refined to address new evidence formats while maintaining legal integrity in a tech-driven society. Successful implementation will rely on overcoming technological challenges, securing necessary investments, and providing adequate training, while also addressing emerging issues like artificial intelligence and data privacy.

References:

1. **Bharatiya Sakshya Adhiniyam, 2023: A Comparative Analysis with the Indian Evidence Act of 1872.** In *Taxmann's Bare Act* (2024).
2. **Sharath Chandran.** (2024). *A Short Commentary on the Bharatiya Sakshya Adhiniyam, 2023.* Lexis Nexis.
3. **J. K. Verma.** (2024). *Bharatiya Sakshya Adhiniyam, 2023 (Evidence): A Commentary.* EBC.
4. **Desai, A. R.** (2024). *Journal of Indian Law & Society, 12(1),* 45-67. “The Bharatiya Sakshya Adhiniyam, 2023: A Contemporary Perspective on Evidence Law.”

5. **Rajan, P.** (2024). *Indian Journal of Legal Studies*, 29(2), 112-130. “Digital Evidence and the Bharatiya Sakshya Adhinyam: A New Era in Indian Evidence Law.”
6. **Iyer, V.** (2024). *Indian Law Review*, 8(2), 189-210. “An Examination of the Bharatiya Sakshya Adhinyam, 2023: Challenges and Concerns.”
7. **Gupta, M.** (2024). “A Critical Evaluation of the Bharatiya Sakshya Adhinyam, 2023, Practical Application.” *Delhi Law Review*, 46(1), 67-85.
8. **Casey, E.** (2011). *Digital Evidence and Computer Crime: Forensic Science, Computers, and the Internet*. Academic Press.
9. **Dahl, C.** (2020). “Ethics and Digital Evidence.” *Journal of Legal Ethics*, 23(2), 55-78.
10. **Freedman, R.** (2014). “Admissibility of Digital Evidence: A Practical Guide.” *International Journal of Evidence & Proof*, 18(4), 287-302.
11. **Kane, B.** (2018). “GDPR and Its Impact on Digital Evidence.” *European Journal of Law and Technology*, 9(1), 1-16.
12. **Kahn, J.** (2021). “Navigating the Future of Digital Evidence Law.” *Law Technology Review*, 14(3), 45-67.
13. **McCormack, J.** (2019). “Social Media as Evidence: Legal Challenges and Implications.” *Journal of Internet Law*, 22(6), 1-10.
14. **Rogers, M.** (2017). *Digital Evidence: A Practitioner’s Guide*. Wiley.
15. **Sammons, J.** (2020). “Challenges of Authenticating Digital Evidence.” *Forensic Science Review*, 32(1), 23-38.
16. **Zatyko, B.** (2019). “Chain of Custody and Digital Evidence.” *Digital Forensics Magazine*, 18(2), 12-15.